Chapter 13

POSTAL INDUSTRY COLLECTIVE BARGAINING AND ARBITRATION

For a long time the financial woes of the U.S. Postal Service (USPS) and, by extension, the unions that represent the various crafts, have been the subject of media and congressional concern. Some solutions, such as the consolidation of postal facilities and the possible abandonment of Saturday delivery, have received extensive coverage. Much of the impact of the industry's financial situation on the collective bargaining and arbitration processes has escaped the attention of the media, but certainly not the attention of the various union and management labor relations practitioners or arbitrators on the various postal panels. The recent USPS/American Postal Workers Union (APWU) national agreement contains union concessions. As of March 10, 2012, when the following paper was written, the USPS and the National Association of Letter Carriers (NALC) had yet to finalize their new national agreement. The USPS has consolidated and centralized some labor relations functions, including the scheduling of arbitration hearings. The transition from areawide to nationwide scheduling has not always gone smoothly, creating problems for labor relations practitioners and arbitrators alike. Revised terms of the contract between the USPS and APWU and arbitrators on their various panels have raised concerns.

In this session, the USPS Manager of Collective Bargaining and Arbitration, two union officials with responsibilities for collective bargaining and arbitration, and a long-time postal arbitrator discussed these and other issues from their different perspectives. The moderator was **Joseph F. Gentile,** National Academy of Arbitrators, Thousand Oaks, CA, and the panelists were **I.B. Helburn,** National Academy of Arbitrators, Austin, TX; **Joey Johnson,** National Rural Letter Carriers Association, Alexandria, VA; **Mike Morris,** American Postal Workers Union, Washington, DC; and **Kevin A. Rachel,** U.S. Postal Service, Washington, DC. The

following papers address the topics that were discussed by the panel and audience members.

I. Suggestions to Improve the Arbitration Process

I.B. Helburn[1]

The U.S. Postal Service (USPS), with its various unions, is the largest single user of labor arbitration services in the United States. The list of those offered appointments to the most recent USPS and American Postal Workers Union (APWU) regular and expedited panels numbers approximately 130.[2] Not all of the arbitrators on the list accepted the offer to serve,[3] but presumably they have been replaced by others. Some arbitrators who hear USPS/APWU cases also serve on panels for the USPS and the National Association of Letter Carriers (NALC), the National Postal Mail Handlers Union (NPMHU), and/or the National Rural Letter Carriers Association (NRLCA), but a count of arbitrators serving on only one of these panels would add to the appropriately 130 noted above. The terms and conditions attached to arbitrator service and the way in which the panels are administered have a significant impact on the arbitrator community.[4]

This paper, confined to APWU and NALC panels, focuses on two areas that are troublesome for postal arbitrators and concludes with what I hope will be seen as two useful suggestions.

The first troublesome area is the requirement that arbitrators anticipate the need for additional study time immediately after the close of the record when the need may not yet be obvious. Regular panel arbitrator contracts with the USPS and the APWU and the NALC restrict study time to one and two days respectively for each hearing day unless the arbitrator gets permission for additional time when the record closes. The parties have approved additional study time every time I have requested it. The good news is that for the vast majority of USPS/NALC cases, two days

[1]National Academy of Arbitrators, Austin, TX.

[2]The list presumably came originally from the parties, but it was privately forwarded to me.

[3]In response to a query on the NAA mail list, I have heard privately from some that declined appointments.

[4]Terms and conditions and administration are not consistent across all unions.

of study time per hearing day is adequate. The bad news is that the one day allocated by the USPS and the APWU is particularly unreasonable and potentially harmful to the arbitration process. A recent American Arbitration Association (AAA) *Labor, Employment and Elections Update* indicated an average of 2.27 study days per hearing.[5] Federal Mediation and Conciliation Service (FMCS) statistics for fiscal year (FY) 2010 and FY 2011 show an average study time of 2.37 days for both years based on 2,149 and 2,296 cases respectively. According to FMCS data, the average hearing time for FY 2010 was 1.14 days and for FY 2011 was 1.10 days.[6] That works out to 2.08 days of study time per hearing day for FY 2010 and 2.15 days of study time for FY 2011.

