C-36043

REGULAR REGIONAL ARBITRATION PANEL

Interim Award - Preliminary Issues

In the Matter of the Arbitration	§	**Grievant**: **CLASS ACTION**
	§	
	§	**Post Office**: **MEMPHIS-EAST/LAMAR MEMPHIS, TENNESSEE**
	§	
Between	§	
	§	
	§	**Case Number**: **4G-19N-4G-C 22008330**
	§	
UNITED STATES POSTAL SERVICE	§	**DRT No.**: **08-556200**
	§	
and	§	
	§	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	§	**Union No.**: **R8-27-1-21**

BEFORE: **TROY D. SOILEAU**, Arbitrator

APPEARANCES:

For the **UNITED STATES POSTAL SERVICE**: **MR. ERIC W. CONKLIN**, **USPS** Advocate

For the **NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO**: **MR. COREY L. WALTON**, **NALC** Advocate

HEARING:

Place of Hearings: 525 South B.B. King Boulevard, Memphis, Tennessee 38101

Date of Hearings: May 17, 2022 and June 30, 2022

Record Closed: August 26, 2022

AWARD:

Issuance of Award: February 22, 2023

AWARD SUMMARY

I. ***Preliminary Issue(s)*** - The Preliminary Issues presented in this case are resolved as follows:

(**A**) **HOLDING**: Future cases in the **TENNESSEE SOUTHERN REGION** before your arbitrator will be subject to the **SOILEAU NOTICE RULE**, to wit:

NOTICE TO OPPOSING PARTIES:

(**i**) All parties are required to give Notice to the non-moving party of their intent to raise:

(**a**) any Preliminary Issue, including, but not limited to, issues of substantive arbitrability; or
(**b**) any other Affirmative Defense.

(**ii**) The Notice requirement in this rule:

(**a**) shall be of sufficient particularity to apprise the non-moving party of the factual and legal contentions the moving party intends to advance;
(**b**) may be in the form of letter, e-mail, or other writing; and providing an opposing party with a true and correct copy of the actual document (motion, argument, or brief) to be advanced at arbitration shall be deemed *prima facie* evidence of Notice to the opposing party; and
(**c**) shall be reasonable as it relates to when the moving party knew, or should have known, of the Preliminary Issue or Affirmative Defense. In no event shall the Notice requirements contained herein be less than five working days prior to the presentment of the Preliminary Issue or Affirmative Defense.

(**iii**) Failure to comply with the Notice requirements contained in this rule may result in the following curative measures at the arbitration level:

(**a**) a granting of a continuance of the matter to a later date, either *sua sponte*, or upon request of the non-moving party;
(**b**) assessment of cost associated with the granting of the

continuance against the party advancing the Preliminary Issue or Affirmative Defense in contravention of this rule;

(**c**) limiting or restricting oral arguments on the Preliminary Issue or Affirmative Defense, and requiring the moving party to advance their legal arguments in writing—thereby giving the non-moving party an opportunity to respond;

(**d**) allowing the non-moving party to provide closing arguments ***and*** post hearing briefs on the Preliminary Issue or Affirmative Defense advanced; and/or

(**e**) other awards that are appropriate under the circumstances.

(**iv**) Nothing in this rule shall be interpreted as to modify, extend, alter, or void any current or future **CBA**, **JCAM**, or **MOU** provision.

(**B**) **HOLDING**: The **USPS MOTION TO DISMISS** the Grievance based upon the timeliness of the **NALC** filing is denied, *in total*. However, this ruling should not be interpreted as to put the grievance to rest at this juncture. The **NALC** must still prove the ongoing and continual "*contractual violations*" as alleged in the filed grievance—and according to the required evidentiary standard (discussed more fully, *infra*).

(**C**) **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the doctrine of *Res Judicata* is denied—*and in total*.

(**D**) **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the doctrine of *Collateral Estoppel* is denied—*and in total*.

(**E**) **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the "failure to meet" at the **INFORMAL A** Step, as well as all other **USPS** procedural objections as to the Form 8190 in this case, are denied—*and in total*.

(**F**) **HOLDING**: The **USPS** argument that the evidentiary standard to be applied in this case should be "*clear and convincing*" violates the **MITTENTHAL NEW ARGUMENT RULE**; and further, ***is not otherwise supported*** by any credible authority that would void the general understandings and application of the above rule. Therefore, the **USPS** argument is denied, in total—and the case shall proceed as a contract case, and all contested issues shall be decided based upon the accepted evidentiary standard of "*preponderance of the credible evidence*".

(**G**) **HOLDING**: The single issue to be resolved in this case shall be:

When acting pursuant to its authority and responsibilities spelled out in the **CBA** and **JCAM**, did the **USPS** violate the Joint Statement on Violence and Behavior in the Workplace, the Postal Service's Policy on Workplace Harassment, the Tennessee District Workplace Violence/Zero Tolerance Policy, Section 115.4 of Handbook M-39, and ELM Section 665.24 via Articles 14, 15 and 19 of the National Agreement?

(**H**) **HOLDING**: The **USPS** argument that the evidentiary standard to be applied in this case should be "*clear and convincing*" violates the **MITTENTHAL NEW ARGUMENT RULE**; and further, ***is not otherwise supported*** by any credible authority that would void the general understandings and application of the above rule. Therefore, the **USPS** argument is denied, in total—and the case shall proceed as a contract case, and all contested issues shall be decided based upon the accepted evidentiary standard of "*preponderance of the credible evidence*".

(**I**) **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the "failure to meet" at the **INFORMAL A** Step, as well as all other **USPS** procedural objections as to the Form 8190 in this case, are denied—*and in total*.

(**J**) **HOLDING**: The **USPS** is barred from advancing any evidence or argument that the complained of conduct is not "ongoing" or "continual".

(**K**) **HOLDING**: The **NALC** request for Summary Judgment relating to the reformed issue in this case is **GRANTED**, and in its entirety.

II. Your arbitrator retains jurisdiction of this case for the purpose of:

(**A**) correcting clerical errors; and

(**B**) enforcement and interpretation of this Award.

By: */S/ Troy D. Soileau*
TROY D. **SOILEAU**, Arbitrator

INTERIM AWARD OPINION
Covering Preliminary Issues

I. *Introductory Matters*

TROY D. SOILEAU [1] served as the appointed arbitrator and submits this **INTERIM AWARD OPINION** of all Preliminary Issues presented.

The above styled and numbered cause arose out of the **MEMPHIS-EAST/LAMAR**, (Sometimes referenced, **MEM-EAST/LAMAR P.O.**) and was presented for arbitration as a Regular Regional Arbitration case—the merits of the case being originally called and heard on May 17, 2021. At the close of the day of the original hearing, the parties requested a recess due to the voluminous record and the number of witnesses remaining to be called. Thereafter, the hearing was recessed and rescheduled for June 30, 2022. ***See***, **ORIGINAL SCHEDULING LETTER**, April 29, 2022; ***See***, ***Also***, **RESCHEDULING LETTER**, May 24, 2022.

After the hearing, the parties agreed to e-mail and cross-exchange each other and your arbitrator their closing briefs and authority on or before the close of business of **August 26**, **2022** at **5:00 p.m. Eastern Standard Time**. All closing documents were timely received; therefore, ***the time-line for the presentment of this Award originally began on Monday, August 29, 2022***.

The original **TENNESSEE DISTRICT DISPUTE RESOLUTION STEP B TEAM CASE FILE** (hereinafter, **DRT CASE FILE**) contained well over 1300 pages. ***See***, **USPS CLOSING BRIEF**, p.5. Additionally, the parties submitted extensive briefs and other authority for your arbitrator to consider. Therefore, your arbitrator requested an extension of the deadline for the filing of this **AWARD** until **October 16**, **2022** at **12:00 a.m. Eastern Standard Time**. In addition to the granted extension above, your arbitrator subsequently extended the deadline for the presentment of this **AWARD** (***until the actual date of submission***) for the following reasons: (**1**) the novelty and complexity of the issues in this

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1. The surname of "Soileau" being pronounced "Swallow" for future reference.

case; including, but not limited to, the "Preliminary Issues" advanced by the parties; (**2**) the length of the record in this case; and (**3**) family and other personal concerns of your Arbitrator.

II. ***Overview Of The Case***

A. ***Advocates*** -

The **NATIONAL ASSOCIATION OF LETTER CARRIERS** (hereinafter, **NALC**), presented this arbitration appeal by and through its authorized representative, **MR**. **COREY L**. **WALTON**, **NALC** Arbitration Advocate.

The **UNITED STATES POSTAL SERVICE** (hereinafter, **USPS**), defended this arbitration appeal by and through its authorized representative, **MR**. **ERIC W**. **CONKLIN**, Labor Relations Specialist.

B. ***Procedural History Of The Case*** -

The **TENNESSEE DISTRICT DISPUTE RESOLUTION STEP B TEAM DECISION** (hereinafter, **DRT DECISION**) presented for arbitration spells out the procedural history of this case as follows:

(**1**) The grievance was filed as a **CLASS ACTION** case. ***See***, **DRT DECISION**, p.2.;

(**2**) The grievance incident date was identified as "Ongoing" . ***See***, ***Id***.;

(**3**) The Informal Step A was initiated on October 26, 2021. ***See***, ***Id***.;

(**4**) The Formal Step A meeting was held on November 8, 2021. ***See***, ***Id***.;

(**5**) The **STEP B TEAM** received this case on November 12, 2021. ***See***, ***Id***.;

(**6**) The **DRT DECISION** was issued on December 9, 2021. ***See***, ***Id***.;

(**7**) The **STEP B TEAM** declared an **IMPASSE** of the contested issues. ***See***, ***Id***.; and,

(**8**) The case was appealed to arbitration by letter dated December 17, 2021. ***See***, ***Id***.. ***See***, **DRT CASE FILE**, p.1.

C. ***Jurisdiction*** -

Article 15 of the **COLLECTIVE BARGAINING AGREEMENT**, (hereinafter, **CBA**) outlines in detail the grievance-arbitration processes, and defines a "grievance" as:

> "A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement." ***See***, **CBA**, **ARTICLE 15.1**, Definition, p.66.

The case was appealed from the **TENNESSEE DISTRICT DISPUTE RESOLUTION STEP B TEAM** (hereinafter, **STEP B TEAM**) Impasse. Prior to the presentment of evidence relating to the substantive issues in this case, both advocates presented Preliminary Issues and defenses for resolution. After considering the arguments and evidence presented by the advocates relating to the Preliminary Issues advanced, your arbitrator took the contested issues under advisement—and now issues final rulings as discussed in this **AWARD**.

III. ***Exhibits***

A. ***Joint Exhibits Offered and Admitted*** -

Prior to introductory comments or presentment of their respective cases, the parties jointly offered into evidence (each in their entirety), the following relevant Exhibits in the resolution of the presented Preliminary Issues:

(**1**) the **CBA**;

(**2**) the **JOINT CONTRACT ADMINISTRATIVE MANUAL** (hereinafter, **JCAM**); and

(**3**) the **DRT CASE FILE**.

Hearing no objections, each of the afore-enumerated was admitted into evidence, in their entirety, and as separate exhibits to the hearing—being formally marked as follows:

(**1**) **CBA** - Arbitration Joint Exhibit #1;

(**2**) **JCAM** - Arbitration Joint Exhibit #2; and

(**3**) **DRT CASE FILE** - Arbitration Joint Exhibit #3.

B. ***Description of Joint Exhibits*** -

(**1**) ***CBA*** - The **CBA** is the written agreement (contract) between the **USPS** and the **NALC**, and contains, among other things, a variety of procedures, benefits, obligations, and responsibilities granted and imposed upon the **NALC** and its members, as well as the **USPS** and its employees—including, but not limited to, the arbitration process;

(**2**) ***JCAM*** - The **JCAM** is a narrative explanation of the **CBA**, and was jointly prepared by the **USPS** and the **NALC** (updated July, 2021). As further explanation, the **JCAM** provides in the Introductory and Preface Comments the following guidance in the arbitration process:

> "...Publication of the JCAM was undertaken in good faith in order to educate the local parties and facilitate the resolution of disputes concerning issues on which the national parties are in agreement. While the parties at the national level still dispute the proper application of some portions of the Collective Bargaining Agreement, there are significant areas of agreement. The JCAM represents the parties' effort to inform labor and management in the field of these areas of agreement and encourage consistency and compliance with the issues treated. The narrative explanation of the Collective Bargaining Agreement contained in ***the JCAM should be considered dispositive of the joint understanding of the parties at the national level*** [emphasis added]. Some sections of the contract do not have a narrative explanation. No inference should be drawn from the lack of explanatory language..." ***See***, **JCAM**, **INTRODUCTION**, p.1.
>
> "The JCAM is self-explanatory and speaks for itself. It is not intended to, nor does it, increase or decrease the rights, responsibilities, or benefits of the parties under the Collective Bargaining Agreement. It neither adds to, nor modifies in any respect, the current Collective Bargaining Agreement. At each step of the grievance/arbitration procedure the parties are required to

jointly review the JCAM in order to facilitate resolution of disputes. ***The JCAM may be introduced in arbitration as dispositive of those issues covered by the manual*** [emphasis added]. If introduced as evidence in arbitration, the document shall speak for itself. ***Without exception, no testimony shall be permitted in support of the content, background, history or any other aspect of the JCAM's narrative*** [emphasis added]." ***See***, ***Id***., **PREFACE**; and

(**3**) ***DRT CASE FILE*** - The **DRT CASE FILE** is a collection of documents supplied by the **STEP B TEAM**, and contains a variety of documents, including, but not limited to, the **DRT DECISION**, as well as all attachments, arguments, forms, and supporting documentation submitted and/or supplied by the **NALC**, **USPS**, and the **STEP B TEAM**, to explain, interpret, or support the parties contentions and defenses. For purposes of this award, the **DRT DECISION** shall consist of pages 02-31 of the **DRT CASE FILE**. However, the remaining pages (attachments) of the **DRT CASE FILE** have been properly incorporated, by reference, into the **DRT DECISION**. Therefore, the attachments to the **DRT DECISION** are given equal weight and consideration as if each were copied, verbatim, in the **DRT DECISION**.

C. ***Hearing Exhibits and Authority*** [2] -

(**1**) ***NALC Hearing Exhibits*** - The **NALC** offered the following relevant Hearing Exhibits in support of their contentions and arguments relating to the Preliminary Issues presented:

(**a**) ***NALC Hearing Exhibit #1*** - The first two paragraphs of the ***Management's Guide to Understanding, Investigating, and Preventing Harassment*** (hereinafter, "**GUIDE**"). The portion of the **GUIDE** offered into evidence states, in total:

"**Overview of Steps** [emphasis in original text]
When encountering a harassment complaint or situation, **your role as a manager is to stop**, **listen**, **inquire**, **and try to resolve the harassment complaint** [emphasis in original text]. Keep in mind that the employee is

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2. Other Exhibits were offered and/or admitted during the hearing regarding the merits of the case. No mention is made in this **INTERIM AWARD** of Exhibits and/or authority that does not directly relate to the contentions and defenses raised as Preliminary Issues.

addressing a sensitive topic.
RESPOND PROMPTLY [emphasis in original text] to the complaint regardless of its form or content. Remember that you could receive a complaint with no prior warning. Any report of harassment is enough to start an inquiry." ***See***, **GUIDE**, #1 Respond Promptly, page number unknown.

Hearing no objections, the foregoing was admitted into evidence as a separate exhibit to the hearing, and as specifically quoted above—being formally marked as **NALC HEARING EXHIBIT #1**; and

(**b**) ***NALC Hearing Exhibit #2*** - **STEP B DECISION**, **CLASS ACTION**, April 29, 2022, Memphis Installation, Heighland Heights Station, G19N-4G-C 221155291.

The **USPS** objected to the admission of the foregoing as a separate exhibit to the hearing. Having considered the objection and arguments by both advocates, the objection was **SUSTAINED**; however, the **NALC** was allowed to present the above case as other precedential authority, or as an extension of their contentions and arguments.

(**c**) ***NALC Hearing Exhibit #3*** - **STEP B DECISION**, **EDMONDSON**, February 14, 2022, Horn Lake Installation, Main Station, 4G-19N-4G C 22087572.

The **USPS** objected to the admission of the foregoing as a separate exhibit to the hearing. Having considered the objection and arguments by both advocates, the objection was **SUSTAINED**; however, the **NALC** was allowed to present the above case as other precedential authority, or as an extension of their contentions and arguments.

(**2**) ***USPS Hearing Exhibits*** - The **USPS** did not offer relevant Hearing Exhibits in support of their contentions and arguments relating to the Preliminary Issues presented.

IV. ***Parties Theory of The Case***

A. ***NALC Position*** - The **NALC** offers the following theory of their case:

(**1**) ***NALC Factual and Legal Summary of the Case*** -"On October 12, 2021, at approximately 11:50 am, City Carrier Assistant (CCA)

(hereinafter, "Shooter") [3] entered the East Lamar Carrier Station, where he shot and killed **STATION MANAGER JAMES WILSON** (emphasis added) and **SUPERVISOR DEMETRIA DORTCH** (emphasis added). Shooter then turned the gun on himself and took his own life. Management will attempt to show you that this senseless tragedy is where the story starts and stops. The Union, however, will show a different story.

After this tragic incident occurred, and with him knowing the toxic environment that Management has fostered in the Memphis installation throughout the years, National Business Agent (NBA) Steve Lassan decided it was time for the Union to take the reins in protecting our City Letter Carriers. Mr. Lassan sent in a team of experienced Union representatives to dig into the history of this installation to see who the prominent individuals were causing, condoning, promoting, and fostering the unacceptable behavior...". ***See***, **NALC OPENING STATEMENT**, p.1; ***See***, ***Also***, **NALC CLOSING BRIEF**, p.6. "What the Union found was staggering." ***See***, ***Id***.

Mr. Jason Atchley "was a member of the team that NBA Lassan sent into the Memphis installation and is considered an expert, by the Union, at dealing with the Joint Statement on Violence and Behavior in the Workplace (JSOV). He was assigned as the Formal Step A representative on the grievance..." ***See***, ***Id***. "He will show a history of unacceptable behavior by Management that would be impossible to believe if it hadn't been documented so well through prior grievance settlements. He will show you how the deplorable state of Managerial behavior has been brought to the attention of, yet intentionally ignored by, the top Management official in this district, District Manager Chris Alexander. Mr. Atchley will show how city carriers in this installation have begged and pleaded for help..., yet those pleas fell on deaf ears repeatedly." ***See***, ***Id***. "He will show how the only action taken against Management's unacceptable behavior has been through the grievance procedure. He will also show that not one time has Management done anything independently to curb the wanton and reckless behavior that certain members of Management have been allowed to consistently get away with. Finally, Mr. Atchley will go over the remedy requested for this grievance. He will pinpoint the vital few Managers whose unacceptable behavior has continued despite numerous attempts by both

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3. The substantive rulings and curative measures contained in all **AWARDS** issued in this case should not be interpreted as to give any notoriety to "Shooter". Based upon the unwarranted and horrific acts of the shooter employee, your arbitrator would advise that the name of Shooter be forgotten—and further erased from the memory of all involved within the United States Postal Service family. I will leave it up to other forums as to whether Shooter deserves specific mention by name due to his potential mental condition or other circumstances leading him to take the lives of innocent people—however, such cowardly actions on the part of Shooter will not be memorialized by your arbitrator.

parties to curb that behavior, whether through training or instructional cease and desist orders." ***See***, **NALC OPENING STATEMENT**, p.1; ***See***, ***Also***, **NALC CLOSING BRIEF**, pp.6-7.

Branch President John Walker "will show you his documented attempts to get upper Management involved in the Memphis installation to help deal with unruly Managers and supervisors. He will show how those attempts were met with 'winks and nods' by those same Management officials.

Finally, you will meet retired City Carrier, Eddie Williams. He will go over his survey and written statement in the case file. He is the only one that will testify today that will be able to give a firsthand ground-level view of precisely what's happening on these workroom floors." ***See***, **NALC OPENING STATEMENT**, p.1.

"...the Union, has brought forward a case of massive neglect on the part of Management at every level, enabling a toxic environment in the Memphis installation to manifest. The issue is overwhelming and documented. The abuses by Management are extreme and ongoing." ***See***, **NALC OPENING STATEMENT**, p.1; ***See***, ***Also***, **NALC CLOSING BRIEF**, p.7. The Union has "brought these contentions to Management in hopes that we could get them to acknowledge our concerns and address them per the JSOV. That didn't happen." ***See***, ***Id***.