The one-day limit puts arbitrators in a very difficult position. The comparative data suggest that for every USPS/APWU case, the arbitrator would be justified in asking for more study time. These requests are to be submitted once the record is closed but presumably before study time is undertaken. I predict that consistent requests for a second study day will not happen because arbitrators will be concerned that they will look bad, incur the displeasure of the parties, and jeopardize their chances for reappointment when the panels are reconstituted once the next new contract is finalized. I suspect that unintended, negative consequences will include the following:

- Prior awards submitted by advocates will not be read or will not be read as carefully as hoped for as a way to hedge study time so as to stay within the one-day limit and avoid accumulating study time that will not be paid for since after-the-fact requests are likely to be denied. Thus, the educational and/or persuasive value of prior awards will be limited.
- A second possibility will be shorter, less detailed awards, again as a hedge against noncompensated study time of more than a day where an extension has not been requested or received. This would further diminish the value of the regular panel awards as educational and/or persuasive tools for advocates.

Unfortunately, the arbitration milieu in this industry is one in which advocates from both sides have sometimes not done the

[5]Issue #4.

[6]These statistics were supplied to the author by the FMCS. FY 2010 data were run on October 1, 2010; FY 2011 data were run on October 3, 2011.

tough work of developing a theory of the case and have introduced prior postal awards in an attempt to let the awards do the persuasive work that the advocate should have done.

In an attempt to test my predictions, I queried the National Academy of Arbitrators' (NAA's) mailing list and asked how postal arbitrators were handling the one-day study time limit and whether they had used study time for which they were not compensated. The 10 responses that I received qualify only as anecdotal data and allow no firm conclusions, but I was the only one with a policy of always asking for a second day. Seven respondents noted study time used but not compensated, either because no request was made or the request came too late. Five arbitrators noted an impact in terms of the shorter, less-detailed decisions they are now writing and/or cautions to advocates to limit the number of witnesses and prior awards submitted. The USPS and the two major unions, but particularly the APWU, should monitor awards to see if there is a major impact of study-time limitations on the quality of the awards.

The requirement that requests for additional study time come after the record has been closed and not after the award has been drafted compounds the arbitrator's problem. My experience suggests that some multi-day hearings may involve additional study time simply to organize a complex record but present little or no problem in reaching a decision. Although sometimes two days or less is adequate even for a multi-day hearing, it is possible to have a partial-day hearing with a straightforward fact situation result in a complex decision-making process because of the need to work through several nuances of the case at hand or even several issues. In a recent case arising in a post office with atrocious union-management relations, the USPS/NALC Dispute Resolution Team reached impasse and posed six issues—one concerning the emergency placement of the Branch President and five others concerned with such things as failure to meet during the grievance procedure, failure to allow adequate steward time for investigation, and failure to respond to information requests. Because it is not always possible to realize that more study time is needed at the time the record closes, the arbitration process will be better served if the USPS, the APWU, and the NALC would allow requests for additional study time at any time before an arbitrator submits the decision and invoice for a particular case. But even with this increased flexibility, the one-day study-time limit in particular should receive additional thought and reconsideration.

Although these remarks have been aimed primarily at the USPS and the unions, I would be remiss if I did not address the arbitrators' role in this matter. We are generally taught that contract language does not arise from thin air but is developed in response to a perceived or real problem. I know from conversations with USPS and APWU representatives that because all USPS invoices now go to the Labor Relations Service Center in Washington, D.C., both USPS and APWU officials have been able to review more information than before centralization. One of the trends they firmly believe exists is that there are arbitrators who automatically apply a "two study day per hearing day" rule of thumb regardless of the length of the hearing and the complexity of the record. I believe the NALC agrees with this observation. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes states that, "Per diem charges for study time should not be in excess of actual time spent."[7] Obviously the Code rules out the kind of formulaic approach that may have influenced the move to the one study-day rule. We have a right to ask the parties that we be treated as professionals. We also have a responsibility to conduct ourselves as professionals and that means conducting our arbitration practices in conformity with the Code.

A second troublesome area involves scheduling. The most hopeful thing that I can say is that this may be a work in progress and that these remarks will be increasingly outdated. Centralization of scheduling, particularly for APWU cases, has not been the arbitrators' best friend and I have heard advocates in the field also voice displeasure. I did not receive my USPS/APWU April scheduling letters until March 2 and my May scheduling letters until March 27. I received my June USPS/APWU scheduling letters on April 28, although in response to an earlier question about when we might expect them, I had been told, "no later than April 20." Arbitrators now have significantly less lead time than when scheduling was done on an area basis. That is problematic; particularly for those of us who have a robust postal and nonpostal case load.

Considering secular and religious holidays and the fact that the USPS, like many other parties, does not schedule hearings for Mondays, there are approximately 16 hearing days a month. Using myself as an example, I owe the USPS/APWU panels six

[7]National Academy of Arbitrators, American Arbitration Association, & Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (as amended and in effect Sept. 2007), at K.1.b(2)(b), *available at* http://www.naarb.org/code.html.

days and the USPS/NALC panels three days each month. That is more than half of the available hearing days. I need to leave time for other clients, for the possibility that parties will need more than one day for a hearing, and for sufficient travel time (because if you live in Texas and use a second address in Cincinnati, Ohio, then scheduling logistics become more complex than they might be for those who fly or drive short distances to most hearings or even hop on the subway). The more lead time we have for postal cases, the more manageable these problems are and the more positive the postal arbitration experience becomes. Because the USPS and the APWU have capped the per diem for arbitrators on their panels at a rate at or below the national average, according to FMCS data,[8] long-time arbitrators, both NAA members and others, are very likely to have higher per diem rates for nonpostal cases. The possibility of losing nonpostal cases because dates have been committed for USPS/APWU or even USPS/NALC cases, only to have the dates returned to us too late to use them for other clients, compounds the problem.

Two other aspects of scheduling need comment. I and other arbitrators have received scheduling letters with the wrong hearing location or with a city and no specific address. When the location is in city of several million and contains a number of reasonable alternatives for hearing sites, that is at least a minor problem, although one that is obviously correctable.

The other concern relates primarily to USPS/APWU scheduling. We are asked to commit two days per month for each panel that we are on. Dates are requested for six-month blocks of time. For an arbitrator on three panels, which is not unusual, that is six days each month—more if that arbitrator works for other postal unions as well. In my experience, not only are all six dates not used, but using only one or two dates is not unusual. That raises the obvious question: Is two days per month per panel excessive? Might one day per month per panel from each arbitrator on that panel satisfy the needs of the parties? If so, there would be advantages all around—a win-win so to speak. The scheduler would have a less complex task and arbitrators would have more flexibility to deal with other clients. Maybe a reduction in complexity would also have the advantage of allowing scheduling letters to be produced further in advance of the hearings.

[8]Issue #4.

Study-time limits, scheduling issues, and lower than average per diem caps have led at least a handful of arbitrators to reject invitations to do postal work. This has occurred in response to the latest round of invitations as well as years back when these topics were issues. The effects of these issues should be studied and assessed by the parties.

I do not want to leave having created the impression that I am a world-class grouch. There are positive things to be said. In early January 2012, I wrote a memo to Kevin Rachel, USPS Manager of Collective Bargaining and Arbitration, and Mike Morris, APWU Director of Industrial Relations, expressing my concerns over the one-day study-time limit. Sometime later I passed on concerns of another arbitrator in Texas who was having problems getting the government rate for hotels, which is the most USPS/APWU will reimburse us for. Not terribly long thereafter Mary Hercules, Kevin Rachel's right-hand person, and Tom Maier, Executive Assistant to Mike Morris, called to discuss my concerns. We had what I thought was a useful, extended conversation that gave me insight into their concerns and, I hope, provided insight into mine on behalf of many of us. I was and continue to be impressed that they took the time to call. That's not what is expected from large-scale organizations. I have had electronic exchanges and an occasional telephone conversation with Laurie Hayden, in charge of the USPS Labor Relations Service Center in Washington, D.C., and Laurel Martin, who is based in San Diego and who does the scheduling for all USPS/NALC cases throughout the country. All of these people have been responsive and a pleasure to deal with. I don't believe that they are any happier with the glitches that have occurred than we have been and I am convinced that they intend to have the entire operation run as smoothly as possible. My criticisms above notwithstanding, in the face of a preponderance of the evidence suggesting otherwise, I remain hopeful that the scheduling effort is a work in progress and that over time we will see improvements that at least for USPS/APWU cases have not yet been forthcoming.