"The Union will show how Management's Formal Step A representative (Mr. Mike Vaccarello) has failed to understand the parties' obligations about things that happen at the Formal step A meeting and not before." ***See***, **NALC OPENING STATEMENT**, p.2; ***See***, ***Also***, **NALC CLOSING BRIEF**, pp.7-8; ***See***, ***Also***, **JCAM**, **Article 15.2** (**d**) - **FORMAL STEP A**, p.15-5. "The Union would be remiss if it did not address...the misguided approach of Management's B-Team member as it pertains to prior signed grievance settlements used to show a pattern or history of unacceptable behavior on Management's part." ***See***, **NALC OPENING STATEMENT**, p.2; ***See***, ***Also***, **NALC CLOSING BRIEF**, p.8. "...Management's understanding of why the Union submits prior grievance settlements that pertain to Management's instructions to cease and desist from their unacceptable behavior in a JSOV case is uneducated at best." ***See***, ***Id***.; ***See***, ***Also***, **CENCI AWARD**; **CLASS ACTION**, Fall River, Massachusetts; B06N-4BC 08130117 (08/19/2018); **NALC CLOSING BRIEF**, p.8; **NALC OPENING STATEMENT**, p.2.

"The Union will show that to prove a Manager's history of abuse, those past decisions, which deal with those specific managers, shall be included in the file to support that claim. Those past decisions are included to provide

historical context. The Union is not asking to relitigate those past decisions." ***See***, **NALC OPENING STATEMENT**, p.2; ***See***, ***Also***, **NALC CLOSING BRIEF**, p.9.

"We were hoping against hope that Management would fulfill their obligation as they signed off to do in the JSOV..." ***See***, **NALC OPENING STATEMENT**, p.3; ***See***, ***Also***, **NALC CLOSING BRIEF**, p.9. "We were hoping against hope that the past grievance settlements would have been enough to change the unacceptable environment which has blanketed this installation for years" ***See***, ***Id***.

(**2**) ***NALC Preliminary Issues*** - The **NALC** offers the following Preliminary Issues to arbitration:

(**a**) ***NALC Preliminary Issue #1*** - Does the Arbitration Record contain un-controverted evidence establishing a *prima facie* case of **USPS** "continual" and "ongoing" violations of the **JOINT STATEMENT ON VIOLENCE AND BEHAVIOR IN THE WORKPLACE**, the **POSTAL SERVICE'S POLICY ON WORKPLACE HARASSMENT**, the **TENNESSEE DISTRICT WORKPLACE VIOLENCE/ZERO TOLERANCE POLICY**, **SECTION 115.4 OF HANDBOOK M-39** and **ELM SECTION 665.24** via Articles 14, 15 and 19 of the National Agreement, thereby entitling them to a summary judgment finding?

(**i**) ***NALC Legal Contention #1*** - "*The Union made* (*sic*) *a prima facia* (*sic*) *case through the overwhelming documentation in the case file*." ***See***, **NALC CLOSING BRIEF**, p.12;

(**ii**) ***NALC Legal Contention #2*** - "*The above-mentioned issue was easily proven*, *and Management could never shift that burden back to the Union*." ***See***, ***Id***. at p.13;

(**iii**) ***NALC Factual Contention #1*** - "*Under cross-examination*, *Management's Formal Step A representative*, *Mike Vacarrallo*, *acknowledged that out of the 1300 pages of case file*, *Management hadn't included one single IMIP*. *Mr*. *Vaccarallo also acknowledged that in the past year*, *Management hadn't initiated one single IMIP.*" ***See***, ***Id***. at p.12;

(**iv**) ***NALC Factual Contention #2*** -

"The Union has accused Management of not only creating but condoning the

toxic environment in the Memphis installation. Management couldn't show the Arbitrator that they took the most basic and mandated steps to attempt to correct the environment. The only actions management took were those mandated through the grievance procedure. I asked Mr. Vacarrello if he could show the Arbitrator one single thing that Management had done independently to correct the toxic environment, but he could not." ***See***, ***Id***.;

and

(**v**) ***NALC Factual Contention #3*** - "*...the case file speaks for itself*. *The continued and documented history of abuse is not in dispute*. *Management's inaction regarding getting these supervisors and managers under control is telling*. *Their silence when it came time to defend their actions in the arbitration hearing was deafening.*" ***See***, ***Id***. at p.13.

B. ***USPS Position*** - The **USPS** offers the following theory of their case:

(**1**) ***USPS Factual and Legal Summary of the Case*** -

"...the case presented is a contract case, with the burden of proof belonging to the NALC." ***See***, **USPS CLOSING STATEMENT**, p.4. "...the NALC has failed to establish a prima facie case." ***See***, ***Id*** at p.5.

"**Issues 1 and 2**

These are very similar, with 1 relating to the Memphis installation, and 2 relating to District Manager Alexander.

"Although this case was filed based on the shooting incident on October 12, 2021, the evidence in the case file and at hearing, provided no evidence of any management actions that would violate the JSOV, toward Shooter, or any employee. ***The shooting may have given grounds to file a grievance*** [emphasis added], but there has been zero proof of any management misconduct on October 12, 2022.

Although NALC is investigating a recent incident and must provide evidence of actions within the past 14 days, survey questions #1 and 2 begin with "over the last year". These are the only two questions that directly relate to the climate and employee treatment, yet NALC intentionally expands the timeline (*sic*) well beyond fourteen days prior, going back an entire year!" ***See***, ***Id***. at p.6.

"The most compelling survey and statement was furnished by Carrier Eddie Williams, J3:35, 310-311..." ***See***, ***Id***. "While there is no dispute Carrier Williams came into the office and met face to face with Shooter, his allegations regarding management misconduct are vague, non-specific, and do not prove any continuing violation of JSOV. Mr. Williams makes reference to something he may have overheard being stated to a clerk by

OIC Sunil Chanan. This is hearsay. The parties stipulated to OIC Chanan's email at pages J3:61-62, in response to Mr. Williams allegations. OIC Chanan states, "I never [sic] going to say to someone who just witnessed a horrific tragedy to resign if they cannot continue to work", and, "…I never made such comments." ***See***, ***Id***. at p.7.

"NALC failed to identify who this clerk being spoken to was, nor did they provide any first-hand statement by this clerk. It appears NALC ignored that part of their investigation, relying on hearsay only. Unrebutted testimony of Mike Vaccarella established that OIC Chanan speaks with a very strong dialect. It is very possible Mr. Williams may have misunderstood OIC Chanan.

When reviewing the summary of surveys, NALC Step B tallied the responses furnished, found at J3:4. Of all the survey's that responded to question #2, "Over the last year, postal management has treated employees in a professional and respectful way:", only one employee in the entire unit answered "Never", it was Mr. Williams. And even with that stated opinion, Mr. Williams didn't describe the workplace as hostile, but only "Tense" (Question #1 J3:310). When reviewing Mr. Williams statement J3:35, he sure appears to be jaded against management. He even goes on to state that "these conditions", referring to actions of management, contributed to the shooting. That is nothing but opinion, as the record of evidence does not support this claim in any way." ***See***, ***Id***.

"Upon reviewing every one of the surveys...:

- They are vague without specifics of who, what, when, where, attendant circumstances
- There are complaints about operational concerns, long hours and overtime since COVID began
- There are complaints about the cleanliness of East Lamar Station.
- Some carriers do not want to delivery mail in the dark Many refer to things admittedly having taken place months or years prior
- Some carriers didn't like having to work in the building following the shooting
- Some carriers are citing hearsay of others
- Some carriers think communication and interactions could improve among both union and management
- References are made to "they", "management", etc, without actually identifying "who"." ***See***, ***Id***. at p.8.

"Aside from the employee surveys, NALC is attempting to prove guilt in the current grievance, by citing previously settled grievances, with a focus on those related to Managers Braswell, Bird and Benson. ***It must be noted***

that NALC jointly entered into every one of those settlements and the terms specified were agreeable to the parties, based on the parties review of the fact circumstances, and also considering the past records [emphasis added]. The summary of these settlements are found at J3:72-80." ***See***, ***Id***.

"While this is not a discipline case, the premise is directly on point with what NALC is attempting to argue. NALC focused heavily on previously settled cases to not only affect the penalty remedies requested against Braswell, Bird and Benson, they are using previously settled cases against to prove their guilt in the current case." ***See***, ***Id*** at pp.8-9. "Further, testimony of Manager Laron McMillon and the Station Manager list at J3:893 confirmed that neither Braswell, Bird or Benson managed Shooter during his short term of employment. Even though Manager Braswell was the Form 50 manager of Mendenhall, Manager McMillon was the acting manager at Mendenhall throughout Mr. Shooter's tenure." ***See***, ***Id*** at p.9.

"...regarding some of the allegations of misconduct in the previously settled cases. If taken at face value as described by NALC, it is concerning. Very concerning, as it should be. Testimony demonstrated both management and union have given close scrutiny to Memphis following the shooting. Unfortunately, we only know what is in the grievance file, and we don't know the extent of changes or recommendations resulting from these reviews. Surely, some things have changed already, we just don't know what." ***See***, ***Id***.

"So, did Memphis create and condone and continue a toxic environment? NALC argues that since the settlements entered into and complied with, were not done unilaterally by Management, they have not taken this seriously. "...most, if not all allegations of EAS misconduct, were first brought to light in the grievance process." ***See***, ***Id***. "Once grieved, it becomes the responsibility of the parties to jointly resolve the cases. Management can't be given a negative inference because they followed the grievance process in resolving matters." ***See***, ***Id***.

"As for District Manager Alexander, he has since retired in December 2021. NALC portrays DM Alexander as condoning this toxic culture primarily because when carriers in Mendenhall Station filed a petition to him regarding Manager Braswell (J3:133-134), he replied asking if the union had spoken with PM Capers (J3:135). Rather than reply to DM Alexander, Local President John Walker's statement at J3:136 states, 'I took that to mean that he wasn't going to be speaking with them…' That is quite an assumption by the NALC, and nothing more. Had Mr. Walker replied to DM Alexander, there is no compelling reason to assume he wouldn't have gotten a response, just as he did after DM Alexander received the petition. Despite

not responding to DM Alexander, the settlement at J3:129 verifies the parties resolved the grievance that PM Capers would speak with the carriers at Mendenhall. That was done, ***and the record demonstrated Manager Braswell was moved from Mendenhall in early 2021***, ***following the meeting*** [emphasis added]. This clearly demonstrates Memphis management is responsive to the carrier claims, and also, that DM Alexander did not create or condone the environment that is claimed to exist. ***Sometimes***, ***just a personnel change can eliminate a perceived poor climate***, ***and there was zero evidence of any current misconduct of Braswell***, ***Bird or Benson in***, ***or admitted into***, ***the record*** [emphasis added]." ***See***, ***Id***. at pp.9-10.

"To summarize issues 1 and 2, ***NALC has fallen short of proving any specific misconduct*** [emphasis added]. Without question there has been ***no evidence of misconduct by Braswell***, ***Bird or Benson during October 12-26***, ***2021*** [emphasis added]. Vague statements alleging poor communication and operational issues such as overtime and delivering mail after dark, do not rise to the level of workplace harassment and violations of the JSOV. That does not mean that those issues are not concerning, and should be addressed, if true." ***See***, ***Id***. at p.10. "...issues 1 and 2 must be denied in their entirety." ***See***, ***Id***.

"ISSUE 3:

Having not proven a prima facie case regarding issues 1 and 2, issue 3 must fail. NALC relies on the prior settlement language from other cases, and is arguing that management has failed to honor the terms of those settlements. NALC witness Jason Leath admitted that the actual terms of those agreements had been satisfied, but he continued to rely on the vague and unspecific surveys as their main evidence of a continuing violation." ***See***, ***Id***. at pp.10-11. "For the reasons explained above, the employee surveys, nor any other evidence in the record, proved the claims in issues 1 and 2. Similarly, issue 3 must be denied it its entirety." ***See***, ***Id***. at p.11.

"ISSUE 4

As for the hiring process known as "Fast Track", the OIG Audit (J3:361) confirmed multiple times that Fast Track has been expanded and is now the national policy for all new hire applicants. NALC argued that Fast Track violated Article 14, ***because management has the responsibility to provide a safe working environment*** [emphasis added]. If this were the case, how has this policy continuing without a National dispute being filed by any craft? There are no grievances pending because Fast Track does not violate anything.

NALC went on to argue that Fast Track may have removed the in-person interview from the hiring process. Upon cross-examination however,

> Jason Leath admitted there was no contract language requiring an in-person interview for any new hires. The OIG Audit was to evaluate the peak season hiring process, nothing more, nothing less. ***Article 3 grants management the exclusive right to hire, and unless restricted by laws or contractual provisions to the contrary, these remain exclusive managerial rights. There has been no proven violation of the hiring process in any way*** [emphasis added]. ***See***, ***Id***.
>
> "Issue 4 also addresses new CCA's are trained. This issue was clearly addressed in the pre-arbitration settlement at J3:362, dated October 29, 2021, three days after this grievance was filed. That was the result of a prior grievance related solely on the manner in which new city carriers were trained in Memphis, and disposed of the training component to this issue. Notice in the requested remedies by NALC (J3:82), they do not request any training remedies, only hiring and conversions remedies relating to CCA new hires." See, Id. at pp.11-12.
>
> "Having proven no violation of contractual hiring or training requirements, issue 4 must be denied it its entirety." ***See***, ***Id***.

(**2**) ***USPS Preliminary Issues*** - The **USPS** offers the following Preliminary Issues to arbitration:

(**a**) ***USPS Preliminary Issue #1*** - Based upon the filing date as alleged by the **NALC**, is the grievance "substantively arbitrable" as an "ongoing" or "continuing" violation?

(**i**) ***USPS Legal Contention #1*** - "*In accordance with Article 15 provisions*, *for a continuing violation to be timely filed*, *and to establish a prima facie case*, *there must be evidence of a violation* (*or recurrence of a violation*) *having taken place within 14 days of filing*. *This case was filed on October 26*, *2022*, *so the NALC burden is to prove specific evidence of management wrongdoing during October 12-26*, *2021*." ***See***, **USPS CLOSING STATEMENT**, p.6; ***See***, ***Also***, **USPS FORMAL A DENIAL - DRT CASE FILE**, p.867;

(**ii**) ***USPS Legal Contention #2*** - "*But*, *did NALC prove such conduct was current and ongoing*? *That has not been proven by even a preponderance of evidence, let alone clear and convincing evidence*." ***See***, **USPS CLOSING STATEMENT**, at p.9;

(**iii**) ***USPS Legal Contention #3*** - "*With his testimony*, *Mike Vaccarella* "[*c*]*larified that even for an ongoing violation*, *a violation or recurrence of a*

violation must be demonstrated within 14 days of filing, *October 12*, *2021 in this case*." ***See***, ***Id***. at p.15;

(**iv**) ***USPS Factual Contention #1*** - "*This was admitted to by NALC witness Jason Atchley*. *Since there was no demonstrated management violation on October 12*, *2022*, *the union relied upon employee surveys created by NALC for this very investigation*, *as well as previously settled historical grievances*, *to establish evidence of a continuing*, '*toxic environment*'". ***See***, ***Id***. at pp.5-6;

(**v**) ***USPS Factual Contention #2*** - *Even NALC Jason Atchley admitted there was no timely misconduct demonstrated by any of these managers in the case file...every allegation of misconduct by these managers is resolved and closed. NALC hasn't proven any current misconduct by any manager*..." ***See***, ***Also***, Id. at p.18; and

(**vi**) ***USPS Factual Contention #3*** - "*But*, *there is no evidence in the record that any management misconduct took place during October 12-26*, *2021*." ***See***, ***Also***, Id. at p.18.

(**b**) ***USPS Preliminary Issue #2*** - Is the grievance in this case barred by the Doctrines of Res Judicata and/or Collateral Estoppel?

(**i**) ***USPS Legal Contention #1*** - "*All the Union's contentions and arguments related to previously adjudicated grievances are not procedurally arbitrable based on the doctrines of issue and claim preclusion*, *collateral estoppel and res judicata*..." ***See***, **DRT DECISION**, p.18;

(**ii**) ***USPS Legal Contention #2*** - is ..."*described in the explanation portion of National Arbitrator Snow's award for H4C4HC-25455*. *Snow explains in detail* '*The Matter of Procedural Arbitrability*' *in Section VI.A*." ***See***, ***Id***.;

(**iii**) ***USPS Legal Contention #3*** - "*National Arbitrator Britton includes the following in the award for H7N-3S-C 21873...in discussing the principle of res judicata*, *cites the definition In Black's Law Dictionary that it is a* '*...rule that final judgement or decree on merits...is conclusive ...*'" ***See***, ***Id***.;

(**iv**) ***USPS Legal Contention #4*** - "*The Union requesting*

action for Management employees involved in previously adjudicated grievances may even result in double jeopardy and due process violations." ***See***, ***Id.***;

(**v**) ***USPS Factual Contention #1*** - "*Management does not dispute the Union has the right to include copies of grievance settlements in subsequent grievance files. The problem is the Union is requesting removal of Management officials based on those settlements without providing evidence of new violations continuing up until 14 days prior to the filing of this grievance*." ***See***, ***Id.***; and

(**vi**) ***USPS Factual Contention #2*** - "*It appears Steward Dotson did absolutely nothing to investigate this grievance as the Memphis East Lamar climate assessments are all dated after the alleged Informal A meeting. The Union felt the work environment of the Memphis East Lamar Station was so toxic that they waited approximately three weeks after the shooting occurred to interview employees*." ***See***, ***Id.***

(**c**) ***USPS Preliminary Issue #3*** - Did the **NALC** violate the procedural requirements of Article 15 of the **CBA** and **JCAM** in this case, thereby rendering the grievance Moot?

(**i**) ***USPS Legal Contention #1*** -

> "Article 15 is crystal clear plain language that progressively states as its first step, an employee and/or the Union must discuss the grievance with the employee's immediate supervisor. Only after the Union has received the immediate supervisor's adverse decision may it advance the Grievance to Step 2." "The Union's failure to discuss this grievance with the Supervisor results in a procedural error and fatal flaw warranting denial of this grievance in its entirety with no review of the merits afforded. The violation of Article 15.2.a resulted in Management being prohibited from responding to any of the Union's claims or allegations and destroyed any possibility of resolution at the lowest possible level in violation of Article 15.3.A..." ***See***, **USPS FORMAL A DENIAL - DRT CASE FILE**, p.865; ***See***, ***Also***, **JCAM**; Article, 15.2(b); ***See***, ***Id.***; ***See***, ***Also***, **DRT DECISION**, p.17;

(**ii**) ***USPS Legal Contention #2*** -

> "Having failed to-(sic) meet its obligations at Step 1 by document and-deed, the Union has waived its grievance rights in the instant case. This analysis renders any further considerations moot." "The failure to respond to the contentions contained in this impasse should result in the forfeiture to do so at Arbitration. Union responses or objections to Management's contentions, *which were not addressed by the Union at Step B*, is new argument and is

prohibited according to National Arbitrators as Management was denied the right to respond." ***See***, ***Id***. at p.866; ***See***, ***Also***, **JCAM**; Article, 15-3; ***See***, ***Also***, **DRT DECISION**, p.28;

(**iii**) ***USPS Factual Contention #1*** - "*Steward Dotson filed this grievance at Informal A with no discussion*, *explanation of facts*, *or evidence*. *She filed on October 26*, *2021 solely to get a timely grievance on record*. *Steward Dotson only presented the PS8190 to Acting Supervisor Anderson.*" ***See***, **USPS CLOSING BRIEF**, p.4;

(**iv**) ***USPS Factual Contention #2*** - "*Management contends*, *at the very minimum*, *the parties at Informal A could have consulted with higher levels of management*, *however*, *that right was taken away from the supervisor*. *Without discussion*, *the supervisor could not know of the issues the union was alleging to determine a violation or remedies the union was requested*." ***See***, ***Id***.; ***See***, ***Also***, **DRT DECISION**, p.16; and

(**v**) ***USPS Factual Contention #3*** - "*The supervisor confirms that*, *at the very minimum*, *there was no discussion or exchange of documents*, *or any remedy requested in violation of Article 15*. *To simply request a signature to* "*to get a grievance started*" *is a grave attempt by the union to circumvent the grievance process*." "*When asked what harm it would do to exchange information in advance of the Formal A meeting*, *NALC Jason Atchley testified*, "*I'm not required to*". *Good faith bargaining*?" ***See***, ***Id***.; ***See***, ***Also***, **USPS CLOSING BRIEF**, p.20.

(**d**) ***USPS Preliminary Issue #4*** - Considering the specific facts of this case, should the standard of evidence be elevated from "preponderance of the credible evidence", to a higher standard of "clear and convincing evidence"?