I close with two suggestions. The first is to make a cadre of experienced postal arbitrators available for inexperienced postal arbitrators to consult with. The second is to develop a joint committee of USPS and union representatives and arbitrators.

In terms of experienced arbitrators serving as mentors, if the parties were to ascertain the willingness of experienced arbitrators to make themselves available to newcomers on the various

postal panels and then provide the newcomers with the names of those willing to be contacted, those new to the various panels would have resources for a multitude of questions. With each new National Agreement, postal panels are revised with arbitrators dropped and others added. Particularly on expedited panels, arbitrators may be new to the profession. Some arbitrators on regular panels will be experienced but new to postal arbitration. Both regular and expedited panel arbitrators may need help with a learning curve that may take place with a large and complex industry and labor agreement and unique administrative requirements often related to the submission of invoices. Undoubtedly, some of these arbitrators will have arbitrator friends to whom they can turn with questions, but this may not be the case for all new to postal arbitration. I can foresee questions about possible places to stay in unfamiliar locations, how to deal with hotel desk clerks who balk at the federal government rate, how to complete an invoice, as well as more substantive questions related to the case at hand, although I want to emphasize that I am not advocating extensive conversations about arbitral awards. I can also foresee discussions about the application of the Code under certain circumstances, as I suspect that arbitrators new to the profession don't know of or at least have the familiarity with the Code that those of us who have been around for a while have.

In terms of the second suggestion for a joint committee, this group could be composed of appropriate USPS and union officials and postal arbitrators—to include NAA representation to ensure that busy, multi-client arbitrators have a voice—that would meet on a periodic basis, if only via telephone conference call, to discuss the USPS arbitration process. The idea is derived from the NAA. As many of you know, the Academy has a Designating Agency Liaison Coordinator (DALC), currently Joan Parker. Her task is to work primarily with AAA and FMCS to deal with problems that may arise affecting arbitrators on these panels and to exchange ideas. There should be value in extending the Academy's DALC concept to the USPS enterprise. Assuming the arbitrator members on the committee are known to the arbitral community, they may be able to transmit concerns broader than their own by serving as contacts for other postal arbitrators. Through our communications channels, we, in turn, should be able to transmit USPS and union concerns to the arbitral community. Together, the largest users of labor arbitration services in the United States and

the arbitrators that work in this industry might smooth the rough edges and improve the process for all concerned.

II. Interest in Rights Arbitration

Mike Morris[9]

The purpose of this paper is to discuss an alarming trend in U.S. Postal Service (USPS) arbitration. From the union perspective, it seems that a growing number of arbitrators issuing awards in rights arbitration cases are including elements that are appropriate only to interest decisions. In other words, some arbitrators are mitigating monetary remedies where contract violations are proven because of the dire financial straits in which the USPS finds itself. When that occurs, in the union's view, the decision ceases to be one made by a rights arbitrator; it crosses the line into interest arbitration and that, quite frankly, is not the role of the rights arbitrator in the negotiated process.

At the risk of oversimplifying the matter, interest arbitration is where the arbitrator attempts either to achieve a right that one party does not currently have or to keep a right that the other party is trying to take away. In other words, interest arbitration is, according to Elkouri and Elkouri: A dispute "over what the terms of… collective bargaining agreements *should* be":[10]

> The distinction between "rights" and "interests" is basic to the classification of labor disputes and to gaining an understanding of which kinds of disputes may be arbitrable. Disputes as to rights comprehend the interpretation of application of laws, agreements, or customary practices, whereas disputes as to interests involve then question of what shall be the basic terms and conditions of employment. …
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> Disputes as to rights are adjudicable under the laws or agreements upon which the rights are based and are readily adaptable to settlement by arbitration. Disputes as to interests, on the other hand, involve questions of policy that, for lack of predetermined standards, have not been generally regarded as justiciable or arbitrable.[11]

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[9]Director of Industrial Relations, American Postal Workers Union, Washington, DC.