(**i**) ***USPS Legal Contention #1*** - The **USPS** asserts that this case is a contract case and the burden of proof belongs to the **NALC** to establish a *prima facie case* regarding the issues relating to the merits of this case. In furtherance of this contention, the **USPS** states: "*Mr*. *Arbitrator*, *the case presented before you is a contract case*, *with the burden of proof belonging to the NALC*." ***See***, **USPS CLOSING BRIEF**, p.4;

(**ii**) ***USPS Legal Contention #2*** - The **USPS** asserts that your arbitrator apply a "*clear and convincing*" evidentiary standard—as opposed to the

evidentiary standard of "*preponderance of the credible evidence*" typically applied in contract cases. To support this legal contention, the **USPS** states:

> "In a case this sensitive, and with requested remedies by the NALC so severe that, if granted, would in essence permanently blackball the affected managers careers, the burden of proof relied upon to establish a prima facie case must be nothing less than clear and convincing. A simple preponderance of evidence is not sufficient to support the serious claims of management misconduct." ***See***, ***Id***.
>
> "However, in Labor Arbitration, a clear and convincing burden must be satisfied before the arbitrator can support these claims and find in favor of the NALC." ***See***, ***Also***, ***Id***. at p.10.
>
> "The burden of proof in this case must be Clear and Convincing, nothing less." ***See***, ***Also***, ***Id***. at p.20;

(**iii**) ***USPS Factual Contention #1*** - The **USPS** alleges that the **NALC** failed to present specific factual allegations to support their case. This failure, according to the **USPS**, supports the application of the higher standard of "clear and convincing" evidence. ***See***, ***Also***, ***Id***. at p.7. Specifically, the **USPS** states:

> "To summarize issues 1 and 2, NALC has fallen short of proving any specific misconduct. Without question there has been no evidence of misconduct by Braswell, Bird or Benson during October 12-26, 2021. Vague statements alleging poor communication and operational issues such as overtime and delivering mail after dark, do not rise to the level of workplace harassment and violations of the JSOV. That does not mean that those issues are not concerning, and should be addressed, if true. However, in Labor Arbitration, a clear and convincing burden must be satisfied before the arbitrator can support these claims and find in favor of the NALC. This was not done, and as such, issues 1 and 2 must be denied in their entirety." ***See***, ***Also***, Id. at p.10.
>
> "NALC team, including Jason Atchley, was in Memphis for weeks following the shooting. All they came up with is outdated settlements and vague surveys. This is hardly clear and convincing evidence of an (*sic*) toxic, installation wide violation." ***See***, ***Also***, Id. at p.20.

(**e**) ***USPS Preliminary Issue #5*** - Did the **NALC** act in bad faith in their presentment of the case through the Article 15 process?

(**i**) ***USPS Legal Contention #1*** - The **USPS** asserts that the **CBA** provides for good faith participation by the **USPS** and **NALC** representatives. More

specifically, the **USPS** references Article 15.3.A. of the National Agreement which states:

> "**Section 3. Grievance Procedure—General**
> A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in resolution of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. At each step of the process the parties are required to jointly review the Joint Contract Administration Manual (JCAM)." ***See***, **CBA**, Article 15, Section 3.A., p.71;
>
> ***See***, ***Also***, **DRT DECISION**, p.16;

(**ii**) ***USPS Legal Contention #2*** - "*As argued in Management Step B pages J3*:*15-30*. *Steward Dotson was only certified to file a grievance for East Lamar Station, not city-wide*. *There was no page 2*, *including claims of installation wide*. *The PS8190 only stated East Lamar*, *the only office she was certified to file in*." ***See***, **USPS CLOSING BRIEF**, p.4;

(**iii**) ***USPS Factual Contention #1*** - "*No documents accompanied the Formal A appeal which supports that the Union prefers to ambush Management at the Formal A level with hundreds of pages of documentation rather than to discuss a grievance and exchange information at the lowest level*." ***See***, **DRT DECISION**, p.18;

(**iv**) ***USPS Factual Contention #2*** -

> "Formal A Jason Atchley admits that he refused to share supporting documentation until the actual Formal A meeting, because he is not required to. This is "sandbagging" information for the Formal A, despite the parties language that encourages the parties to work together to jointly develop the file. In a case of this magnitude, why would the NALC withhold information until the meeting. Are they not interested in full development, but rather how can they keep management at a disadvantage as long as possible? I think the latter applies in this case. " ***See***, **USPS CLOSING BRIEF**, pp.4, 20;

(**v**) ***USPS Factual Contention #3*** - "*At best*, *NALC rushed this case through before they knew what they could prove*. *Now they need to make the evidence appear to support a charge*. *This case was taken over by the NBA office*, *and pursued regardless of the facts that were not proven.*" ***See***, ***Id***.

C. ***Undisputed Facts*** -

The following undisputed facts were presented to arbitration by the parties:

"1. The local parties are properly certified.
2. This grievance is timely at all levels." ***See***, **DRT CASE FILE**, p.67. ***See***, **MOU**, **JCAM**, p.15-24. [4]

V. *Preliminary Issues - Analysis, Discussion, and Holdings* [5]

A. ***Preliminary Issues - Initial Discussions and Concerns*** -

Prior to addressing the merits of the case, it is necessary for me to consider and rule upon the Preliminary Issues advanced by the **USPS** and **NALC**. Considering the length of the record in this case, as well as the complexity of the issues presented to arbitration, I will address the Preliminary Issues raised by the parties in this **INTERIM AWARD**—and reserve my analysis, discussions, and holdings on the merits of the case for further ruling.

I reiterate that Affirmative Defenses are considered Preliminary Issues and are raised by a party to defeat or mitigate possible legal consequences; and the moving party has the burden to prove that the Affirmative Defense ***is applicable***. Examples of this type of defense are: *Arbitration and Award*, *Duress*, ***Estoppel***, *Fraud*, *Illegality*, *Laches*, ***Res Judicata*** **and** ***Collateral Estoppel*** (sometimes used interchangeably), *Statute of Frauds*,

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4. The **NALC** and **USPS** Formal A Representatives, namely, Mr. Jason Atchley and Mr. Michael Vaccarella, signed the document styled "**Undisputed Facts for Grievance # R8-27-1-21"**, which contained the quoted information.

5. Nothing in this Award should be interpreted as to imply that the advocates or their assistants were not prepared, or otherwise did not follow current accepted procedures and/or practices. To the contrary, your arbitrator ***commended*** both advocates and their assistants (on more than one occasion) on their individual skill, understanding, and presentment of a very difficult case—and I emphasize, once again, the professionalism and preparedness that both parties demonstrated during the arbitration process in this case.

I further note that I have not received one Regional Award, National Level Case, or other advocate argument, in contravention with, or otherwise distinguishing, any of my prior rulings discussed in this Award—including, but not limited to, the **SOILEAU NOTICE RULE**, discussed, *infra*.

Statute of Limitations, *Waiver*, and any other matter constituting an avoidance of the claims or causes of action presented within a grievance. ***See***, **SOILEAU AWARD**, Class Action, 4E-16N-4E-C 20470293, p.22; ***See***, ***Also***, **SOILEAU AWARD**, Class Action, 4E-16N-4E-C21113819, *et*. *al*., pp.20-21; ***See***, ***Also***, **SOILEAU AWARD**, Meyer, E16N-4E-C 17216750, p.16; ***See***, ***Also***, **SOILEAU AWARD**, Dunlop/Chiles, 4J-19N-4J-C 21233111 and 4J-19N-4J-C 21233419, p.13; ***See***, ***Also***, **SOILEAU AWARD**, Class Action, E19N-4E-C21245558, p.29; ***See***, ***Also***, **SOILEAU AWARD**, Boyd, 4J 19N-4J-C 21160778, p.17; and ***See***, ***Also***, **SOILEAU AWARD**, Class Action, J 19N-4J-C 22229908, p.9.

An affirmative defense or other procedural concern is generally raised in a dispositve motion. A dispositive motion is a plea, that if granted, disposes of the claims of the opposing party without the need of further hearing or proceedings, resembling a ***Motion to Dismiss*** or ***Motion for Summary Judgment***. Typically, a Motion to Dismiss or Motion for Summary Judgment is contained in a separate document (or sufficiently segregated within a pleading or motion); and requires the pleading party to state, with particularity, the facts, circumstances, and legal authority that would defeat the underlying action on its face—***and it is advisable for the parties to clearly and distinctly outline these types of Motions in a separate writing for the opposing party and arbitrator to consider***. [6] Of course, Preliminary Issues in the Article 15 process are not limited to Affirmative Defenses; and all Preliminary Issues ***should be*** decided ***before*** consideration of the issues contained within the grievance regarding the merits of the case—more especially, issues questioning the jurisdiction of your arbitrator (***in which a preliminary ruling is mandatory***). ***See***, ***Id***. Therefore, I will address the issues relating to my authority (*i.e*., "substantive arbitrability") first, and then move to the other Preliminary Issues in a logical legal order.

I have said many times that if a party properly raises Preliminary Issues, and the

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6. Preliminary Issues may be formally raised in the written Opening Statements of the advocates—but should be properly segregated and identified as such. I would also note that Preliminary Issues are subject to the **MITTENTHAL NEW ARGUMENT RULE**; save and except, "substantive arbitrability" issues, now subject to the **SOILEAU NOTICE RULE**—as discussed, *infra*.

issues are sustained, *in part or in total*, the legal result would be that no further discussion is warranted regarding the portion of the Preliminary Issues sustained. If, however, the raised Preliminary Issues are overruled, *in total*, then the **STEP B TEAM** issues presented in the case would remain live and proceed to arbitration. ***See***, ***Id***.

(**1**) ***Incorporation Language***[7] - A significant problem arises when a party to arbitration attempts to raise Preliminary Issues or other arguments by using creative language designed to "incorporate" large portions of the record—such as, attempting to incorporate the entire **DRT CASE FILE**, (or the entirety of the **DRT DECISION**), simply by the use of, or reference to, the word "incorporate" (or some other legal language designed to invoke a derivative of the word "incorporate"). This is the case as presented by the **USPS** in their closing brief, and I quote:

> "This brief is submitted in support of the presentation made by the United States Postal Service at this hearing. ***The submission of this brief does not constitute a waiver by the Service on any issue concerning procedure or merit which may be drawn from the record of this hearing solely by its failure to mention them herein***. ***In fact***, ***Management specifically relies upon the written arguments outlined in its Management Step B position***, ***as well as the prior levels to avoid redundancy***, and a very lengthy brief [emphasis added]." ***See***, **USPS CLOSING BRIEF**, p.3; and
>
> "**Procedure/Bad Faith Bargaining Arguments**
> • ***As argued in Management Step B pages J3: 15-30*** [emphasis added]."
> ***See***, ***Id***. at p. 4.

In addressing the above concern, I first point out that the **STEP B TEAM** is charged with the responsibility of ensuring that all of the issues and arguments are compiled prior to the case being presented to arbitration.

> "...(b) The Step B team will review the appeal ***and issue a joint report of the decision and any supporting findings*** [emphasis added] (hereinafter, **DRT DECISION**)...It is the responsibility of the Step B team to ***ensure that the facts and contentions of grievances are fully developed and***

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7. **NOTE**: The following discussion is not limited to Preliminary Issues, but equally applies to issues, contentions, and defenses relating to the merits of the case.

considered....***4***) ***remand the grievance with specific instructions*** [emphasis added]. In any case where the ***Step B team mutually concludes that relevant facts or contentions were not developed adequately in Formal Step A, they have authority to return the grievance to the Formal Step A level for full development of all facts and further consideration at that level*** [emphasis added]...

(c) ***The written Step B joint report shall state the reasons in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Formal Step A*** [emphasis added](hereinafter, **DRT CASE FILE**)..." ***See***, **CBA**, Article 15, Section 2. Step B (b)(**c**), p.69.

"Both Step B representatives are responsible for ensuring that the facts and contentions of grievances are fully developed. ***The Step B representatives may restate or change a grievance's issue statement as appropriate*** [emphasis added]." ***See***, **JOINT CONTRACT ADMINISTRATIVE MANUAL**, (hereinafter, **JCAM**), p.15-8.

"***Step B teams are not responsible for building the grievance file. It is the responsibility of the parties at Step A to exchange documentary evidence and place copies in the file*** [emphasis added]. However, a file lacking proper documentation should be remanded to the local level, or the Step B Dispute Resolution Team should jointly call the local parties with a request for the submission of specific information within a specific timeframe (*sic*), whichever is more effective. The primary responsibility of the Step B team is making timely decisions on the merits of disputes." ***See***, **MOU**, **JCAM**, p.15-24.

When examining the above, *in total*, it becomes clear that the "...***joint report of the decision and any supporting findings*** [emphasis added]..." should contain a complete summary of the case, as well as the parties legal and factual positions and defenses. ***See***, **CBA**, Article 15, Section 2. Step B (b)(**c**), p. 69. Moreover, an arbitrator should recognize that the **STEP B TEAM** does not have the authority to assemble the **DRT CASE FILE**, as this task is reserved unto the **FORMAL A** representatives to compile. If, however, the **STEP B TEAM** feels that the **DRT CASE FILE** is incomplete, or otherwise determines that the issues in the case are not fully developed, they may ***remand the grievance with specific instructions*** [emphasis added]—very clearly suggesting that the **FORMAL A** representatives in such circumstances should complete the **DRT CASE FILE**, as

instructed, (or correct prior errors); and thereafter, resubmit the completed or corrected **DRT CASE FILE** to the **STEP B TEAM** for further consideration. ***See***, **JOINT CONTRACT ADMINISTRATIVE MANUAL**, (hereinafter, **JCAM**), p.15-8; ***See***, ***Also***, **MOU**, **JCAM**, p.15-24.

More often than not, the advocates will offer the **DRT CASE FILE** as a "Joint Exhibit" to arbitration; or, will offer a particular document or case contained within the **DRT CASE FILE** as a separate Exhibit to arbitration. Irrespective of whether the **DRT CASE FILE** (or any document or case contained in the **DRT CASE FILE**) is admitted as a separate Exhibit to the arbitration hearing, the **JCAM** specifically provides that the documents contained in the **DRT CASE FILE** are included in the **DRT DECISION**, to wit:

> "The parties at the national level have agreed any arguments and facts brought forth at either Informal or Formal Step A and properly included in the PS Form 8190/case file (**DRT CASE FILE**) are ***incorporated in the Step B decision*** (**DRT DECISION**), ***and any of this material may be cited in the event of arbitration*** [emphasis added]." ***See***, **JCAM**, Article15.2, Step B (a), p.15-7.

The phrase "...***may be cited in the event of arbitration***" in the above referenced **JCAM** section is of particular importance in this discussion—and the plain reading of the phrase suggests ***that the advocates at arbitration may decide whether or not to cite the incorporated material***. Moreover, a logical legal extension of the above **JCAM** section implies that the **DRT CASE FILE** and the **DRT DECISION** become one document by way of the "incorporation language", (or said in another way, a complete ***Appellate Record***), and the parties are free to cite any or all of the contents of the Appellate Record at arbitration. Therefore, the "***Arbitration Record***" would include: the "Appellate Record", testimony of the witnesses, Exhibits admitted into evidence at arbitration, opening and closing statements, and closing briefs. With the above understandings, I now address the purpose of the rule.

In a normal court proceeding, documents are typically offered into evidence as Exhibits to the hearing, (*i.e.*, Plaintiff's Exhibit #1, Respondent's Exhibit #1, etc.), and the opposing party has a number of responses within their quiver to object to the admission of the document—such objections typically relating to the authenticity or relevance of the offered Exhibit. Once offered, the Court considers the arguments and objections of the

advocates, and thereafter, issues a ruling on whether the offered document will be "admitted into evidence".

When viewed in light of admission of Exhibits in a formal court proceeding, it becomes clear that the documents contained in the **DRT CASE FILE** and **DRT DECISION** (combined as the ***Appellate Record***) are predetermined to be authentic and relevant; and the arbitrator may rely upon the documents and cases as presented by the advocates—***and without further admission procedures or objections at the arbitration hearing***. In other words, the contents of the Appellate Record are ***self-authenticating***—and the formal introduction and admission of the various documents being unnecessary as the witnesses and advocates reference them during testimony, (or in the presentment and argument of their case). However, this does not mean that the parties and arbitrator should place any particular weight on the documents contained in the Appellate Record—as it is up to each advocate to offer testimony and evidence to support the truthfulness, veracity, and application of the document to their case or defense. Said in another way, just because the Appellate Record is self-authenticated, does not mean that each document contained therein is of such sufficiency as to "carry the day".

Another purpose of the rule is to afford the parties and advocates proper "Notice". As the advocates should know by now, I often write on the requirement or sufficiency of "Notice" relating to the arguments of the advocates (to include Preliminary Issues)—as I believe this is an integral part of Article 15 that all arbitrators must uphold. With this in mind, I view the requirements of the prior Steps to include a "discovery control plan". If the prior Steps are performed correctly, the parties will formulate the issues and contentions by assembling the relevant documents and arguments—and thereafter, present the **FORMAL A RECORD** to the **STEP B TEAM** for their consideration as they attempt resolution of the case. As I see it, if no resolution is reached at the **STEP B TEAM** Step, the file is handed over to the advocates—and no further discovery or argument is permitted pursuant to the **MITTENTHAL NEW ARGUMENT RULE**. This process ensures that prior to arbitration, the parties and advocates receive proper "Notice" of the issues, contentions, and defenses; ***and I find nothing to support the argument that the Appellate Record is prepared for the arbitrator to decipher each and every nuance contained therein***.

In support of the above analysis, I assume that the advocates in the various regions are not intimately aware of each and every grievance that is filed (or all grievances that reach the **STEP B TEAM** for consideration). If my assumptions are correct, *and I strongly believe they are*, it makes perfect sense for the **STEP B TEAM** to prepare the Appellate Record so that the advocates may become familiar with the particular grievance appealed to arbitration—and ultimately, prepare their case. Therefore, the Appellate Record is prepared for the benefit of the advocates so that they may prepare and prosecute their case with confidence that the Appellate Record contains all of the arguments, contentions, and issues in the case. If this were not so, then the voluminous record would be mailed to the arbitrator for consideration and ruling—and there would be no need to have arbitration hearings.

Furthermore, the rules contained in Article 15 allow for each advocate to present arguments and defenses, as well as submit legal and factual contentions, in their Opening/Closing Statements and Closing Briefs (again, within the confines of the Appellate Record). These arguments and contentions will often include additional National Level Cases and other precedent Regional Awards and Step B decisions—and more often than not, will contain arguments and legal authority derived from the Appellate Record that was not outlined in the **DRT DECISION**. To me, this authority or deference, as granted unto each advocate, would emphasize that the advocates may present their case as they see fit—and according to their interpretation of the legal and factual basis for the granting or denial of the grievance.

Considering the above, Article15.2, Step B (a) of the **JCAM** provides for admission of documents contained in the Appellate Record at arbitration, should the advocates choose to reference or cite them—and does not, in and of itself:

(**i**) offer further authentication of the document(s);

(**ii**) add to the veracity of the document(s); or

(**iii**) impose an additional duty upon the arbitrator to review the Appellate Record for issues, arguments, or defenses, ***and irrespective of any*** "***incorporation language***".

(**2**) ***Duties of Advocates and Arbitrators*** - The question becomes: to what extent should an arbitrator review or discuss the various cases and other documents contained within the Appellate Record? The answer to this question lies within the specific duties of the advocates and arbitrators in the Article 15 process.

It is the sole responsibility of the advocates to develop his or her case and/or defense as presented to them by the **STEP B TEAM**—and each advocate is charged with the responsibility of:

(**i**) presenting their case;

(**ii**) offering testimony, exhibits, arguments, defenses, and legal theories supporting their case;

(**iii**) placing emphasis on document(s) and cases contained within the Appellate Record—as it relates to their theory of the case—including, but not limited to, a particular defensive theory;

(**iv**) offering National Level Awards and other precedent cases supporting their arguments, defenses, and legal positions; and

(**v**) offering Opening/Closing Statements or Closing Briefs that outline their case or defensive position.

To be clear, the presentment of the case and offering of defenses is reserved unto the advocates—and the emphasis, interpretation, or understanding of each document, argument, or case contained within the Appellate Record is contingent upon the advocates (and how they choose to present and defend their respective positions). Moreover, the advocates are free to ***advance or abandon*** any claim, defense, or contention contained within the Appellate Record (either in their written filings, or during presentment of their case)—***and I find no authority requiring an arbitrator to demand a complete and absolute presentment of all contested issues and defenses as presented by the STEP B TEAM in the Appellate Record***.

It's also important to note that an arbitrator should caution against assuming the role of an advocate by independently developing issues, contentions, or arguments on behalf

of the parties. This means that an arbitrator should not "advocate" by searching the Appellate Record for legal or factual contentions and defenses that may have been omitted at arbitration. Therefore, an arbitrator is only required to review the Appellate Record as a resource for clarification, verification, or for further understanding of the advocates arguments and defenses—and an arbitrator's ultimate Award should be limited to the legal and factual contentions and defenses proffered or advanced by the advocates. How then should the above instructions be applied? Since the Article 15 process acts as an appeal to a ruling authority, I turn to my own experiences in my 25th year as a practicing attorney to answer the question.