[10]Elkouri & Elkouri: How Arbitration Works 1348 (Alan Miles Rubin, ed., 6th ed. 2003) (emphasis added).

[11]*Id.* at 108.

Most of you already know that most collective bargaining agreements do not provide for interest arbitration. Interest arbitration is a permissive, not mandatory, subject of bargaining under the National Labor Relations Act (NLRA).[12] Interest arbitration may have become the norm for first contract disputes had the Employee Free Choice Act been enacted, but that has not happened yet.

USPS employees are forbidden to strike under Section 410(b)(1) of the Postal Reorganization Act,[13] which says: "An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—… (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia.…"[14] Because of this prohibition by law from job actions, the Postal Reorganization Act requires that if the contract expires, the parties are required to submit issues remaining in dispute to an impartial arbitrator for a binding decision. The details are in Section 1207 of the Postal Reorganization Act, found in Title 39. You will be pleased to note that the National Academy of Arbitrators is written into the statute:

> (a) If there is a collective-bargaining agreement in effect, no party to such agreement shall terminate or modify such agreement unless the party desiring such termination or modification serves written notice upon the other party to the agreement of the proposed termination or modification not less than 90 days prior to the expiration date thereof, or not less than 90 days prior to the time it is proposed to make such termination or modification. The party serving such notice shall notify the Federal Mediation and Conciliation Service of the existence of a dispute within 45 days after such notice, if no agreement has been reached by that time.
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> (b) If the parties fail to reach agreement or to adopt a procedure providing for a binding resolution of a dispute by the expiration date of the agreement in effect, or the date of the proposed termination or modification, the Director of the Federal Mediation and Conciliation Service shall within 10 days appoint a mediator of nationwide reputation and professional stature, and who is also a member of the National Academy of Arbitrators. The parties shall cooperate with the

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[12] *See* Columbus Printing Pressman & Assistants' Union No. 252 (R.W. Page Corp.), 219 N.L.R.B. 268 (1975), *enforced*, 543 F.2d 1161 (5th Cir. 1976).

[13] Pub. L. No. 91-375 (Aug. 12, 1970). It incorporates chapter 73 of U.S. Code Title 5, which includes 5 U.S.C. §7311.

[14] *Id. See* American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (vacating an arbitration award reinstating striking postal worker).

mediator in an effort to reach an agreement and shall meet and negotiate in good faith at such times and places that the mediator, in consultation with the parties, shall direct.

(c)

(1) If no agreement is reached within 60 days after the expiration or termination of the agreement or the date on which the agreement became subject to modification under subsection (a) of this section, or if the parties decide upon arbitration but do not agree upon the procedures therefore, an arbitration board shall be established consisting of 3 members, 1 of whom shall be selected by the Postal Service, 1 by the bargaining representative of the employees, and the third by the 2 thus selected. If either of the parties fails to select a member, or if the members chosen by the parties fail to agree on the third person within 5 days after their first meeting, the selection shall be made from a list of names provided by the Director. This list shall consist of not less than 9 names of arbitrators of nationwide reputation and professional nature, who are also members of the National Academy of Arbitrators, and whom the Director has determined are available and willing to serve.

(2) The arbitration board shall give the parties a full and fair hearing, including an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel or by other representative as they may elect. Decisions of the arbitration board shall be conclusive and binding upon the parties. The arbitration board shall render its decision within 45 days after its appointment.

(3) Costs of the arbitration board and mediation shall be shared equally by the Postal Service and the bargaining representative.

(d) In the case of a bargaining unit whose recognized collective-bargaining representative does not have an agreement with the Postal Service, if the parties fail to reach the agreement within 90 days after the commencement of collective bargaining, a mediator shall be appointed in accordance with the terms in subsection (b) of this section, unless the parties have previously agreed to another procedure for a binding resolution of their differences. If the parties fail to reach agreement within 180 days after the commencement of collective bargaining, and if they have not agreed to another procedure for binding resolution, an arbitration board shall be established to provide conclusive and binding arbitration in accordance with the terms of subsection (c) of this section.[15]

This, of course, is classic interest arbitration.

The collective bargaining agreement (CBA) between the USPS and the American Postal Workers Union (APWU) also permits

[15]39 U.S.C. §1207.

interest arbitration when local negotiators fail to agree to items that are subject to local negotiations. Some Academy members have heard those cases.

There is no question that, under the NLRA, midterm changes in working conditions are subject to mandatory bargaining unless waived. Waivers of the right to bargain must be "clear and unmistakable."[16] Under Article 19 of the CBA, these can come about through proposed changes to handbooks or manuals where the changes directly affect the wages, hours, and working conditions of employees. Article 19 stipulates that such changes cannot violate the CBA, but there is an added requirement that, if they do not, they must be "fair, reasonable, and equitable." An arbitrator considering handbook and manual disputes sits as a kind of interest arbitrator because the arbitrator is making determinations about rights and duties not contained in the four corners of the CBA. The most recent APWU National Agreement actually sets up a separate arbitration panel dedicated to Article 19 appeals.

The rest of USPS arbitration, which is probably 99.9 percent of APWU's arbitration, is rights arbitration. It is how the rights achieved either in negotiations or in interest arbitration are enforced. When rights arbitrators start writing and reasoning like interest arbitrators, it confuses the rights arbitration process.

Most labor arbitrators probably know that our CBA states, in Article 15.5.A.6, that "All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator." This is typical rights arbitration language. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes states: "An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which the arbitrator serves."[17]

Of course as arbitrators, you have very broad remedial powers. In the U.S. Supreme Court's *Enterprise Wheel* decision,[18] Justice Douglas stated:

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[16]Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

[17]NATIONAL ACADEMY OF ARBITRATORS, AMERICAN ARBITRATION ASSOCIATION, & FEDERAL MEDIATION & CONCILIATION SERVICE, CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES (as amended and in effect Sept. 2007), at 1.E.1, *available at* http://www.naarb.org/code.html.

[18]United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

> 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 to the problem. This is especially true when 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. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.[19]

The last sentence of that opinion bears emphasis. Although the Code does not say so explicitly, perhaps because the principle is so obvious that it does not need to be stated, an award should be based only on the record evidence before the arbitrator.

Here is a recent example of the concern this paper discusses. A well-respected arbitrator, who also happens to be a law professor at a well-respected law school, issued a decision in September 2011. The facts of the case are as follows:

The APWU agreement has a provision that generally prohibits postmasters and members of other crafts from performing bargaining unit work except under specified circumstances. A very small town post office was staffed with a postmaster, two full-time clerks, two part-time flexible clerks (PTFs), and several rural route carriers and their reliefs. The USPS declared the junior full-time clerk excess to the needs of the office and involuntarily relocated him some 70 miles away. When that occurred, (1) the postmaster began to perform work he had not done previously; (2) the PTF hours went up significantly; and (3) the relief rural carriers also performed work (clerk work) that they had not previously performed. All three of these actions violated our agreement. The union filed a grievance over the improper excessing, another over the increase in the amount of bargaining unit work performed by the postmaster, and another over the improper performance of our work by rural carrier relief employees.

The arbitrator found that the CBA had been violated in all three cases, and he returned the improperly excessed employee to his original office and made him whole in his grievance over the improper excessing. The arbitrator also found violations in the other two class-action grievances (the postmaster performing

[19] *Id.* at 597.