When cases are advanced on appeal, (in my neck of the woods), there are a number of appellate rules in which the attorneys must follow. A great number of these rules specifically relate to the writing of the Appellate Brief and the Appellate Record, (*i.e.*, the presentment of the case). The first requirement is for the attorney to offer a legal and factual summary of the case, and specifically identify where the information, statement, or assertion may be found in the record. In other words, the appellate court (or arbitrator) does not substitute its judgment, reasoning, or interpretation into the advocates case—irrespective of what may be contained in the record. Simply put, the attorneys are charged with the responsibility of outlining their case and must use their own judgment as to what part of the record they believe is important in resolving the issues on appeal. This leads me to conclude that the advocates should very clearly outline their legal and factual contentions and defenses—either in a separate writing, or within their Opening/Closing Statements and/or Closing Briefs. [8] I would also stress that this advocate task should be so complete and organized that an arbitrator would be able to follow the submitted legal and factual contentions and defenses when analyzing the case and ultimately preparing

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8. Understanding that the legal and factual contentions and defense contained in the opening statement (or other writing presented to your arbitrator) would be identical to the ones contained in the closing brief; however, the closing brief ***would not*** include those legal and factual contentions and defenses abandoned during the arbitration hearing—***but would include the additional citations*** as to the witness who testified to the legal and factual contention or defense, (or the Exhibits that were admitted into evidence that supported the particular contention or defense).

the Award.

In furtherance of this discussion, the parties to arbitration must recognize that there can be a number of legal and factual contentions and defenses that support resolution of a single issue. To emphasis the importance of the entirety of the above discussion, I offer the following examples for the advocates to consider: [9]

Example - NALC Closing Brief:

ISSUE #1:

Did the **USPS** violate Article 14 of the **CBA** and **JCAM** by not providing a safe and secure workplace for **MR**. **SMITH**? If so, what are the appropriate remedies?

(**1**) ***NALC Legal Contention #1*** -

The **USPS** has a duty to protect **MR**. **SMITH** and ensure that he does not stub his big toe while at work. This legal duty is outlined in Articles 3 and 14 of the **CBA** and **JCAM**. ***See***, **DRT CASE FILE**, pp. 25, 103 and 1,045; ***See***, ***Also***, **CBA** and **JCAM**, Articles 3 and 14; ***See***, ***Also***, **NALC EXHIBIT #1**; and

(**2**) ***NALC Legal Contention #2*** -

National Arbitrator **SNOW** previously ruled on the issue of employee injuries that is directly on point with the grievant's case. ***See***, **SNOW AWARD**, H-2222222, p. 14; ***See***, ***Also***, **DRT CASE FILE**, p. 35.

(**3**) ***NALC Factual Contention #1*** -

While working on his regular scheduled day, **MR**. **SMITH** stubbed his big toe which led to him having to go to the big toe hospital. ***See***, **DRT CASE FILE**, pp. 8, 14, and 2,045; ***See***, ***Also***, testimony of **MR**. **SMITH**; and

(**4**) ***NALC Factual Contention #2*** -

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9. The format and citation style is an advocate preference. However, the legal and factual contentions and defenses, as well as citations, should be sufficiently segregated and described so there can be no misunderstand as to the argument of the advocate, or the application of the legal or factual contention to a particular issue.

MR. **SMITH** obtained injuries that required him to miss work for three weeks; and further, cost him several thousand dollars in out-of-pocket expenses. ***See***, **DRT CASE FILE**, pp. 88, 269 and 1,146; ***See***, ***Also***, **NALC EXHIBIT #1 - PHOTOS OF INJURIES**.

Example - USPS Closing Brief:

ISSUE #1:

Did the **USPS** violate Article 14 of the **CBA** and **JCAM** by not providing a safe and secure workplace for **MR**. **SMITH**? If so, what are the appropriate remedies?

(**1**) ***USPS Legal Contention #1*** -

The employee manual requires all **USPS** employees to wear protective shoes while at work, and Articles 3 and 14 do not extend to employees who cause their own injuries. ***See***, **DRT CASE FILE**, pp. 45, 367, an 1,678; ***See***, ***Also***, **USPS EXHIBIT #2 - EMPLOYEE HANDBOOK**, p.15; ***See***, ***Also***, **ARTICLES 3 AND 14**, **CBA** and **JCAM**; and

(**2**) ***USPS Legal Contention #2*** -

Arbitrator **AARON** expands on the **SNOW AWARD** and specifically states that the **USPS** is not responsible for employee injuries that occur while the employee is off the clock. ***See***, **AARON AWARD**, H-2222222, p. 22; ***See***, ***Also***, **DRT CASE FILE**, p. 52.

(**3**) ***USPS Factual Contention #1*** -

The **USPS** did not contribute to the injuries of **MR**. **SMITH**. In 1996, **MR**. **SMITH** obtained an injury while playing High School football known as the "Dion Sanders turf toe", and the "alleged injury" while at work is not supported by the record in this case. ***See***, **DRT CASE FILE**, pp. 2, 38, and 1,555; ***See***, ***Also***, testimony of **MS**. **WITNESS**; ***See***, ***Also***, **USPS Exhibit #3**; and

(**4**) ***USPS Factual Contention #2*** -

On the day of **MR**. **SMITH**'**S** alleged injury, **MR**. **SMITH** was wearing flip flops while delivering mail. ***See***, **USPS EXHIBIT #1 - PICTURES OF MR**. **SMITH WEARING FLIP FLOPS**.

In other words, only upon rare occasions should an arbitrator consider and discuss specific case(s), document(s), or Preliminary Issues contained within the Appellate or Arbitration Records that the advocates failed to address when presenting their case. These ***limited circumstances*** of arbitrator involvement in the development and discussion of issues arise ***when Due Process would demand***, coupled with one or all of the following:

> (**i**) the Appellate and/or Arbitration Records clearly and distinctly identifies Preliminary Issues, more specifically, issues of "***substantive arbitrability***", that need resolution prior to addressing the merits of the case;
>
> (**ii**) the advocates advancement of the issues, contentions, and/or defenses is in clear contradiction with the dictates of the **CBA**, **JCAM**, or other authority—or otherwise unsupported by the documents and authority contained in the Appellate and/or Arbitration Records;
>
> (**iii**) the documents and authority contained in the Appellate and/or Arbitration Records contain information that would substantially change or alter the outcome or level of the Award; and/or
>
> (**iv**) other instructional purposes.

I further acknowledge that the above discussion (in all probability) is new to the advocates and parties in this case and region; and (in all fairness), I should allow an appropriate amount of time for other arbitrators and advocates to weigh in on the procedural discussions and instructions herein—for this, in my estimation, goes to the heart of the Due Process concerns I discuss above.[10] As I stated before, when Due Process concerns are coupled with the Preliminary Issues raised in the Appellate and/or Arbitration

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10. I understand that I am attempting to play (single handedly) a game of tug-of-war against the entire Tennessee Titans organization. While I await being violently pulled into the swill, I nevertheless will accept the challenge, for I played High School football—and at one time in my life thought I was stronger than I actually was. However, I most earnestly urge the advocates in this case and region to consider the above discussions—and further, apply the instructions offered in this Award to future cases presented to arbitration (as it is my sincere hope that further rulings will be unnecessary).

Records, (more especially, "jurisdictional" issues), I will reluctantly address all Preliminary Issues as requested by the **USPS** advocate—with the following codicils.

When reading the **USPS** argument above, it's abundantly clear that the **USPS** advocate is concerned about the length of his closing brief—and perhaps equally concerned about missing something previously raised. ***I also have the same concerns when the onus is placed upon me***. It should be obvious that a major point of contention could be missed, especially considering the size of the Arbitration Record in this case. Moreover, I have read the Arbitration Record several times, (literally), and have lived for over three months with the Arbitration Record organized and spread all over my office. I have scanned a substantial number of documents and cases into my computer so that I may conduct word searches to help ensure that I don't miss anything. I have literally written over 100 additional pages (of finished work) that has been cut from this Award in an effort to "*streamline*" the case (if such is possible). I want to stress to both advocates that it is above my "pay grade" (as discussed above) to look for and determine the Preliminary Issues that have been raised in the Arbitration Record. Nevertheless, I have attempted to do what was asked of me—even though the **DRT DECISION** was not written, and the **DRT CASE FILE** was not compiled, in a way that is conducive to such research. Finally, my review of the Arbitration Record will be limited to those Preliminary Issues that are clearly identified and discussed—and I will not note every legal and factual contention that might be remotely or obscurely referenced within the **DRT DECISION** or the **DRT CASE FILE** (or otherwise conceivably applicable to the Preliminary Issues I identify).

(**3**) ***Due Process Concerns*** - Another concern I have regarding an arbitrator searching the Arbitration Record for Preliminary Issues or arguments (that were not specifically raised by the advocates) relates to the Due Process rights of each party. If the arbitrator decides to take on this responsibility, as limited above, then it's entirely possible that the opposing party would not have addressed the Preliminary Issue or argument omitted—as the neglect to raise such issues could suggest that the opposing party has chosen to abandoned them (and irrespective of how glaring the issue have been raised). It follows that in such situations, deference should be given to the due process

rights of the each party—and the fundamental rights of each party to participate in the process should not be ignored. For example, if I were to assume the responsibility of searching the record for Preliminary Issues, as completely as the **USPS** suggest, then I potentially could be left with the singular presentment of the argument—and perhaps, without the benefit of the opposing view of the **NALC** as to the accuracy or veracity of such evidence and argument (which could lead to absurd and nonsensical results). Therefore, my analysis must also include a profound appreciation of the *due process rights of both parties*—as observed through the edict that I must arrive at a just, right, and reasoned decision; while simultaneously protecting the sanctity of Article 15. Therefore, fairness would dictate, in such situations, that the arbitrator assume or anticipate defenses or arguments in contradiction of the Preliminary Issues not raised by an advocate—but discussed by the arbitrator, *sua sponte*. Moreover, if I search for issues contained in the Arbitration Record for one party, then fairness would also dictate that I do the same for the opposing party to arbitration.

(**4**) ***Statement of Relevant Facts*/*Theory of the Case*** - I have one final area of concern that is appropriately discussed in this introductory section.

When an arbitrator drafts an Award, generally it will contain a section regarding the relevant facts of the case. This is important in arbitration Awards so that the reader will gain a general understanding of the who, what, when, where, and how of the parties claims or defenses. In the Article 15 process, it appears that this factual portion of the Award has been expanded and will contain two additional sections, *i.e*., "**USPS** position" and "**NALC**"position"—or some other connotation designed to reflect each sides "theory of the case" (and not necessarily limited to the "relevant facts of the case"). While I encourage and applaud the inclusion of such a section, I have serious concerns based upon my own experiences when drafting this portion of an Award in Article 15 arbitrations.

Again, the advocates are charged with the responsibility of preparing and presenting their case—which includes preparing their "theory of their case" in support of the filed claim(s) and/or defenses. Therefore, one would assume that such preparation or presentment of the case would include, but not limited to, such things as the procedural

history of the case, legal authority supporting their case, relevant factual contentions, and other information and arguments necessary in ***summarizing*** their claims and defenses. I find that such preparation would not only be beneficial to the advocates at arbitration, (essentially serving as an outline), but would also benefit the arbitrator when ultimately drafting the Award. Furthermore, such descriptions or writings could be contained in the Opening/Closing Statement or Closing Brief (but, once again, should be properly segregated and defined as such).

In continuing with this discussion, words, phrases, conjunctions, references, ideas, theories, and arguments matter when preparing the "theory of the case". It follows, that an arbitrator's independent development of the "**USPS** position" and the "**NALC** position" may not be consistent with the messages, theories, and/or arguments the advocates are intending to convey. Moreover, if an arbitrator takes it upon himself or herself to sift through the Appellate and/or Arbitration Record and assemble such a statement or writing, then the arbitrator would be walking a thin line between sitting in judgment of the case and serving as an advocate, (as discussed, *supra*). Therefore, I believe that the "theory of the case" (or "position of the parties") should be prepared by the advocates, and with such particularity that the arbitrator could essentially "copy and paste" the parties "position" directly into the Award. Again, this is typical in other legal appeals. However, I caution the advocates against misinterpreting my instructions by including statements or arguments in violation of generally accepted arbitration procedures. With this in mind, I offer the following additional comments. The advocates "theory of the case" should:

1. be clearly identified or segregated within the body of the Opening/Closing Statement or Closing Brief;

2. be prepared in a structured format so as not to commingle thoughts, arguments, or contentions;

3. be prepared in such a manner that the arbitrator (or reader) can clearly understand the parties factual and legal arguments—as well as the argued application of the authority presented;

4. caution against using inflammatory language—or other statements or contentions that could be interpreted as insulting or unprofessional;

5. summarize the factual and legal basis and arguments for each claim or defense—while clearly distinguishing the Preliminary Issues from those necessary in resolving the merits of the case;

6. should clearly distinguish Preliminary Issues (more importantly, "substantive arbitrability" issues);

7. summarize the application of the authority relied upon in resolution of the issues. It is not necessary to quote the entire paragraph, section, or page the advocate is referring to—a simple description, reference, citation, and proposed application, to and of, the authority is sufficient (and further detailed quotation reserved for the body of the document);

8. caution against violating the "**MITTENTHAL NEW ARGUMENT RULE**";

9. caution against inserting statements that are irrelevant in resolution of the issues; and

10. include citations as to where information may be found in the Arbitration or Appellate Records. Individual citation style is acceptable, provided the arbitrator is made aware of the citation style used, and can easily find the referenced document; (*i.e.*, **A.R.** at p.56; **APPELLATE RECORD** at p.456; **DRT CASE FILE** at p.105; or simply, p.26 (provided it's clear that the page is referencing the **DRT CASE FILE** or Appellate Record). [11]

B. ***Preliminary Issues Concerning*** "***Substantive Arbitrability***" -

(**1**) ***Notice of Preliminary Issues*** - I have an initial concern regarding Preliminary Issues that should be address before I "*jump off into the* '*gator*' *infested waters*" relating to the Preliminary Issues presented in this case. More specifically, I first address the application of the **MITTENTHAL NEW ARGUMENT RULE** when considering Preliminary Issues not previously raised by the advocates. To be clear, the **MITTENTHAL NEW ARGUMENT RULE** remains intact and applicable in the arbitrator's analysis in such

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11. Understanding that is appropriate for an arbitrator to omit any statement, argument, or contention in violation of the above. It's also appropriate for arbitrators to add conjunctions, or otherwise modify the writing of the advocates, for the purposes of "ease of reading" or "grammatical correctness".

situations—and I offer the following analysis for the advocates and parties to consider and apply in future cases.

As far as I can tell, the "new argument" question was first raised in 1981 in a National Case before Professor **MITTENTHAL**. In considering the "new argument" objection raised by the **NALC**, Professor **MITTENTHAL** ruled:

> "There remains the Postal Service's claim that the local clause in question is 'inconsistent or in conflict with' Article XIII which concerns 'assignment of ill or injured regular work force employees.' ***The difficulty here is the lateness of this argument*** [emphasis added]. Article XV describes in great detail what is expected of the parties in the grievance procedure. ***The Postal Service's Step 2 decision must make a "full statement" of its*** '***understanding of***...***the contractual provisions involved***.' ***Its Step 3 decision must include*** '***a statement of any additional—contentions not previously set forth*** ...' ***Its Step 4 decision must contain*** '***an adequate explanation of the reasons therefor*** [emphasis added].' In this case, the Postal Service made no mention of Article XIII in Steps 2, 3 and 4. ***Its reliance on this contract provision did not surface until the arbitration hearing itself***. ***Under such circumstances***, ***it would be inappropriate to consider this belated Article XIII claim*** [emphasis added]." ***See***, **MITTENTHAL AWARD**, H8N-SL--C 10418, pp.9-10.

In another National Level Award, Professor Emeritus, **BENJAMIN AARON**, recognized the above ruling by Professor **MITTENTHAL**—and his subsequent findings confirmed the application

and legitimacy of the **MITTENTHAL NEW ARGUMENT RULE**. In restricting factual allegations and arguments in the 1982 case, Professor **AARON** held:

> "***I am fully in agreement with Arbitrator MITTENTHAL that the provisions of Article XV requiring that all of the facts and arguments relied upon by both parties must be fully disclosed before the case is submitted to arbitration should be strictly enforced*** [emphasis added]. In this case, therefore, ***I have given no consideration to any of the arguments advanced by the Postal Service other than those referred to specifically in this and the preceding paragraph*** [emphasis added]." ***See***, **AARON AWARD**, H8N-5B-C 17682, p.9.

In this case, neither party has provided me with one argument or case that stands in contravention with the rules pronounced in the above cited cases issued by Professors **MITTENTHAL** and **AARON**—and I can only assume that this failure is an acceptance of

the validity of the 42 year old rule. While often advanced at arbitration by both the **NALC** and the **USPS**, it's obvious to me that the **MITTENTHAL NEW ARGUMENT RULE** has withstood the test of time—and is considered in arbitration circles as the "towering pine of the Big Thicket". This, in and of itself, is more than sufficient persuasion for me to follow the instructions of the preeminent Professors **MITTENTHAL** and **AARON** regarding the **MITTENTHAL NEW ARGUMENT RULE**. This leaves me with the following question: to what extent shall an arbitrator weigh the **MITTENTHAL NEW ARGUMENT RULE** when considering Preliminary Issues not specifically raised prior to arbitration? To arrive at a proper answer to the question, I must first explore the underlying reasons for the **MITTENTHAL NEW ARGUMENT RULE**.

When examining the "new argument" rule above in light of the overall Article 15 process, it first appears that Professors **MITTENTHAL** and **AARON** were concerned about one party being unaware of the opposing party's argument and evidence prior to the scheduled hearing or arbitration (simply put, "Notice")—therefore, leaving the non-advancing party in the position of being partially unable to advance or defend their case on the day of the arbitration hearing. [12] In a traditional court case, these "discovery" matters are typically outlined by specific rules of procedure adopted by a controlling authority. If either party fails to comply with these "discovery" mandates, then it becomes difficult, if not altogether impossible, for each party to fully consider the strengths and weakness of their case—and most probably resulting in the parties advancing their case with unrealistic expectations. Clearly this is not the end result the parties anticipated when adopting Article 15—and only if everyone fully complies with the mandates of Article 15 may the expectation of settlement rise to the level originally anticipated when the parties entered into the **CBA** and **JCAM**.

It should be noted that questions presented at arbitration relating to the "*substantive*

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12. The advocates should caution against raising Preliminary Issues for the sole purpose of being able to present a significant portion of their case first, and contrary to the normal arbitration procedures relating to the presentment of evidence—i.e., in disciplinary cases, the **USPS** must prove their case, and thus, have the right to open and close their case first; and the **NALC** has the same right in contract cases.

arbitrability" of the case are raised as Preliminary Issues. In such instances, the substantive arbitrability Preliminary Issues rise to the top of the barrel as "***jurisdictional*** ***questions***, and must be addressed before proceeding to the merits of the case. In other words, if an arbitrator lacks jurisdiction, then it ***would not be*** permissible to dismiss a Preliminary Issue of "substantive arbitrability", or rule on the merits of the grievance, prior to the presentment of the "substantive arbitrability" issue(s)—***as jurisdiction goes to the heart of a ruling authority's ability to rule on any issue***.

In furtherance of the procedural rules relating to the advancement of Affirmative Defenses, I accept that it is settled law that ***jurisdictional issues*** may be urged at any point in the legal process—which includes the Article 15 process. This means that a party may "lay in wait" when raising jurisdictional arguments without fear of a "new argument" objection from the non-moving party. ***Simply put***, ***the raising of jurisdictional arguments are not*** "***new arguments***" as commonly understood by the **NALC** and **USPS** advocates. ***See***, **MITTENTHAL AWARD**; H8N-SL--C 10418, September 21, 1981; ***See***, ***Also***, **AARON AWARD**; H8N-5B-C 17682, p.9. However, failure to follow procedural rules, such as the failure to give proper Notice to the opposing party of the jurisdictional arguments to be advanced at arbitration, could result in other consequences or remedies afforded to the non-moving party. ***See***, ***Also***, **AARON AWARD**; H8N-5B-C 17682, p.9; ***See***, ***Also***, **SOILEAU NOTICE RULE**, *infra*. Ultimately, it is the responsibility of the arbitrator to determine the extent of the "new argument" exclusion. While identifying "new arguments" within an opening or closing statement may be little more than a ministerial task, the ultimate resolution of whether evidence or argument at arbitration falls within the **MITTENTHAL NEW ARGUMENT RULE** exclusion is subservient to issues questioning the ***jurisdiction of the arbitrator to rule on the merits of the case***.

Considering the totality of the above, the teachings of Professor **AARON** becomes a bright star in the Article 15 galaxy, to wit: "...***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 not time to prepare rebuttal evidence and argument*** [emphasis added]." ***See***, **AARON AWARD**, H8N-5B-C 17682, p.9; (cited in **DRT DECISION**), p.27. I would add to Professor **AARON**'**S** teachings that

"proper and reasonable" Notice relating to "***substantive arbitrability***" issues are not contingent upon the outcome of a strict mathematical equation; but instead, is determined by the understandings, analysis, and reasoned judgment of each arbitrator. While failure to give reasonable Notice to an opposing party will not bar the presentment of ***jurisdiction issues***—nevertheless, such Notice failures are clearly outside of the intent of the parties when adopting Article 15 of the **CBA** and **JCAM**.

Considering the above, I issue the following:

HOLDING: In consideration of the above, I will adopt the following "Notice Rules" for future cases before me in the **TENNESSEE SOUTHERN REGION**—and I will leave it up to other arbitrators as to whether such rules should apply to cases before them.