bargaining unit work and the rural carrier reliefs improperly crossing crafts to perform APWU unit work). But while he found that violations had occurred, he merely ordered the USPS to cease and desist, because, in his view, to pay the clerks for violations that occurred in their office would be, "given the *exigent financial circumstances of the Postal Service,* an unwise use of remedial powers of the arbitrator."[20] The record was silent on the exigent financial circumstances of the USPS. Moreover, there is nothing in the CBA that allows an arbitrator to consider the ability of the USPS to pay a remedial award. In fact, the opposite is true. The Joint Contract Interpretation Manual (JCIM) negotiated between the APWU and the USPS states that "*when the union establishes that an employee was assigned across craft lines in violation of Article 7… a make whole remedy requires the payment (at the appropriate rate) to the available and qualified employee(s) who would have been scheduled to work but for the contractual violation*".[21]

The JCIM also states "*where BUW [bargaining unit work] which would have been assigned to employees is performed by a supervisor and such work hours are not de minimus, the bargaining unit employee(s) who would have been assigned the work, shall be paid for the time involved at the applicable rate*".[22]

As can be plainly seen, this arbitrator ignored the CBA and the plain language in the JCIM because, in his view, it would be unwise to remedy the violations of our agreement because of the USPS's "exigent financial circumstances." That is inappropriate in our view—the arbitrator simply dispensed his own brand of industrial justice. But at least he clearly stated what he was doing; there are other awards where the arbitrator is doing the same thing but is less forthright about it.

In a normal case, an employee would not likely be given additional compensation because his credit rating is now in shambles due to the unjust removal and the employee has to pay exorbitant interest rates to buy a car. An employee would not be compensated for the equity that was lost when he could not pay the mortgage and the family home was repossessed during a depressed real estate market. In other words, an arbitrator would rarely, if ever,

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[20] *In re* U.S. Postal Serv. (Bryson City, NC) v. American Postal Workers Union, Nos. K06C-4K-C 08356186 & 28713152, at 8 (Sept. 27, 2011) (Hardin, Arb.) (emphasis added).

[21] U.S. Postal Service & American Postal Workers Union-AFL-CIO, JCIM 2012: Joint Contract Interpretation Manual (July 13, 2012), at 39, *available at* http://www.apwu.org/dept/ind-rel/sc/jcim-2012-july.pdf (emphasis added).

[22] *Id.* at 23 (emphasis added).

consider the *employee's* "exigent financial circumstances" in a discipline case. If that is true, then an arbitrator should not consider the USPS's "exigent financial circumstances" in a contract case.

In a discipline case, an arbitrator can make an equity decision based upon the common contractual concept of just cause, but in a case involving the application of a contract clause, an arbitrator must make a decision based upon the negotiated contract language.

No arbitrator has decided to help the USPS out of its "exigent financial circumstances" by reducing his or her fees by half or by writing the USPS a check. Why? It is because the arbitrator's agreement with the union and the USPS specifies the arbitrator's compensation. The terms were negotiated and fixed, and financial considerations were addressed in arriving at the terms of the contract. The same is true when the USPS negotiates its CBA with a union. If this principle is so in the arbitrator's own arrangements with the parties, then that same principle applies when an arbitrator is awarding a remedy for CBA violations.

Within the past year the USPS has sued to vacate an arbitration award that it believes imposed a large financial burden on it by considering evidence inapplicable to the case. The USPS was wrong, but the point is that if the USPS wants to make a defense of excessive financial burden, then the place to do it is in court after the award is issued. This is not a proper consideration for the arbitrator because the CBA does not make it a valid defense to a remedial award otherwise warranted by the evidence.

There is an old legal principle of damages that stands for the notion that the wrongdoer must bear the burden—however big—of uncertainty. The Supreme Court has held that:

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.[23]

An award like the one from the small town post office cited earlier does the exact opposite of what it should do. It actually *incentivizes* the USPS to violate its agreement with the APWU. Why would the USPS ever be concerned with violating the agreement when it knows that (especially in small post offices like this one),

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[23]Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264–65 (1946).

given the small percentage of violations the union can actually properly document, an arbitrator will only tell the USPS not to do it anymore and nothing else?

There is another principle of law that provides that the inability to pay or even outright insolvency does not excuse the insolvent party from breaching the contract.[24] Rather, it gives the other party justification to suspend the contract until the insolvent party demonstrates that it can perform. While this rule is applicable to breaches of contract under common law, the point is relevant for this discussion. A rights arbitrator is duty bound and contractually bound to grant remedies for proven violations of our CBA. That is especially true when the remedies are provided for in the national agreement or the JCIM.