NOTICE TO OPPOSING PARTIES: [13]

(**i**) All parties are required to give Notice to the non-moving party of their intent to raise:

(**a**) any Preliminary Issue, including, but not limited to, issues of substantive arbitrability; or
(**b**) any other Affirmative Defense.

(**ii**) The Notice requirement in this rule:

(**a**) shall be of sufficient particularity to apprise the non-moving party of the factual and legal contentions the moving party intends to advance;
(**b**) may be in the form of letter, e-mail, or other writing; and providing an opposing party with a true and correct copy of the actual document (motion, argument, or brief) to be advanced at arbitration shall be deemed *prima facie* evidence of Notice to the opposing party; and
(**c**) shall be reasonable as it relates to when the moving party knew, or should have known, of the Preliminary Issue or Affirmative Defense. In no event shall the Notice requirements contained herein be less than five working days prior to the presentment of the Preliminary Issue or Affirmative Defense.

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13. The following rule shall be known, and hereafter cited within the **TENNESSEE SOUTHERN REGION**, as the **SOILEAU NOTICE RULE**.

(**iii**) Failure to comply with the Notice requirements contained in this rule may result in the following curative measures at the arbitration level:

(**a**) a granting of a continuance of the matter to a later date, either *sua sponte*, or upon request of the non-moving party;
(**b**) assessment of cost associated with the granting of the continuance against the party advancing the Preliminary Issue or Affirmative Defense in contravention of this rule;
(**c**) limiting or restricting oral arguments on the Preliminary Issue or Affirmative Defense, and requiring the moving party to advance their legal arguments in writing—thereby giving the non-moving party an opportunity to respond;
(**d**) allowing the non-moving party to provide closing arguments ***and*** post hearing briefs on the Preliminary Issue or Affirmative Defense advanced; and/or
(**e**) other awards that are appropriate under the circumstances.

(**iv**) Nothing in this rule shall be interpreted as to modify, extend, alter, or void any current or future **CBA**, **JCAM**, or **MOU** provision.

(**2**) ***Timeliness of the Grievance*** - It's settled procedure, in Article 15 arbitrations, that questions relating to the "timeliness" of filed grievances fall into the category of Preliminary Issues—and specifically concern the jurisdictional authority of the arbitrator. In this case, the **USPS** essentially argues that the **NALC** failed to timely file a grievance ***within 14 days of an alleged actionable contract violation or incident***; and therefore, said grievance should be dismissed without further hearing or consideration of the claims. ***See***, **DRT DECISION**, pp.23-24, 27. To determine the "timeliness" of the grievance filed in this case, I must first turn to the **CBA** and **JCAM** for guidance.

The **CBA** states, in pertinent part:

"Any employee who feels aggrieved ***must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause*** [emphasis added]. This constitutes the Informal Step A filing date..." ***See***, **CBA**, Article 15, Informal Step A, Section 2(a).

"***The failure of the employee or the Union in Informal Step A, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the***

grievance [emphasis added]. However, ***if the employer fails to raise the issue of timeliness at Formal Step A***, ***or at the Step at which the employee or the Union failed to meet the prescribed time limits***, ***whichever is later***, ***such objection to the processing of the grievance is waived*** [emphasis added].*"* ***See***, ***Id***., at Section 3(B).

The **JCAM** expounds on the above **CBA** provisions regarding the timeliness of a claim or grievance as follows:

> "...If management fails to raise the issue of timeliness, ***in writing,*** [emphasis added] at Formal Step A, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, it waives the right to raise the issue at a later time. Management's obligations depend upon the step at which it asserts the grievance was untimely. If management asserts that a grievance is untimely filed at Informal Step A, it must raise the issue in the written ***Formal Step A decision*** [emphasis added] (because Formal Step A is later than Informal Step A) or the objection is waived. ***It is not sufficient to assert during the Informal Step A meeting that a grievance is untimely*** [emphasis added]. If management asserts that a grievance is untimely at Formal Step A or later, it must raise the objection in the ***written decision*** [emphasis added] at the step at which the time limits were not met." ***See***, **JCAM**, Article15, Section 3(B).

The "writing" requirement contained in Article 15 of the **JACM** is designed to give "Notice" to the parties or advocates of the intention to raise the affirmative defense or dispositive issue of "timeliness" of a grievance. This "Notice" requirement is a matter of fundamental fairness, and should be viewed in conjunction with the traditional notions and interpretive cases of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In this case, the **USPS** complied with the writing requirement (however skeleton) and stated in the **FORMAL A DENIAL**:

> "The union claims this is an ongoing violation, however, the union provides no supporting documentation prior to Formal A of a continuing violation." ***See***, **USPS FORMAL A DENIAL - DRT CASE FILE**, p.866.

> "Without the union producing any requested information, it can only be concluded that this grievance is a result of October 12, 2021 and therefore cannot be considered 'ongoing'" ***See***, ***Id***. at p.867.

Without holding the **NALC** and the **USPS** to the standard of a knowledgeable legal practitioners, the plain reading of the **USPS** response clearly informs the **NALC** of their

objection to the "*ongoing*" and "*continuing violation*" claims. Considering the above, I find that the **USPS** has met their threshold requirement by apprising the **NALC** of their objection relating to the "timeliness" of the **NALC** grievance—and this Notice was in conformity with the above **CBA** and **JCAM** Articles. Therefore, based upon the foregoing Notice to the **NALC**, the **USPS** is not barred from raising the "substantive arbitrability" Preliminary Issue of "timeliness" at the arbitration level. [14] However, this does not mean that I should read the above Notice and insert my interpretations or assumptions as to what the **USPS** fully intended with their global statements—and I find nothing in the record suggesting that **USPS** intended to raise (at any level) the "timeliness" of *all claims* raised in the complained of grievance. Allow me to explain.

The **NALC** specifically and generally asserts that the alleged contract violations, (complained of in this grievance), are "ongoing". ***See***, **DRT CASE FILE** - Form 8190, Box 10, p.66. This designated "incident date", *along with the complained of conduct raised throughout the* ***DRT CASE FILE***, clearly indicates that the **NALC** is alleging that the contract violations relating to a "toxic" work environment continue—and until such time as final resolution is reached. The **USPS** objects to the "timeliness" of the grievance, specifically referencing the October 12, 2021 incident date—and, in their analysis of the case, the lack of credible evidence that the **USPS** violated any particular contract provision on the incident date should bar further consideration. Professor **MITTENTHAL** weighs in on the subject and offered the following guidance regarding "continual violations":

> "**Time Limits**. The fourteen days for filing a grievance at Informal Step A begins the day after the occurrence or the day after the grievant or the union may reasonably have been expected to have learned of the occurrence. For example, if a grievant receives a letter of warning, day one of the fourteen days is the day after the letter of warning is received.

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14. The "writing requirement" is a precursory rule regarding the "substantive arbitrability" issue of timeliness—and is a "*maverick*" in the traditional understandings of when a party may raise jurisdictional questions. In other words, by clear contract language, the writing requirement is mandated; however, once the requirement has been met, the opposing party may wait until the arbitration level to question of jurisdiction of the arbitrator relating to timeliness—and has no responsibility to raise the issue at the **STEP B** level. However, such an "substantive arbitrability" issue is now subject to the **SOILEAU NOTICE RULE**.

Continuing Violations. ***These are an exception to the general rule stated above*** [emphasis added]. In H1N-5D-C 297, June 16, 1994 (C-13671), National Arbitrator Mittenthal explained the theory of continuing violations as follows: Assume for the moment, consistent with the federal court rulings, that the Postal Service incorrectly calculated FLSA overtime for TCOLA recipients under the ELM. Each such error would have been a separate and distinct violation. We are not dealing here with a single, isolated occurrence. Management was involved in a continuing violation of the ELM. ***The affected employees (or NALC) could properly have grieved the violation on any day the miscalculation took place and such grievance would be timely provided it was submitted within the fourteen-day time limit set forth in Article 15*** [emphasis added]. This is precisely the kind of case where a "continuing violation" theory seems applicable. To rule otherwise would allow an improper pay practice to be frozen forever into the ELM by the mere failure of some employee initially to challenge that practice within the relevant fourteen-day period." ***See***, **JCAM**, **Article15**, **Section 2**(**A**)(**a**), pp.15-2-15-3.

To me, the above **CBA** and **JCAM** sections authorizes the filing of grievances for "ongoing" or "continual violations", for so long as alleged contract violation continues—but recovery is limited to 14 days prior to the actual filed grievance date (which is of little importance in this case considering the relief requested by the **NALC**). In other words, the **NALC** is not seeking relief for alleged prior contract violations occurring outside of the 14 day time bar, but is specifically requesting curative measures going forward—and future curative relief is clearly within my authority to grant. Therefore, the "timeliness" objection of the **USPS** relating to the requested relief has been partially resolved by the specific **NALC** requested relief. However, there remains the issue of whether the **NALC** must produce credible evidence ***of an alleged actionable contract violation or incident*** within 14 days of October 12, 2021. Once again, I want to be clear in my interpretations of the **MITTENTHAL NEW ARGUMENT RULE**.

It's obvious that the parties have contracted to limit filed grievances within 14 days of the incident date. One purpose of this rule is to allow the **USPS** to have confidence, as they move forward in their operations, that they will not have to respond to stale or remote complaints from their employees. Another purpose is to place the onus upon the employee to timely present potential contract concerns—understanding that said grievances may ultimately be proved to be unwarranted. The above leaves me to conclude that the thrust

of the **MITTENTHAL NEW ARGUMENT RULE**, as applied to this case, centers around what the **USPS** knew, or should have known, regarding an "ongoing" or "continued" violation.

In this case, the **NALC** is arguing that the work environment in the Installation at large is "toxic"—and the **USPS** is aware, or should be aware, of a number of past incidents of violence, threats of violence, harassment, and other reprehensible conduct specifically prohibited by the various contractual provisions and managerial mandates. In support of these arguments, the **NALC** references prior settlements and Awards contained within the Arbitration Record in which **USPS** "knowledge" is conclusive, (and without further debate or argument), based upon the resolution of grievance procedures outlined in Article 15 of the **CBA** and **JCAM**. In furtherance of the argument, the **NALC** asserts that the **USPS** has done nothing to correct the ongoing problem—and instead, has chosen to remedy or address each of the prior grievances individually, while ignoring its Article 3 and 14 obligations to correct the overall problem. If the **NALC** is correct in this case, then the actual "incident" date is of no consequence because a grievance could have been filed at any time before or after October 12, 2021—as the allegations clearly imply that on any given day the **USPS** was, and remains, out of compliance with the **CBA** and **JCAM**.

On the other hand, if I am to understand the **USPS** response correctly, I would agree that there should be some point on a "reasonableness" scale that would cut-off the "ongoing" or "continual" exception to a filed grievance. While I can understand that there comes a point in time in which prior conduct, in and of itself, should not support a current grievance, I cannot agree that such a determination is as calculated as the **USPS** suggests. I can only anticipate that such a cut-off rule would consider the remoteness of the alleged "ongoing" or "continued" prior contract violations to the current filed grievance date; and further, that no "rational legal argument" could be made that the alleged prior contract violations remain a current or viable concern. However, such a negative determination of an "ongoing" or "continual" violation would not prevent a grievance with a specific incident date—or using prior agreements and Awards as arguments in support of a subsequently filed grievance.

After careful consideration of the entire Arbitration Record, I cannot come to the

conclusion that the "ongoing" or "continual" nature of the filed grievance in this case is so remote that I should bar any further consideration of the issues presented as being beyond any rational legal argument. It would follow that the **NALC** decision to file a grievance after the October 12, 2021 incident was within their contractual rights to do—however, the **NALC** has the burden to prove that the **USPS** alleged contract violations, as contained in the issues presented to arbitration, are "ongoing" and/or "continual" within 14 days of the filed grievance date.

I would also point out that my conclusions relating to the **USPS** timeliness objections in this case are further supported by the parties agreed undisputed facts presented to arbitration—the second of these enumerated agreements is particularly concerning ("*2. This grievance is timely at all levels*."). ***See***, **DRT CASE FILE**, p.67 (cited, *supra*). While I fall short of determining that an agreement as to a jurisdictional issue is complete, final, and binding—nevertheless an agreement as to jurisdiction should be weighed by your arbitrator. More clearly, it's my prior ruling that a jurisdictional issue may be raised at any level of the Article 15 process, (***and now***, ***irrespective of prior agreements***); however, the subsequent determination of the question does not exclude from consideration the prior understandings of the parties relating my jurisdiction.

Considering the above, the **NALC**:

(**i**) is not requesting relief outside of the 14 day time bar;

(**ii**) identifies a rational legal argument of an "*ongoing*" and "*continuing*" complaint; and

(**iii**) complaints contained within the issues presented to arbitration are not so so remote as to bar further consideration and ruling.

HOLDING: The **USPS MOTION TO DISMISS** the Grievance based upon the timeliness of the **NALC** filing is denied, *in total*. However, this ruling should not be interpreted as to put the grievance to rest at this juncture. The **NALC** must still prove the ongoing and continual "*contractual violations*" as alleged in the filed grievance—and according to the required evidentiary standard (discussed more fully, *infra*).

(**3**) ***USPS Dispositive Motions Res Judicata and Colateral Estoppel*** - The **USPS** formally urged a dismissal of the presented grievance in this case based upon the common law doctrines of *Res Judicata* and *Collateral Estoppel*—specifically relying upon two National Level Awards. ***See***, **SNOW AWARD**, H4C4HC-25455; ***See***, ***Also***, **BRITTON AWARD**, H7N-3S-C 21873. [15] In advancing this Preliminary "*jurisdictional*" Issue, the **USPS** essentially argues that the **NALC** is attempting to re-litigate prior grievances that reached settlement, or resulted in an Award being issued by a controlling authority. ***See***, **DRT DECISION**, p.18. The **USPS** goes on to argue that the advancement of the doctrines of *Res Judicata* and *Collateral Estoppel* in this case follows the instructions of Professors **SNOW** and **BRITTON** in their prior National Decisions. ***See***, ***Id***.

The **NALC** refutes the above *Res Judicata* and *Collateral Estoppel* arguments advanced by the **USPS** as being inapplicable. More specifically, the **NALC** states:

> "The Union will show that a Managers history of abuse, and those past decisions, dealing with those specific managers shall be included in the file to support that claim. The Union is not asking to relitigate (*sic*) those past decisions. They are simply used to provide historical context. Mr. Arbitrator the Union is here now. The days of bullying and intimidation by local Management will no longer be allowed to continue. We will no longer tolerate the unacceptable behavior of a certain few Managers." ***See***, **NALC OPENING STATEMENT**, p.2; ***See***, ***Also***, **NALC CLOSING BRIEF**, p.9. (*Citing*, **CENCI AWARD**, B06N-4B-C 08130117, August 19, 2008, p.8.)

The common law Doctrine of *Res Judicata* is an equitable doctrine designed ***to protect a responding party from having to defend itself of a*** "***claim***" ***or*** "***cause of action***" ***previously litigated*** between the same parties—and some legal scholars have equated the Doctrine of *Res Judicata* as the civil law cousin to the Double Jeopardy clause found in the 5th Amendment to the United States Constitution (as argued by the **USPS**). ***See***, **DRT DECISION**, p.18. In other words, if the **USPS** establishes the application of the

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15. In years past, it was a common practice to refer to the Doctrine of *Res Judicata* as an all encompassing rule of preclusion. In more recent times, most legal scholars and jurist make a clear distinction between the Doctrine of *Res Judicata* and the Doctrine of *Collateral Estoppel*. While it's true that the two doctrines share significant elements and rules of applicability, they should not be used interchangeably. Therefore, this Award will address both doctrines separately, as if the parties specifically asserted each in the alternative.

above doctrine, then the issues in this case would be barred from further consideration because your arbitrator would lack jurisdiction to offer further ruling.

Former Article 15 National Arbitrator, the eminent Professor, **CARLTON J**. **SNOW**, offers clarity regarding the Doctrine of *Res Judicata* in the arbitration process, and states:

> "Whether in court or an arbitration forum, ***the principle of decisional finality is important***; ***and rules have been developed in both arenas to*** '***relieve parties of the cost and vexation of multiple law suits***, ***conserve judicial resources***, ***and***, ***by preventing inconsistent decisions***, ***and encourage reliance on adjudication*** [emphasis added].'" (See Allen v. McCurry, 449 U.S. 90, 94 (1980).) Rules fostering finality are described as preclusion rules. ***Preclusion rules limiting an arbitrator's review of claims and issues are important in an arbitration system both because of their impact on the settlement of disputes as well as on relieving parties from the expense of repeated arbitration*** [emphasis added]. While parties debate the persuasive value of prior arbitration decisions as a tool to interpret their collective bargaining agreements, the tradition in this particular industry is to apply the Doctrine of Stare Decisis to national level arbitration decisions. (See St. Antoine, The Common Law of Workplace, 48 (1998)). ***This tradition increases the importance of Res Judicata rules because the parties made a commitment to constrain the right to re-arbitrate claims that already have been adjudicated***. ***Hence***, ***rules of preclusion become more relevant than they might be in an industry where precedential value is not assigned to arbitration awards*** [emphasis added].
>
> Res Judicata rules generally are divided into ***claim preclusion and issue preclusion*** [emphasis added]. Claim preclusion generally prevents a party from reverberating in a later proceeding a matter that was a part of the same claim arbitrated in an earlier dispute. As the eminent Whitely McCoy stated many years ago, "***Where the prior decision involves the interpretation of the identical contract provision between the same company and union*** [emphasis added] every principle of common sense, policy, and labor relations demand that it [a prior arbitration decision] stand until the parties annul it by a newly worded contract provision." (see 9 LA 731, 732 (1948.) Rules of claim preclusion teach that any part of a claim which might have been litigated, even though it was not, should be precluded from later arbitration." ***See***, **SNOW AWARD**, H4-C 25455; ***See***, ***Also***, **USPS CLOSING BRIEF**, pp.6-7.

Professor **SNOW**, as well as a plethora of other legal scholars, have outlined the elements necessary in the proper advancement of the Doctrine of Res Judicata—and failure to establish the applicability of any one of the elements eliminates the legal

proposition altogether. [16] To establish a *prima facie case* that the Doctrine of *Res Judicata* is applicable to a given case, the moving party must satisfy each of the following in the affirmative:

(**i**) the ruling authority in the prior case had proper jurisdiction to rule on the merits of the case (*i.e*., "substantively arbitrable");

(**ii**) the issue(s) and factual allegation(s) in the subsequent or current case(s) is/are identical to (or mirror imaged of) the prior relied upon case(s);

(**iii**) the parties in the current case are the exact same parties as in the previous relied upon case(s); and,

(**iv**) the previous relied upon case(s) was/were fully adjudicated to resolution—and not necessarily disposed of on preliminary or procedural grounds (or otherwise settled by the parties). ***See***, **SNOW AWARD**, H4-C 25455.

In order to arrive at a correct, right, and just decision regarding the jurisdictional issue raised by the **USPS**, I must consider and apply the above required elements to the factual allegations and authority presented in this case.

Element #1 - ***Did the STEP B TEAMS and Arbitrators in the prior cases contained in the Appellate Record have jurisdiction to rule on the merits of the cases***?; and

Element #4 - ***Were the previous relied upon case(s) fully adjudicated to resolution***?

I have examined the prior **AWARDS** and **STEP B DECISIONS** contained in the Appellate Record, and find that all were advanced in accordance with Article 15 of the **CBA** and **JCAM**—and all jurisdictional questions of the Arbitrators and **STEP B TEAMS** to issue rulings on the contested issues presented were either resolved, or went unchallenged. Additionally, I need not belabor the point of whether the prior cases contained in the

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16. Each element is essential to invoke the protections of *Res Judicata*. In other words, if it is determined that any one element has not been satisfied by the moving party, further analysis would be unnecessary—and the application of the doctrine inapplicable and overruled.

Appellate Record were fully adjudicated to resolution. Having no authority to question or challenge the prior rulings of Arbitrators or **STEP B TEAMS** regarding their conclusions, I defer to the respective findings that jurisdiction was proper in each of the cited cases—and the resolutions reached regarding the merits of the respective cases being proper, complete, and final. Therefore, the first and fourth elements in the *Res Judicata* analysis ***have been satisfied***.

Element #2 - ***Are the issue(s) and factual allegation(s) in prior APPELLATE RECORD cases identical to (or mirror imaged of) the issue(s) and factual allegation(s) in this case***?

In deciding whether the factual allegations and issues presented in the cited Appellate Record cases are the same, identical, or mirror imaged, as those presented in this case, the parties and the Arbitrator must completely understand the purpose of the requirement of factual and issue consistency.

As Professor **SNOW** teaches, when the parties advance a grievance pursuant to a collective bargaining agreement, they have expectations of finality of the contested issues at some point in the process. ***See***, **SNOW AWARD**, H4-C 25455; ***See, Also***, **Allen v. McCurry**, 449 U.S. 90, 94 (1980). In other words, a grievant should not be allowed to bring the same claim or cause or action, arising under the same set of factual allegations, over and over; and essentially "forum shop" until such time as the grievant finds an Arbitrator or **STEP B TEAM** that agrees with his or her legal and factual conclusions regarding a particular contested issue.

Moreover, a party advancing the doctrine of *Res Judicata* must caution against examining the elemental requirements for success *singularly*, but must consider all of the required elements *in conjunction with each other*. For example, the parties in this case are not the same as required in Element #3. ***See***, discussion, *infra*. Therefore, the issues in the cited cases are not "identical to" or "mirrored imaged of" those presented in this case because of the different parties—and the different parties would result in different circumstances and factual allegations, however slight or minimal.

I would also add that the **NALC** advances the prior cases as a historical context of

an "*ongoing*" or "*continual*" violation—and is not intending to re-litigate prior rulings and/or issues. In fact, the requested relief in this case suggests that the **NALC** is seeking resolution of an "ongoing" or "continual" violation that is supported by the prior Awards and settlements. This historical context was recognized by Arbitrator **CENCI** whereby she reasons:

> "All information in the grievance file was part of the grievance file below and was considered by the B Team. In addition the agreed issue at arbitration is broadly worded to include ***the supervisor's pattern of behavior and is not limited to a specific time and place*** [emphasis added]. The arbitrator therefore has the authority to consider all information about the supervisor's conduct that was included in the grievance file.
>
> Additional information about previous grievance that were resolved in Mr. Nelson's favor by the B Team is also included in the joint files submitted in this arbitration. ***Such information provides historical context and goes to the question of whether a pattern of harassing or intimidating behavior has been established*** [emphasis added]." ***See***, **CENCI AWARD**; B06N-4BC 08130117; p.8.

Considering the above, I find that the issues and factual allegations presented in this case are not identical to, or mirrored image of, those presented in the prior cases contained in the Appellate Record. Therefore, the second element in the *Res Judicata* analysis has not been satisfied—***and the advancement of the doctrine fails***. [17]

Element #3 - ***Are the parties in this case the same parties as in the APPELLATE RECORD cases***?

I want to stress that the **NALC** is generally not a party in Article 15 arbitrations, and Professors **SNOW** and **MCCOY** acknowledge this. ***See***, **SNOW AWARD**, H4-C 25455 (emphasized language), *supra*. While I recognize that the **NALC** may file a grievance as a "party", simply serving to advocate on behalf of one or more of its members, or being able to advocate or enforce **CBA** and **JCAM** provisions regarding proper "Notice" or document production in a filed grievance, does not, in and of itself, advance the **NALC** (as an organization) as a party. ***See***, **CBA**, **UNION RECOGNITION**, Article 1, Section 1, p,1;

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17. Considering the significance of the Preliminary Issue advanced by the **USPS**, as well as the potential for misapplication of the Doctrine of *Res Judicata* in future cases within the Region, I continue my analysis in an abundance of caution.

See, ***Also***, **JCAM**, **UNION RECOGNITION**, Article 1, pp.1-1–1-2. Moreover, Article 15 of the **CBA** and **JCAM** clearly provides that the **NALC** (or its representatives) may serve in the capacity ***as an advocate***, ***or as an aggrieved party***.

> "**Section 1**. **Definition**
> ...A grievance shall include, but is not limited to, ***the complaint of an employee or of the Union*** [emphasis added] which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement." ***See***, **CBA**, **GRIEVANCE-ARBITRATION PROCEDURE**, Article 15, Section 1, p.66. ***See***, ***Also***, **DRT CASE FILE**, Form 8190, Informal A item (1), p.12.

> "**Section 2. Grievance Procedure—Steps**
> **Informal Step A**
> (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on ***which the employee or the Union*** [emphasis added] first learned or may reasonably have been expected to have learned of its cause. This constitutes the Informal Step A filing date. ***The employee***, ***if he or she so desires***, ***may be accompanied and represented by the employee's steward or a Union representative*** [emphasis added]. During the meeting the parties are encouraged to jointly review all relevant documents to facilitate resolution of the dispute. ***The Union also may initiate a grievance at Informal Step A*** [emphasis added] within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. ***In such case the participation of an individual grievant is not required*** [emphasis added]. ***An Informal Step A Union grievance*** [emphasis added] may involve a complaint affecting more than one employee in the office." ***See***, **CBA**, **GRIEVANCE-ARBITRATION PROCEDURE**, Article 15, Section 2, pp.66-67.

> "...***If the union initiates a grievance on behalf of an individual*** [emphasis added] the individual grievant's participation in an Informal Step A meeting is neither required nor prohibited. If a letter carrier instead files his or her own grievance, management must give the steward or other union representative the opportunity to be present during any portion of the discussion which involves adjustment or settlement of the grievance (Prearbitration Settlement, H7N-5R-C 26829, April 2, 1992, M-01065)." ***See***, **JCAM**, **INFORMAL STEP A** (a), Article 15.2, p.15-2.

> "In any arbitration proceeding in which a Union feels that its interests may be affected, ***it shall be entitled to intervene and participate in such***

arbitration proceeding [emphasis added]..." ***See***, **CBA**, **GRIEVANCE-ARBITRATION PROCEDURE**, Article 15, Section 4.A.9, pp.74-75.

"**Intervention.** ***This provision gives postal unions the right to intervene in each others' arbitration proceedings if they feel that their interests may be affected***. ***National Arbitrator Britton held in case H4N-4J-C-18504***, ***March 16***, ***1989*** (***C-08730***), ***concerning NALC and the NRLCA***, ***that the right of a postal union to intervene in a jurisdictional case is not contingent upon the two unions being signatory to a joint contract*** [emphasis added].

The NALC, ***when it has intervened in an area level arbitration case pursuant to the provisions of Article 15***, ***Section 4.A.9*** [emphasis added]...

...***after the NALC intervenes in the initial arbitration***..." ***See***, **JCAM**, Article 14.4.A.9, p.15-16.

Moreover, Article 17 of the **CBA** and **JCAM** recognizes the authority of the **NALC** to represent and participate in the grievance process, to wit:

"**Section 1**. **Stewards**
Stewards may be designated for the purpose of ***investigating, presenting and adjusting grievances*** [emphasis added]." ***See***, **CBA**, Article 17, Section 1, p.82; ***See***, ***Also***, **JCAM**, Article 17.1, p. 17.1;

"**Section 2**. **Appointment of Stewards**
...B. At an installation, ***the Union may designate in writing to the Employer one Union representative actively employed at that installation to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance*** [emphasis added]." ***See***, **CBA**, Article 17, Section 2(B), p.83; ***See***, ***Also***, **JCAM**, Article 17.2.B.; p.17-2;

"**Section 3**. **Rights of Stewards**
When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance..." "***If an employee requests a steward or Union representative to be present during the course of an interrogation*** [emphasis added] by the Inspection Service, such request will be granted..." ***See***, **CBA**, Article 17, Section 3, p.84; ***See***, ***Also***, **JCAM**, Article 17.3; p.17-3;

"**Section 4**. **Payment of Stewards**
The Employer will authorize payment only under the following conditions:

> Grievances—Informal and Formal Step A: ***The aggrieved and one Union steward*** [emphasis added] (only as permitted under the formula in Section 2.A) for time actually spent in grievance handling, including investigation and meetings with the Employer. ***The Employer will also compensate a steward for the time reasonably necessary to write a grievance***." ***See***, **CBA**, Article 17, Section 2(B), p.85; "***An employee must be given reasonable time to consult with his or her steward***, ***and such reasonable time may not be measured by a predetermined factor*** [emphasis added] (Step 4, H1C-3W-C 44345, May 9, 1985, M-00303). Although Article 17.4 provides that the grievant and a steward shall be paid for time actually spent in grievance handling and meetings with management,..." ***See***, ***Also***, **JCAM**, Article 17.4; pp.17-5—17-6.

Clearly the **GRIEVANT** in this case is not the same as in the Appellate Record cases—and any attempt by the **USPS** to claim that the **NALC** (*as an organization*), is or was, the aggrieved party, is ill-advanced and procedurally incorrect. Even if the **NALC** advanced a class action grievance regarding the same **NALC** members, that would not satisfy the third element of the analysis regarding the same parties. To be clear, when the issue in the grievance changes, the class participants take on different characteristics—and irrespective of who serves as the advocate in the grievance. In each of the cited cases, as well as in this case, the **NALC** acted as an advocate on behalf of the grievants, and in no way did they argue or advance the grievance as a party—(and for future cases, the **USPS** should take special note of my analysis regarding this element of the *Res Judicata* analysis). Furthermore, the prior issues were individual complaints representing a specific set of factual allegations and issues, and was not clearly focused on the "*ongoing*" nature of the complaint contained in this grievance—which encompasses all of the filed grievances and their individual conclusions, (filed collectively as a separate complaint).

I cannot **DISAGREE** more strongly with the **USPS** position that the **GRIEVANT** in this case is the same as the grievants in the cases contained in the Appellate Record. Therefore, the third element in the *Res Judicata* analysis has not been satisfied—***and the advancement of the doctrine fails***, ***once again***.

> **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the doctrine of *Res Judicata* is denied—*and in total*.

I next turn my attention to the claim by the **USPS** that the Doctrine of Collateral Estoppel would bar further consideration of this case. As stated before, the Doctrine of *Collateral Estoppel* is typically referred to as an "issue" preclusion. Unlike the overall "claim" preclusion defining the Doctrine of *Res Judicata*, the application of the Doctrine of *Collateral Estoppel* specifically relates to the "issues" within a claim—such as liability for certain actions; or a prior determination that certain actions have a specific legal result.

Like *Res Judicata*, *Collateral Estoppel* operates to ***exclude*** issues that were, or should have been, fully litigated in a prior case; provided, however, the subsequent case involves the ***same party whom the doctrine is being enforced against***, and the case arises under the same set of factual allegations. Considering their similarities, it's understandable how a comparison of the two Doctrines can become confusing—and a distinction between the two Doctrines difficult to grasp. Professor **SNOW** recognized these blurred lines and stated:

> "Some courts and scholars do not group issue preclusion under the topic of res judicata rules and, instead, describe issue preclusion under the doctrine of collateral estoppel. (*See*, e.g., McCoy v. Cooke, 419 N.W.2d 44 (1988).) ***While such variegated terminology can be a source of confusion*** [emphasis added], issue preclusion rules generally limit any further arbitration of issues "actually" arbitrated in an earlier proceeding. ***Restatement*** (***Second***) ***of Judgments includes both claim preclusion and issue preclusion as a part of res judicata rules*** [emphasis added]. (*See*, Ch. 3, 131 (1982).)" ***See***, **SNOW AWARD**; H4C-4H-C 25455, p.11.

I can only interpret the above teachings of Professor **SNOW** to mean that the core elements necessary in establishing a *prima facie case* for *Res Judicata* or *Collateral Estoppel* ***are essentially the same***—save and except minor nuances. Moreover, if the core elements are the same, or sometimes used interchangeably, then it follows that the requirement that each element in the analysis must be satisfied in the affirmative must also be the same (as discussed in the *Res Judicata* analysis above). ***See***, *supra*. Therefore, the question becomes: why make any distinction between "claim" and "issue" preclusion? In other words, if an issue is barred (irrespective of the specific name given to the Doctrine), then the "claim" would fail because all required issues (or elements of the claim) must be resolved in the affirmative to prevail on the claim or cause of action. Professor

SNOW answers the question to include the following additional understanding contained in the "issue" preclusion analysis:

> "Finally, ***the issue the arbitrator decided in the first proceeding must***, ***in fact***, ***support the award of the arbitrator before that issue will be precluded from being revisited in a later proceeding*** [emphasis added]. In other words, ***even if an arbitrator actually decided a matter in an earlier decision but it was not essential to the ultimate award of the arbitrator***, ***a party is not precluded from later pursuing the issue on the theory that the first arbitration decision merely provided dicta with regard to the challenged issue***. ***Likewise***, ***if an arbitrator based an award on alternative theories***, ***either of which would justify the determination***, ***rules of issue preclusion would permit the matter to be pursued in a later proceeding*** [emphasis added]. (See Restatement (Second) of Judgments, Section 27 (1982).)" ***See***, **SNOW AWARD**; H4C-4H-C 25455, pp.11-12.

When examining the totality of the **USPS** arguments, it appears that they have taken the position that the Doctrine of *Collateral Estoppel* (issue preclusion) should apply to the "issues" as provided by the **STEP B TEAM**—which is an incorrect interpretation of the Doctrine of *Collateral Estoppel*. In other words, the word "issue" has multiple applications in the legal context. The use of the word "issue" in a issue statement relates to the overall claim, because the resolution of the issue resolves the overall conflict between the parties. However, the issue preclusion contained in a *Collateral Estoppel* argument relates to a specific element or factual assertion necessary in resolving the overall claim or cause of action (*i.e*., a prior determination regarding a **CBA** or **JCAM** Article).

In continuing my analysis of the above, I recognize that if I am to decide that *Collateral Estoppel* applies to the "issue" of "ongoing violation", as presumably argued by the **USPS**, I must find that each of the following elements are satisfied in the affirmative:

(**i**) the ruling authority in the prior case had proper jurisdiction to rule on the "issue" sought to be barred from further consideration in this case;

(**ii**) the issue(s) and factual allegation(s) in the subsequent or current case(s) is/are identical to (or mirror imaged of) the prior relied upon case(s);

(**iii**) the party ***against whom enforcement is sought*** in the current case is the exact same party as in the previous

relied upon case(s); and,

(**iv**) the previous relied upon case(s) was/were fully adjudicated to resolution—and not necessarily disposed of on preliminary or procedural grounds (or otherwise settled by the parties); ***and the "issue" sought to be barred from further consideration in the current case was considered and ruled upon—and the prior ruling on the "issue" was essential to the prior Award***. ***See***, **SNOW AWARD**, H4-C 25455; ***See, Also***, **SNOW AWARD**, H4C-4H-C 25455, pp.11-12. [18]

Considering the mirrored image of the analysis of the above elements as it relates to the Doctrine of *Res Judicata*, I need not go through the exercise of evaluating elements (**i**), (**ii**), (**iii**), and a portion of (**iv**) above, for I have previously done so in this Award. ***See***, *supra*. I further note that I previously determined that the **USPS** failed to satisfy elements (**ii**) and (**iii**). ***Therefore, the argument of the USPS that the Doctrine of Collateral Estoppel is applicable in this case must fail***, and I need not examine the portion of the **SNOW AWARD** that distinguishes the Doctrines of *Res Judicata* and *Collateral Estoppel for educational purposes only*. I will, however, note that the Doctrine of *Collateral Estoppel* is typically advanced to show that "liability" or "fault" has been previously decided by a ruling authority regarding a specific incident or set of factual allegations—therefore, an advancement of the *Collateral Estoppel* argument would have been better served if advanced by the **NALC**.

The Doctrine of *Collateral Estoppel*, as advanced by the **USPS**, is inapplicable in this case. To simply argue that a prior case ruled a certain way, without more, fails to invoke the legal maxims urged by the **USPS**. Considering the above, I issue the following:

HOLDING: The **USPS** dispositive Motion to Dismiss the grievance based upon the doctrine of *collateral estoppel* is denied—*and in total*.

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18. The elements necessary in the analysis of the application of *Res Judicata* and *Collateral Estoppel* being identical; save and except the emphasized language in (iv)—as instructed by Professor **SNOW**.

(**4**) ***Implications of Alleged Article 15 Procedural Violations*** - The **USPS** first argues that the **NALC** failed to "meet" in accordance with the spirit and intent of Article 15 of the **CBA** and **JCAM**; thereby rendering further hearing at arbitration Moot—suggesting by the use of the word "Moot" that your arbitrator lacks jurisdiction to rule on any contested issues due to the alleged failure. (*i.e.*, "*Having failed to*-(*sic*) *meet its obligations at Step 1 by document and-deed*, *the Union has waived its grievance rights in the instant case*. *This analysis renders any further considerations moot*."). ***See***, **USPS FORMAL A DENIAL - DRT CASE FILE**, p.866; ***See***, ***Also***, **DRT DECISION**, p.28. Moreover, the **USPS** contends that "*The violation of Article 15.2.A resulted in Management being prohibited from responding to any of the Union's claims or allegations and destroyed any possibility of resolution at the lowest possible level in violation of Article 15.3.A*." ***See***, ***Id***. at p.865; ***See***, ***Also***, ***Id***. at p.17. To resolve the above Preliminary Issue as presented by the **USPS**, I must now turn to the relevant **CBA** and **JCAM** Articles for guidance.

The **CBA** provides for mandatory participation in preliminary steps of dispute resolution prior to arbitration, more specifically: "**INFORMAL STEP A**", **FORMAL STEP A**", and "**STEP B**", each Step operating as an appeal from the prior Step. The **CBA** provides:

> "**Informal Step A**
> (a) ***Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause*** [emphasis added]. This constitutes the Informal Step A filing date. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. ***During the meeting the parties are encouraged to jointly review all relevant documents to facilitate resolution of the dispute*** [emphasis added]. The Union also may initiate a grievance at Informal Step A within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. An Informal Step A Union grievance may involve a complaint affecting more than one employee in the office.
>
> (b) ***In any such discussion the supervisor shall have authority to resolve the grievance*** [emphasis added]. The steward or other Union representative likewise shall have authority to resolve the grievance in whole or in part. The local parties are not prohibited from using the Joint Step A

Grievance Form to ***memorialize a resolution*** [emphasis added] reached at an Informal Step A Meeting. ***No resolution reached as a result of such discussion shall be a precedent for any purpose*** [emphasis added].

(c) If no resolution is reached as a result of such discussion, the Union shall be entitled to file a written appeal to Formal Step A of the grievance procedure within seven (7) days of the date of the discussion. ***Such appeal shall be made by completing the Informal Step A portion of the Joint Step A Grievance Form***. ***At the request of the Union***, ***the supervisor shall print his/her name on the Joint Step A Grievance Form and initial***, ***confirming the date of the discussion*** [emphasis added]. ***See***, **CBA ARTICLE 15.2**; pp.66-67.

The **JCAM** also requires participation of the parties at **INFORMAL STEP A**, and provides:

"An employee or union representative ***must discuss the grievance with the employee's immediate supervisor within fourteen calendar days*** [emphasis added] of when the grievant or the union first learned, or may reasonably have been expected to learn, of its cause. The date of this discussion is the Informal Step A filing date.

- If the union initiates a grievance on behalf of an individual, the individual grievant's participation in an Informal Step A meeting is neither required nor prohibited.

- If a letter carrier instead files his or her own grievance, management must give the steward or other union representative the opportunity to be present during any portion of the discussion which involves adjustment or settlement of the grievance (Prearbitration Settlement, H7N- 5R-C 26829, April 2, 1992, M-01065).

- Should the grievance affect more than one employee in the office, the union may initiate a class grievance on behalf of all affected employees."

"***During the Informal Step A discussion the supervisor and the steward (unless the grievant represents themself) have the authority to resolve the grievance*** [emphasis added]. Both parties must use the JCAM as their guide to the contract. A resolution at this informal stage does not establish a precedent. ***While either representative may consult with higher levels of management or the union on an issue in dispute, this section establishes that the parties to the initial discussion of a grievance retain independent authority to settle the dispute*** [emphasis added].

> If the parties are unable to resolve the grievance during the Informal Step A meeting the union may file a written appeal to Formal Step A within 7 calendar days after the meeting.
>
> The time limits for filing a grievance at Informal Step A or appealing to Formal Step A may be extended by mutual agreement.
>
> ***The steward appeals a grievance to Formal Step A by filling out the Informal Step A portion of the NALC-USPS Joint Step A Grievance Form (PS Form 8190) and sending it to the installation head or designee*** [emphasis added]. The grievance appeal to Formal Step A should include relevant documents that were shared and discussed at the Informal Step A meeting.
>
> When appealing a grievance to Formal Step A, day one is the day following the receipt of the supervisor's oral decision. In appealing any grievance beyond Informal Step A, a union representative has until the last day to send the appeal. Thus, the appeal must be sent (if faxed or e-mailed), postmarked (if mailed), or received (if hand-delivered), on or before the seventh day following the Informal Step A decision (for example, on the tenth if the decision is received on the third). To avoid problems union representatives should not wait until the last day." ***See***, **JCAM**, Article 15.2; pp. 15-2–15-4.

Clearly the above **CBA** and **JCAM** Articles mandate that the **INFORMAL A STEP** is required as the first Step in the grievance process—and the parties, in my estimation, ***cannot informally agree***, (***or otherwise consent by their respective silence***), ***to eliminate this all important initial Step***. Having established that both the **USPS** and the **NALC** must participate at the **INFORMAL A STEP**, I next turn to the specific facts of this case to determine whether the parties actually "met" at **INFORMAL STEP A**—as generally understood by the parties when entering into the **CBA** and **JCAM**.