It is not the intention of this paper to trivialize the difficult financial position the USPS is in; it is well documented. It is also well known that if the USPS fails, the employees, as well as the arbitrators, will lose their jobs. The APWU made some very responsible and very difficult decisions regarding the future of our union and the future of the USPS in the most recent negotiations. Changes were negotiated in how we define full-time employment; negotiations included a two-year wage freeze, a much higher percentage of non-career employees, and a lower wage scale for new employees. This was done because the APWU took the "exigent financial circumstances" of the USPS into consideration. That was for the parties to do in negotiations; it is not for the rights arbitrator to do in a decision. According to the Postmaster General's testimony before Congress, the APWU put the USPS in the position to save more than $3.5 *billion* over the life of the agreement.[25]

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[24]RESTATEMENT (SECOND) OF CONTRACTS §252.

[25]Statement of Postmaster General/CEO Patrick R. Donahoe Before the Committee on Oversight and Government Reform, U.S. House of Representatives 1 (Apr. 5, 2011), *available at* http://oversight.house.gov/wp-content/uploads/2012/0¼-5-2011_Donahoe_Testimony-Bio_2.pdf.

Although the Postmaster General does not list all of the savings or their value, he cites two major costs savings: the first is $1.8 billion, and the second $1.9 billion, for a total of $3.7 billion:

> This tentative agreement also provides immediate cost relief by freezing wages for the first two years, and leads to wage savings of $1.8 billion over the term of the agreement. We negotiated structural changes that resulted in a two-tier career pay schedule for new employees that is 10.2 percent below the existing schedule.
>
> We will also be able to increase the use of non-career employees from the 5.9 percent today with restrictions, to roughly 20 percent totally unrestricted. These changes provide a $1.9 billion benefit.

Id. at 1–2.

In answer to questions at the hearing, the Postmaster General said: "We have worked through a very good agreement with the APWU to reduce labor costs in a 4½ year period

In exchange for the more than $3.5 billion in savings that the USPS sought and received, the union got contract language that it believes will protect the membership over the life of the agreement. Contract language was the quid pro quo for that $3.5 billion in savings.

The APWU has already paid for this contract, and it can never get the benefit of that bargain if rights arbitrators are making the union pay more by limiting the awards for breaching the contract.

In summary, when an arbitrator includes cease and desist language in a rights arbitration case and denies a monetary remedy because of the "exigent financial circumstances" of the USPS, the arbitrator is encouraging future violations of the agreement and, more importantly, usurping the role of the union in negotiations.

Awards like the one cited earlier also undermine the ability of the union to enforce its contract and ultimately the credibility of the union with its membership. When a union cannot enforce its agreement and thereby loses its ability to represent its members, it loses its very reason for existence.

The arbitrator's role in rights arbitration of a contract case is not to dispense his or her own brand of industrial justice, but to enforce rights. Needless to say, when a rights arbitrator strays into the role of an interest arbitrator, it is taken very seriously.

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at a minimum of $3.8 billion." *See Are Postal Workforce Costs Sustainable? Hearing Before the H. Comm. on Oversight and Government Reform,* 112th Cong. 48 (2011) (statement of Postmaster General Patrick R. Donahoe), *available at* http://oversight.house.gov/wp-content/uploads/2012/04/4-5-11-Full-Committee-Hearing-Transcript.pdf.

At the same hearing, the then-Chairman of the Board of Governors, Louis J. Giuliano, said: "The tentative agreement provides the Postal Service with three important things: immediate cost control, a flexible work force and long-term structural change. The Board unanimously supports the tentative agreement, which would produce a cost savings of $3.8 billion during its life." Statement of Louis Giuliano, Chairman, Board of Governors, U.S. Postal Service, Before the Committee On Oversight and Government Reform, U.S. House of Representatives 2 (Apr. 5, 2011), *available at* http://oversight.house.gov/wp-content/uploads/2012/0¼-5-2011_Giuliano_Testimony-Bio_2.pdf.