When examining the standard Form 8190, it very clearly has two designated sections: **INFORMAL STEP A** and **FORMAL STEP A**. Both sections contain a number of items (or boxes) that should be completed as the grievance moves through the process—presumably ensuring that the requirements of the **CBA** and **JCAM** have been met. Moreover, Form 8190 has separate boxes for signatures of the parties (***i.e.***, Supervisor and Steward - **INFORMAL STEP A**; and, **USPS** Representative and **NALC** Representative - **FORMAL STEP A**). Upon examination of the Form 8190 in this case, it

very clearly has the requisite signatures—and I must assume that at the time of the acknowledgment, (10/26/21 and 11/8/21, respectively), the representatives were each satisfied that the **STEPS** were completed pursuant to the **CBA** and **JCAM**. ***See***, **DRT CASE FILE**, pp.66 and 878. If this were not the case, then it's at least puzzling as to why the representatives would sign such a form indicating "***11. Date Discussed With Supervisor*** (***Filing Date***)" [emphasis added]. ***See***, ***Id***.

In furtherance of my analysis, it appears from the **DRT CASE FILE** that the **USPS** contacted their **INFORMAL A** supervisor regarding information requested by the **NALC**. The e-mail exchange to and from **MR**. **MICHAEL VACCARELLA** and **MR**. **JOSEPH ANDERSON** is of particular concern to me, whereby the exchange states, in pertinent parts:

> **MR**. **VACCARELLA**: "...I see you were the Informal A Representative on the grievance, I am asking that you send me several items;..."
>
> **MR**. **ANDERSON**: "I was not involved in any of the meeting dealing with this grievance. ***I was just the supervisor available to sign off on it*** [emphasis added]."
>
> **MR**. **VACCARELLA**: ***You are now involved as you signed off on the 8190 as the Informal A Representative*** [emphasis added]. In order for management to argue this grievance successfully, I will need all supporting documentation I requested yesterday, including any police and/or Postal Inspector Report...***As the manager who signed off on the 8190*** [emphasis added] you still need to answer what I need below including what the union requested remedy (*sic*)".
>
> **MR**. **ANDERSON**: ***There was no meeting***, ***there was no evidence shown***, ***the union representative never spoke to me about this grievance at all*** (*sic*) ***she stated that she need me*** (*sic*) ***to sign the 8190 to get the grievance started*** [emphasis added]. " ***See***, ***Id***. at pp.888-892.

I next observe that the **FORMAL A** notes of the **USPS** contains the following sentence: "***Prior to Formal A meeting*** [emphasis added] *the 8190 only identified the East Lamar Station* ***when discussed*** [emphasis added] (*sic*) *only the office wide was added*." ***See***, ***Id***. at p. 1302. Although I recognize that parties should not be strictly held to personal "notes", as notes may be skeleton and lack specificity; nevertheless, the **USPS FORMAL**

A notes in this case appear to be very detailed and cover a wide variety of other procedural concerns. Therefore, the omission of the lack of **INFORMAL A** meeting in the **USPS** notes is concerning to me—especially when viewed in light of the "***Prior to Formal A meeting***" and "***when discussed***" notations, along with the **USPS** argument that the alleged failure to meet at **INFORMAL A** would bar the presentment of the case to arbitration.

In their **FORMAL A DENIAL**, the **USPS** points to the **PLANT AWARD** as being dispositive on the issue regarding the failure to meet at **INFORMAL A**, whereby Arbitrator **PLANT** states:

> "The Step 2 Grievance Appeal form (among other items covered on the form) records the details of Step 1 and based on those details the advancement to Step 2. This is consistent with industrial justice principles of grievances being settled at the lowest level possible between the two people who have the most knowledge of the situation, i.e. the employee and/or Union, and the employee's immediate supervisor. And consistent with Article 15 Section 4 Grievance Procedure In General:
>
> > 'The parties expect that good faith observances, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end [emphasis in original document].' (***See***, **CBA - ARTICLE15.3.A.**, p.71; ***See***, ***Also***, **JCAM ARTICLE 15.3.A.**, p.15–10 [citation added].)
>
> The Agreement says there can be no appeal to Step 2 (with the exception of Articles 2 and 14) ***without an adverse decision from an immediate supervisor at the conclusion of a Step 1 meeting*** [emphasis added]. ***It is interesting that nowhere in the Grievance package is there any record of what the outcome of the alleged Step 1 meeting was*** [emphasis added]. Nor was there any discussion of this element at the hearing. [19]

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19. I find no such language in the **CBA** or **JCAM** mandating a "***an adverse decision from an immediate supervisor at the conclusion of a Step 1 meeting***". The relevant **CBA** and **JCAM** language references "no resolution" and "appeal". For example, it's entirely possible that a grievance would be accepted by the **USPS** supervisor; and yet, the specific **AWARD** remaining reserved for appeal—which, in my estimation, is not an "***adverse decision***".

Furthermore, I find no such requirement for a ***"record of what the outcome of the***

> The instant case Grievance form clearly states that one day prior to the alleged Step 1 meeting, the Union advanced the Grievance to Step 2. ***It proceeded first to Step 2 and then receded to Step 1***. ***The Agreement does not allow for that*** [emphasis added].
>
> Article 15 is crystal clear plain language that progressively states as its first step, an employee and/or the Union must discuss the grievance with the employee's immediate supervisor. ***Only after the Union has received the immediate supervisor's adverse decision may it advance the Grievance to Step 2***. ***Section 4 B of the Article states*** [emphasis added]. 'The failure of the employee or the Union in Step 1 or the Union thereafter ***to meet the prescribed time limits of the Steps of this procedure*** [emphasis added] including arbitration, ***shall be considered as a waiver of the grievance*** [emphasis added]. 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'. My analysis is that the onus or burden during the grievance process is first placed on the Union. Having failed to meet its obligations at Step 1 by document and deed, the Union has waived its grievance rights in the instant case. ***This analysis renders any further considerations moot*** [emphasis added]." ***See***, **PLANT AWARD**, C00C-4C D02218005, Chapel Hill, North Carolina, (May 22, 2003); p.9; ***See***, ***Also***, **DRT CASE FILE**, pp.950-959; **See**, ***Also***, **USPS FORMAL A DENIAL - DRT CASE FILE**, pp.865-866.

I agree with my esteemed colleague that when entering into the **CBA** and **JCAM**, the parties intended that the grievance process would more often than not result in resolution of disputes; or, at the very least, render arbitration as a last result after all other reasonable attempts have failed. In support of this mutual understanding, I acknowledge that the **JCAM** tracks this contractual intent of resolution, and states in pertinent part:

> "During the Informal Step A discussion ***the supervisor and the steward*** (***unless the grievant represents themself***) ***have the authority to resolve the grievance***. (emphasis added). Both parties must use the JCAM as their guide to the contract. A resolution at this informal stage does not establish a precedent. While either representative may consult with higher levels of management or the union on an issue in dispute, ***this section establishes that the parties to the initial discussion of a grievance retain independent authority to settle the dispute***." [emphasis added]. ***See***, **JCAM**, Article 15.2, Informal Step A (b), p.15-3.

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alleged Step 1 meeting was*"*—however, the parties may "***memorialize the resolution***" on the Form 8190.

"If the parties are ***unable to resolve the grievance*** [emphasis added] during the Informal Step A meeting..." ***See***, ***Id***., at Informal Step A (c), p.15-5.

"...The parties' representatives at Formal Step A ***shall have the authority to settle or withdraw grievances in whole or in part***."... [emphasis added]. ***See***, ***Id***.

"...***Resolutions and withdrawals at Formal Step A*** (emphasis added) do not establish a precedent unless the parties specifically agree otherwise or develop an agreement to dispose of future similar or related problems. ***If the grievance is resolved***, (emphasis added) copies of the resolution must be sent to the steward and supervisor who discussed the grievance at Informal Step A." ***See***, ***Id***., at Formal Step A (e), p.15-6.

"**Appeal to Step B.** If the grievance ***is not resolved at Formal Step A***,...[emphasis added]. ***See***, ***Id***., at Formal Step A (f).

"**Step B—*Dispute Resolution Teams*.** (emphasis added). The Step B teams each consist of two Step B representatives—***one appointed by the NALC and the other by the Postal Service. Appeals of unresolved cases at Formal Step A are made in writing to the Step B Dispute Resolution Team***. [emphasis added]. ***See***, ***Id***., at Step B (a), p.15-7.

"**Review**. The Step B representatives ***work together in pairs and attempt to resolve grievances jointly***....**Resolve*. A resolved Step B decision may be a compromise settlement***,..." [emphasis added]. ***See***, ***Id***., at Step B (c), p.15-8.

"The decisions of arbitrators are final and binding. ***Arbitration is the last step of the grievance/arbitration procedure and there are no further contractual avenues for management or the union to challenge or appeal an arbitration award***. ..." [emphasis added]. ***See***, ***Id***., at Article 15.4.A.6, p.15-15.

I also agree with Arbitrator **PLANT** whereby she suggests that failure to timely comply with the Article 15 Steps could rise to a "substantive arbitrability" question—and perhaps, rendering presented **STEP B** issues moot. However, it's at this juncture that I part ways with Arbitrator **PLANT** and the **USPS**, and further distinguish my interpretation of the relevant Article 15 concerns raised by the **USPS**—more specifically, issues relating to the **INFORMAL A** meeting.

It appears to me that Arbitrator **PLANT** views a "timeliness" objection as being one

in the same as a procedural objection—such as the failure to meet at a particular Step. To me, ***the two are totally different arguments that have yet to be merged by any National Level Award or other specific contractual language***. A "timeliness" objection, as raised in an Article 15 process, specifically relates to the issue of whether a grievance is untimely appealed in the various Steps—and is more closely aligned with a Statute of Limitations concern (a substantive concern). These time bars, if proven, ***would*** typically render the issues in a grievance moot—and as far as I can tell, are strictly and universally applied. On the other hand, a "failure to meet" objection is a "procedural" question—and may not, in and of itself, render the case moot for all purposes. Allow me to explain.

When determining whether a "failure to meet" would automatically bar further consideration of the grievance, (pursuant to the theory of "timeliness" as contained in Article 15), I must consider the application of such a ruling to other possible scenarios that could arise in future. For example, if I were to determine that the alleged "failure to meet" in this case bars further consideration, then conceivably I would also bar other grievances for "failure to meet"—even if the "failure" falls directly upon the **USPS**. In yet another grievance, both parties may each be "partially responsible" for the "failure to meet". Would I then bar the grievance from further consideration? Although these examples are extreme in their possibilities, I strongly feel that such situations could arise and cause absurd interpretations if I were to rule as the **USPS** request. In other words, the issue of "failure to meet" requires resolution of a number of factual questions, and cannot be neatly placed in a box as a "timeliness" objection would be. Moreover, I will not reach out on the limb to grab such poisonous fruit as the **USPS** and Arbitrator **PLANT** argues—as it is procedurally ridiculous to interpret the specific language of the **CBA** and **JCAM** to include a "failure to meet" objection within the rules pertaining to "timeliness of an appeal". In other words, the parties may fail to meet at one of the prior Steps in the grievance process, and yet, still comply with the "Statute of Limitations" portion of the rule. Moreover, the **JCAM** appears to support my interpretations above and states:

> "**Warning.** Article 15.3.C can easily be misunderstood. It does not mean that grievances are automatically appealed if management fails to issue a timely decision. Rather, if management fails to issue a timely decision (unless the parties mutually agree to an extension), the union must appeal the case to

> the next step within the prescribed time limits if it wishes to pursue the grievance. In cases where management fails to issue a timely decision, the time limits for appeal to the next step are counted from the date management's decision was due." ***See***, ***Id***., at Article 15.3.C., p.15-11.

In this case, the **USPS** argues there was no **INFORMAL A** meeting; however, their supervisor signed the Form 8190 attesting to the meeting of October 26, 2021. Additionally, the **USPS FORMAL A** Representative states: "***Prior to Formal A meeting*** [emphasis added] *the 8190 only identified the East Lamar Station* ***when discussed*** [emphasis added] (*sic*) *only the office wide was added*." ***See***, **DRT CASE FILE**, p. 1302. Adding to the confusion is the e-mail exchange between **MR**. **VACCARELLA** and **MR**. **ANDERSON**, whereby **MR**. **VACCARELLA** states: "***You are now involved as you signed off on the 8190 as the Informal A Representative*** [emphasis added]...***As the manager who signed off on the 8190*** [emphasis added] *you still need to answer what I need below including what the union requested remedy* (*sic*)". ***See***, ***Id***. at pp.888-892. The **USPS** further argues that after the alleged **INFORMAL A** "meeting", they produced over 6,000 pages to the **NALC**. ***See***, ***Id***. at p. 1308. This, in and of itself, supports the proposition that the **USPS INFORMAL A** supervisor could have recognized the level of complexity of the issues and evidence in this grievance; and thereafter, sent the grievance up the ladder for a more formal response. All of the above leads me to conclude that the **USPS** should be estopped from presenting the "failure to meet" issue at arbitration based upon their prior conduct.

Furthermore, I have no idea how **INFORMAL A** meetings are typically held. Are refreshments provided? Do the parties have an agenda typed out to strictly follow? Do the parties and representatives put on their Sunday best for such a meeting? Are there minimum time limitations for such meetings to be considered a "meeting"? I do not believe that I, or anyone else, could answer the above questions in a yes or no fashion from installation to installation—and thus the name of the meeting being labeled "**INFORMAL**". The logical answer to the questions, in my estimation, lies within the accepted practice within each installation—and according to the allegations contained within the grievance. Considering the above, I believe it is impossible to pre-determine what a "meeting" would look like from case to case, (more especially in this case)—and it's quite possible that an

INFORMAL A meeting would be nothing more than signing off on the PS8190 grievance Form. Finally, I do not think it is appropriate for an arbitrator to substitute his or her judgment as to what constitutes a "meeting" in a particular case—or worse still, attempt to assume what the parties "really intended" when advancing the case. Therefore, I would caution each representative not to sign any form that contains incorrect information—for such authorization or approval, ***without a showing of fraud***, should be interpreted and used to establish intent or factual sufficiency at the time of the signing, (as I do herein). [20]

I also note that when deciding Preliminary Issues, I must consider whether the parties attempted resolution of the dispute prior to the question being placed before your arbitrator. This, in my opinion, is an absolute requirement in order to mitigate the objecting party's possible damages. For example, if the "failure to meet" argument resulted in the **USPS** not being able to resolve the issue at the lowest possible level, I believe it would be prudent to seek intervention by the **STEP B TEAM**—such as requesting that the case be remanded back down to fully develop the case (including possible resolution). I cannot find in the Arbitration Record where the **USPS** made subsequent demands of the **STEP B TEAM** that the case be remanded so that full participation could be had at the **INFORMAL STEP A**—including, but not limited to, resolution.

I have one last point to make when deciding the "substantive arbitrability" nature of the **USPS** objection of "failure to meet". If I were to interpret the "failure to meet" in conjunction with the "timeliness" objection as argued by the **USPS** and Arbitrator **PLANT**, I notice one specific flaw that would bar the issue altogether. The **JCAM** specifically requires:

> "***If management fails to raise the issue of timeliness, in writing*** [emphasis added] at Formal Step A, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, ***it waives the right to raise the issue at a later time*** [emphasis added]. Management's obligations depend upon the step at which it asserts the grievance was untimely.
>
> ***If management asserts that a grievance is untimely filed at Informal***

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20. The same analysis applies to the alleged insertion of "City-Wide" into the Form PS8190.

> ***Step A, it must raise the issue in the written Formal Step A decision*** [emphasis added] (because Formal Step A is later than Informal Step A) or the objection is waived. ***It is not sufficient to assert during the Informal Step A meeting that a grievance is untimely*** [emphasis added].
>
> If management asserts that a grievance is untimely at Formal Step A or later, it must raise the objection in the written decision at the step at which the time limits were not met. ***Vague references do not rise to the level of notice relating to a timeliness objection*** [emphasis added]." ***See***, **JCAM**, Article 15.3.B., p.15-11.

I interpret the above to mean that a "timeliness" objection requires ***specific notice***, and I need not reiterate the **CBA** and **JCAM** Articles cited above. Suffice for me to point out that in their **FORMAL A DENIAL**, the **USPS** did not specifically raise the "failure to meet" objection within their Notice of the "timeliness" objection (if they are one in the same as the **USPS** argues)—and, therefore, such objection would be barred at arbitration. Instead, the **USPS** states:

> "Management request the Union to be given instructions that when discussing grievances and appealing grievance (*sic*) at Informal A and Formal A documentation supporting their allegation be presented in order for Management to be given the right to settle at the lowest level." ***See***, **DRT CASE FILE**, **USPS FORMAL A DENIAL**, p.877.

While I recognize that the **USPS FORMAL A DENIAL** discusses in great lengths their concerns and how they interpret Article 15, I do not see any language giving "specific notice" that they intend to raise the issue of "failure to meet" going forward. This leaves me to conclude that at the very least the **USPS** should be estopped, once again, from objecting to the formalities of an **INFORMAL A** meeting.

Unlike equitable estoppel, quasi estoppel requires no showing of a false representation or detrimental reliance. "***Quasi estoppel***" is a legal theory that would cut-off certain legal arguments relating to the prohibition of an opposing party to proceed with their case (such as a contract provision that would bar further consideration of an issue; or, a common law theory that would bar further consideration or ruling on an issue presented). The "*quasi-estoppel*" theory essentially states that a party advancing a legal principal or theory is estopped from bringing such an argument, (*i.e.*, "failure to meet" objection), due to the advancing party's previous actions in reliance upon the barring

conduct or omission. Therefore, the application of "quasi-estoppel" would necessitate a resolution of the issue: whether the application of the barring doctrine, statute, or other common law theory is unconscionable based upon the moving party's prior position that is inconsistent with the one subsequently advanced—more especially, is there is proof of an objecting party's prior ***ratification***, election, acquiescence, or accepted benefit (*i.e.*, signatures on the PS8190 Form) relating to the complained of conduct or omission?

Considering the above, I can only conclude that the thrust of the **USPS** objection relating to "failure to meet" is a procedural question outside of the understandings of "timeliness". Furthermore, I find that raising such an objection is legally unconscionable considering the totality of the above discussions—and therefore, wholly without merit.

> **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the "failure to meet" at the **INFORMAL A** Step, as well as all other **USPS** procedural objections as to the Form 8190 in this case, are denied—*and in total*.

C. ***STEP B TEAM Issue(s)*** -

I have previously held that "an arbitrator lacks complete and absolute authority to formulate the issue(s) in a grievance presented"; and, "...the thrust of the complaints must be gathered from the entire record (Appellate Record), including, but not limited to, the **DRT CASE FILE**.". ***See***, **SOILEAU AWARD**, Meyer, E16N-4E-C 17216750, p.7. In other words, the contested issues in any grievance should be determined based upon a full and complete presentment of the factual and legal contentions by the parties to the **STEP B TEAM**. If the **STEP B TEAM** fails to ensure the proper application of this rule, then it follows that the presentment of the case to the **STEP B TEAM** could be premature or incomplete—and resolution at the **STEP B** level would be difficult, if not altogether impossible (and this incomplete result in conflict with the **CBA** and **JCAM** provisions regarding settlement). ***See***, *supra*. In furthering this analysis, poorly drafted issues presented to arbitration forces arbitrators into an oversight role that is imposed upon the **STEP B TEAM** by the **CBA** and **JCAM**—as arbitrators have no authority to remand the case back to the **STEP B TEAM** or any other Article 15 Step. ***See***, **CBA**, Article 15, Section 2. Step B (**c**), p.69. After reviewing the entire record in this case, I find no reason

not to follow my prior analysis. Therefore, I will modify and reform the issues presented in this case so that the mandates and understandings of the **CBA** and **JCAM** are applied to the ultimate resolutions in this case; and further, to ensure that generally accepted arbitration procedures are followed. However, modification or reformation of the presented issues herein will be limited to accomplish the minimal mandates and understandings discussed above, as arbitrators should caution against interjecting their independent interpretations and understandings of the issues contained within the Appellate Record at this initial step.

The **STEP B TEAM** presented the following issues:

> "**1**. Did Management in the Memphis Installation violate the Joint Statement on Violence and Behavior in the Workplace, the Postal Service's Policy on Workplace Harassment, the Tennessee District Workplace Violence/Zero Tolerance Policy, Section 115.4 of Handbook M-39 and ELM Section 665.24 via Articles 14, 15 and 19 of the National Agreement by the environment that has been created and condoned in the Memphis Installation, and if so, what should the remedy be?
>
> **2**. Did the USPS Tennessee District, specifically District Manager Chris Alexander, violate the Joint Statement on Violence and Behavior in the Workplace, the Postal Service's Policy on Workplace Harassment, the Tennessee District Workplace Violence/Zero Tolerance Policy, Section 115.4 of Handbook M-39 and ELM Section 665.24 via Articles 14, 15 and 19 of the National Agreement by the environment that has been created and condoned In the Memphis Installation, and if so, what should the remedy be?
>
> **3**. Did Management violate Article 15.3 of the National Agreement along with M-01517 by failing to comply with numerous grievance settlements in the case file, and if so, what should the remedy be?
>
> **4**. Did Management violate Article 3 of the National Agreement by the manner in which they hire and train new employees, and if so, what should the remedy be?" ***See***, **DRT DECISION**, p.2.

I have said before that "issue(s)" advanced to arbitration should not contain dispositive findings of the factual and legal allegations and contentions raised by the parties. When mandating that the parties issue "a joint report" and "ensure that the facts and

contentions of grievances are fully developed and considered", the **CBA** and **JCAM** suggests that the issues presented for arbitration should be presented as neutral as possible—and otherwise void of factual and legal conclusions and statements unnecessary in stating the issue. ***See***, **CBA**, Article 15, Section 2. Step B (b)(**c**), p.69; ***See***, ***Also***, **JCAM**, p.15-8. In other words, the Appellate Record speaks for itself—and further outlining of factual and legal contentions within an issue are deemed unnecessary and inappropriate. Of course, an exception to the above rule would include, ***in very limited situations***, certain undisputed factual or legal conclusions that are necessary in resolving the contested issue—and further agreed to by the parties. If this were not the rule of construction of issues, then the arbitrator would have to take the "factual statements" and "legal conclusions" contained within the issue as being "true", "correct", and otherwise "dispositive"—even if the referenced factual statements and legal conclusions remain disputed.

Considering the above, I have concerns with the **STEP B TEAM** issues presented in this case containing such dispositive factual and/or legal findings. More specifically, the phrase: "...*by the environment that has been created and condoned In the Memphis Installation*...", (as stated in Issue #1 and #2, *supra)*, would require an initial factual finding ***that there is***, ***in fact***, ***an environment that has been created and condoned within the Memphis Installation***—and before the presentment of testimony, argument, or other authority. [21] In other words, the phrase, as presented, should not be included in the issue before your arbitrator—as such language is potentially a resulting conclusion of the "alleged violations".

I further note that the first two issues presented by the **STEP B TEAM** contain the phrases "Did Management in the Memphis Installation violate..."; and, "Did the USPS Tennessee District, specifically District Manager Chris Alexander, violate...". In large part, I find nothing in this phrases that are offensive to the specific language of the **CBA**, **JCAM**, or the "rule of construction of issues" I discuss above—and obviously both members of the

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21. Stated in context of the overall issue, the phrase implies that the "environment created and condoned" is negative or unauthorized—if such a negative or unauthorized environment were actually "created or condoned".

STEP B TEAM are in agreement with the insertion of this language in Issues #1 and #2, respectively. However, I do not see the need to segregate the complaints into two separate issues as the terms "Management", "USPS Tennessee District", and "District Manager Chris Alexander" are one in the same pursuant to "Article 3". Allow me to explain.

Any and all acts of **USPS** managerial employees, good or bad, are imputed to the organization as a whole. In other words, if one **USPS** managerial employee violates a contractual provision, **MOU**, or other management duty or responsibility, that single employee is not singularly responsible—as the **USPS** as a whole is charged with the responsibility of ensuring contract and management compliance pursuant to Article 3 (up and down the chain of command). When examining Issues #1 and #2 above, the segregation of the issues between various levels of **USPS** management and employees violates the above general understanding. If I were to accept the issues, as presented, it could be interpreted that the **USPS** organization (as a whole) is not responsible for the alleged individual acts—more especially, when the individuals were acting under the color of authority pursuant to Articles 3 or 5. However, my analysis should not be interpreted to suggest that management at certain levels, or other named individuals, did not contribute or participate in the alleged conduct complained of in the filed grievance before me—but to say that the **USPS** is solely responsible for any and all acts of all of its employees. Therefore, individual managerial and employee acts that are in violation of the **CBA** and **JCAM** become factual allegations, and not separate levels of responsibilities. Considering my analysis, there should not be two separate issues—as the ultimate question becomes whether the **USPS** violated the **CBA** and **JCAM** as contained in both Issues #1 and #2.

I would also add that in the Article 15 process, the **CBA** and **JCAM** specifically addresses the authority of your arbitrator to fashion remedies. The **CBA** states:

> "***All decisions of an arbitrator will be final and binding*** [emphasis added]. 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..." ***See***, **CBA**, Article 15, Section 4(A)6, p.74.

The **JCAM** offers expanding language and states:

> "***The decisions of arbitrators are final and binding*** [emphasis added].

> Arbitration is the last step of the grievance/arbitration procedure and there are no further contractual avenues for management or the union to challenge or appeal an arbitration award. The parties have agreed that filing a grievance for the enforcement of an arbitration award is permitted under Article 15 of the National Agreement [emphasis added]." ***See***, **JCAM**, Article 15.4(A)6, p.15-5.

I interpret the foregoing to mean that an arbitrator has authority to fashion remedies based upon the ultimate resolution of the issues presented. To avoid confusion, I will not include a "question" relating to remedies as presented by the **STEP B TEAM**—as such is unnecessary and redundant; and the fashioning of remedies at the arbitration level is clearly within the authority of your arbitrator. If it is determined that a question as to remedies is important or required (or the arbitrator lacks authority to fashion remedies without it), then the Arbitrator's authority to act would be a "jurisdictional" question based upon the formation of the issue. The above discussion, in and of itself, is a sufficient legal reason to exclude such a question from the reformed and modified issue in this case.

I next address Issue #3 as presented by the Step B Team—"*Did Management violate Article 15.3 of the National Agreement along with M-01517 by failing to comply with numerous grievance settlements in the case file, and if so, what should the remedy be*?"

Once again, I have concerns that the statement within the presented issue "...*by failure to comply with numerous grievance settlements in the case file...*" violates my previous analysis. While I understand the purpose of the statement is at the core of the grievance issue, I reiterate that the issue should raise the question—as opposed to stating an affirmative finding. If such a statement is necessary, the issue should be worded "*Did Management fail to comply with numerous grievance settlements in the case file in violation of Article 15.3 of the National Agreement and M-01517*?"

The above temporarily reformed issue first raises the question of whether the **NALC** may bring an Article 15.3 violation. Article 15.3 of the **CBA** states, in pertinent parts:

> "**Section 3. Grievance Procedure—General**
> A. The parties ***expect that good faith observance*** [emphasis added] by their respective representatives, of the principles and procedures set forth above ***will result in resolution of substantially all grievances initiated hereunder at the lowest possible step*** [emphasis added] and recognize their obligation to achieve that end. At each step of the process the parties

are required to jointly review the Joint Contract Administration Manual (JCAM)." ***See***, **CBA**, Article 15.3.A., p.70.

The question of an Article 15.3.A. violation often arises when the **NALC** alleges that the **USPS** failed to comply with the "good faith" principles in the grievance process—such as: a "failure to meet" or "failure to provide requested documents" claim. Moreover, I have yet to come across a grievance that asserts an Article 15.3.A. claim for events occurring ***after*** the grievance has been settled or an Award issued. When reading the specific language of Article 15.3.A., very clearly the thrust of the contract provision addresses the "good faith observances" ***while the case is pending***, and I am reluctant to extend the general understandings as the issue suggest. However, my understanding of the rule should not be interpreted to exclude an Article 15.3 complaint raised as an "ongoing" or "continual" contention, but to say that such an issue would require an initial finding that the **USPS** previously acted in violation of the **CBA** Article as discussed above—and while the prior case was pending.

When reviewing the entire Arbitration Record, I cannot find where the **NALC** has alleged that in a prior case, the **USPS** violated the "good faith" portion of Article 15.3.A. If, however, my research skills have failed me, and the **NALC** has in fact raised the "good faith" argument in a previous case, then I add to my review of Article 15.3.A., (and further find), that the **NALC** has failed to assert (in the case before me) that the **USPS** acted in "bad faith" during the grievance process. ***See***, **NALC CLOSING BRIEF**, pp.15-16. I would note, however, that the reverse is true—in that the **USPS** has raised an Article 15.3.A. allegation against the **NALC** (discussed, *infra*). Considering the above, Issue #3 should not include an alleged Article 15.3 violation.

I next turn my attention to the M-01517 portion of the Issue. Article 19 of the **CBA** and **JCAM** recognizes the contractual enforceability of "handbooks, manuals and published regulations of the Postal Service", and provides:

> "Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions..." ***See***, **CBA**, Article 19, p.89.

"Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement..." ***See***, **JCAM**, Article 19, p.19-1.

Clearly the intent of Article 19 is to incorporate all " handbooks, manuals and published regulations" produced or published by the **USPS** into the **CBA** and **JCAM**—as if they were copied therein, verbatim. When considering M-01517 in a previous case, I reasoned:

"As I stated before, the thrust of Article 15 is resolution of disputes, and it is incumbent upon arbitrator's to protect the sanctity of this process. The **CBA** and **JCAM** provisions contained in Article 15 do not suggest or imply that the **USPS** can ignore the dictates imposed upon them when the mood strikes. If a party to the grievance process fails to show the required respect to the authoritative body and its decisions, the whole process breaks down. This disjointed result was recognized by Former Postmaster General Patrick Donahoe in a correspondence to the **USPS** field offices where he states:

'*Headquarters is currently responding to union concerns that some field officials are failing to comply with grievance settlements and arbitration awards*. *While all managers are aware that settlements reached in any stage of the grievance/arbitration procedure are final and binding*, *I want to reiterate our policy on this subject*.

Compliance with arbitration awards and grievance settlements is not optional. *No manager or supervisor has the authority to ignore or override an arbitrator's award or a signed grievance settlement*. *Steps to comply with arbitration awards and grievance settlements should be taken in a timely manner to avoid the perception of non-compliance, and those steps should be documented*.

Please ensure that all managers and supervisors in your area are aware of this policy and their responsibility to implement arbitration awards and grievance settlements in a timely manner.'" ***See***, **SOILEAU AWARD**; Class Action, E19N-4E-C21245558, pp35-36; ***See***, ***Also***, **USPS POLICY LETTER–M-01517**.

Typically, an M-01517 complaint arises when it is alleged that the **USPS** failed to comply with a "cease and desist", "warning", or other "cautionary" order arising out of a

particular settlement or grievance. Moreover, such a complaint could be raised if the **USPS** was ordered to perform certain acts within a particular time frame—or violations of other specific settlement or Award conditions. In either event, there is a particular "failure" on the part of the **USPS** that triggers the complaint.

When examining Issue #3, I must first recognize that if the **USPS** fails to comply with a grievance "settlement", (or other Award), the **NALC** must raise the issue with the original arbitrator; provided, however, the arbitrator retained jurisdiction. If, however, the grievance was settled prior to arbitration, or the arbitrator fails to retain jurisdiction in a particular case, then the **NALC** must file a separate grievance seeking relief for the complained of conduct. This leads me to conclude that I cannot consider an alleged M-01517 violation as presented in Issue #3. As added support for my conclusions, if I were to determined that an M-01517 violation had occurred as argued by the **NALC**, I would have difficulty in fashioning a remedy that would be separate and apart from the relief requested in Issue #1 and #2 above. Therefore, I conclude that Issue #3 is not properly before me.

Finally, I consider Issue #4 to determine whether I have authority to rule on the complaint as presented. I first recognize that the **USPS** derives its managerial authority from Articles 3 and 5 of the **CBA** and **JCAM**. Article 3 of the **CBA** states:

> "The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
>
> A. To direct employees of the Employer in the performance of official duties;
>
> B. ***To hire***, ***promote***, ***transfer***, ***assign***, ***and retain employees in positions within the Postal Service*** [emphasis added] and to suspend, demote, discharge, or take other disciplinary action against such employees;
>
> C. ***To maintain the efficiency of the operations entrusted to it*** [emphasis added];
>
> D. ***To determine the methods***, ***means***, ***and personnel by which such operations are to be conducted*** [emphasis added];
>
> E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
>
> F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a

situation which is not expected to be of a recurring nature.
(The preceding Article, Article 3, shall apply to City Carrier Assistant Employees.)" ***See***, **CBA**, Article 3, pp.4-5.

The corresponding **JCAM** provides:

"***The Postal Service's exclusive rights*** [emphasis added] under Article 3 are basically the same as its statutory rights under the Postal Reorganization Act, 39 U.S.C. Section 1001(e). While postal management has the right to manage the Postal Service, ***it must act in accordance with applicable laws***, ***regulations***, ***contract provisions***, ***arbitration awards***, ***letters of agreement and memoranda*** [emphasis added]. Consequently, ***many of the management rights enumerated in Article 3 are limited by negotiated contract provisions*** [emphasis added]. For example, the Postal Service's Article 3 right to suspend, demote, discharge, or take other disciplinary action against employees is subject to the provisions of Articles 15 and 16." ***See***, **JCAM**, Article 3, p.3-1.

When previously considering the application and scope of Article 3 to filed grievances, I reasoned:

"I interpret the above **CBA** and **JCAM** provisions to mean that the **USPS** has absolute and complete authority to operate the organization; including, but not limited to, the development of processes and procedures necessary to carry out the organizations missions. At first glance this authority appears to be unlimited, however, the specific language of the **JCAM** (that I must follow), limits the authority of the **USPS**. ***See***, **CBA**, Article 3, pp.4-5. ***See***, ***Also***, **JCAM**, **INTRODUCTION**, p.1. I also note at this juncture that a grievance based solely upon an alleged violation of Article 3 cannot stand, and must have other "***applicable laws***, ***regulations***, ***contract provisions***, ***arbitration awards***, ***letters of agreement and memoranda***" [emphasis added], or other "***management rights enumerated in Article 3 that are limited by negotiated contract provisions***" [emphasis added] at the core of the grievance. In other words, a determination that the **USPS** violated...(***a CBA or JCAM provision***)...as alleged in this case... automatically result(s) in an Article 3 violation—without further consideration or evidentiary proof. ***See***, **CBA**, Article 3, pp.4-5; ***See***, ***Also***, **JCAM**, p.3-1. Therefore, I must consider the applicable **CBA**, **JCAM**, and **MEMORANDUM OF UNDERSTANDINGS** (hereinafter, **MOU**'**S**), in determining whether the **USPS** acted in violation of Article 3 of the **CBA** when denying the **GRIEVANT**'**S** local E-Reassign request." ***See***, **SOILEAU AWARD**, Black, C16N-4C-C1014971, pp.15-16.

I would add to the above discussion that the **USPS** Article 3 authority clearly extends from the Board of Governors of the United States Postal Service to the lowest seniority

USPS managerial employee; and "...*certain management decisions concerning the operation of the business are specifically reserved in Article 3 unless otherwise restricted by a specific contractual provision*." ***See***, **JCAM** - Article 5, p.5-1.

Finally I would note that my conclusions appear to be supported by National Arbitrator, **PROFESSOR**, **MENTOR BERNSTEIN**, in which he wrote:

> "The only purpose the Article [Article 5] 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*** [emphasis added]. 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*** [emphasis added]..." ***See***, **SOILEAU AWARD**; Boyd, 4J 19N-4J-C 21160778; pp97-98.

Without alleging a specific contract violation, I simply cannot arrive at a conclusion that I have authority to scrutinize the hiring and training practices of the **USPS** pursuant to Article 3 of the **CBA** and **JCAM**—and, therefore, the issue is improperly presented to arbitration.

Considering the above, I **RELUCTANTLY** modify and reform the issues presented to arbitration as follows:

> **HOLDING**: The single issue to be resolved in this case shall be:
>
> When acting pursuant to its authority and responsibilities spelled out in the **CBA** and **JCAM**, did the **USPS** violate the Joint Statement on Violence and Behavior in the Workplace, the Postal Service's Policy on Workplace Harassment, the Tennessee District Workplace Violence/Zero Tolerance Policy, Section 115.4 of Handbook M-39, and ELM Section 665.24 via Articles 14, 15 and 19 of the National Agreement?

D. ***Evidentiary Standard*** -

From the beginning of the Article 15 process in this case, the **USPS** has advanced the argument that the grievance is a contract case.

> ("*The Union did not prove a contractual violation*"). ***See***, **USPS FORMAL A CONTENTIONS**, **DRT CASE FILE**, p.875; ("*It is contractual case burden of proof is on Union*, *the Union* ***has the burden of proving by a preponderance of the evidence*** [emphasis added] *that the actions of*

Management of which they complain, constitute a violation of one or more provisions of the National Agreement and/or Handbooks and Manuals. ***The burden of proof remains throughout a case*** [emphasis added] *upon the party affirming a fact in support of his case*. ***The burden of proof itself never shifts*** [emphasis added]. *The original party (in the case Union) asserting a fact* ***keeps the burden of proving his point by a preponderance of the evidence throughout the hearing*** [emphasis added].") ***See***, ***Id***. At p.876; ("*Since the burden is on the union here to establish a contract violation*, *it must demonstrate the existence of a current infraction* [emphasis added].") ***See***, ***Id***. at p.877; ("*In matter of an alleged contract violation*, *the burden of proof is on the Union to establish that the Postal Service violated certain provision of the National Agreement* [emphasis added].") ***See***, ***Id***.

Irrespective of the prior arguments, the **USPS** puts forth the argument in their Closing Brief that the Evidentiary Standard should be "*clear and convincing evidence*", and states:

> "Mr. Arbitrator, the case presented before you is a contract case, with the burden of proof belonging to the NALC. In a case this sensitive, and with requested remedies by the NALC so severe that, if granted, would in essence permanently blackball the affected managers careers, ***the burden of proof relied upon to establish a prima facie case must be nothing less than clear and convincing*** [emphasis added]. A simple preponderance of evidence is not sufficient to support the serious claims of management misconduct." ***See***, **USPS CLOSING STATEMENT**, p.4.

The determination of whether the evidentiary standard should be "*preponderance of the credible evidence*" or "*clear and convincing*" is important to discuss as a Preliminary Issue because the ultimate ruling would dictate the level of proof required to establish a *prima facie case*. Furthermore, I previously discussed the importance of the distinction as to "who carries the burden" in a case presented to arbitration—and I find no reason not to follow my prior reasoning in this case. Therefore, I reiterate:

> "Moreover, it is a widely accepted legal maxim that once a complainant establishes a *prima facie case*, the burden typically shifts to the opposing party to offer:
>
> (**1**) evidence to rebut or diminish the case of the complainant; or,
>
> (**2**) provide a statutory, contractual, or common law basis in avoidance of the complained of conduct.

> "Failure to provide such controverting evidence leaves the fact finder (your arbitrator) with no other choice but to find in favor of the complainant (**GRIEVANT**). This is not to say that the **USPS** cannot put forth a demurred response to a filed grievance, but to stress that such a "wait and see" approach could result in their peril. Considering the foregoing, I find that arbitrators must apply the legal maxim of shifting the burden to the responding party (**USPS**) once the complainant (the **GRIEVANT** in a contract case) establishes a *prima facie case*." ***See***, **SOILEAU AWARD**, Black, C16N-4C-C1014971, pp.21-22; ***See***, ***Also***, **SOILEAU AWARD**, Boyd, 4J 19N-4J-C 21160778, p.27; ***See***, ***Also***, **SOILEAU AWARD**, Class Action, J19N4JC2229908, pp.14-15.

It is well established that in "disciplinary" cases, the **USPS** is charged with the duty to prove their case against the **GRIEVANT**—and the level of proof to establish a *prima facie case* requires a "*just cause*" finding by the ruling authority. Conversely, an alleged "contract" violation on the part of the **USPS** mandates that the **GRIEVANT** prove the contractual violation—and in such cases, "*preponderance of the credible evidence*" is the required level of proof necessary to shift the burden of the case. While I recognize that a *just cause* evidentiary standard is not an accepted standard in a normal court case, I understand that such a standard is clearly defined and accepted in the **CBA** and **JCAM**—and Article 16 specifically authorizes and requires the application of such an evidentiary standard in disciplinary cases. I further recognize the teachings of Professor **MITTENTHAL** whereby he expands on the fluid nature of the *just cause* standard and stated:

> "One important caveat should be noted. "Just cause" is not an absolute concept. ***Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic*** [emphasis added]. For instance, arbitrators ordinarily use a "preponderance of the evidence" rule or some similar standard ***in deciding fact questions in a discipline dispute*** [emphasis added]. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that "just cause" can be calibrated differently on the basis of the nature of the alleged misconduct." ***See***, **JCAM**, Article 16.7, p.16-9.

It follows that the right to open and close the case at the arbitration level depends upon the type of case presented, and who is required to tote the burden—"disciplinary" (**USPS**), or "contract" (**GRIEVANT**). In other words, the **USPS** carries the burden in

"disciplinary" cases, thus having the right to open and close such cases; while the **GRIEVANT** carries the burden in contract cases, and has the right to open and close cases involving potential "contract" violations. However, little has been provided to me in the form of rules or authority to follow when deciding whether a grievance is a "contract" or "disciplinary" case. The only thing that I have that is set in concrete is that the **NALC** filed this grievance—and neither the **USPS**, nor the **NALC**, has suggested, urged, or argued, that any employee should be disciplined. To the contrary, the **USPS** has argued that the **NALC** has not proven that the **USPS** (or any other management employee) has done one thing wrong. This, to me, is foundational, in that the basic propositions discussed above suggests the case can only be considered a contract case (and the application of the heightened standard of "*just cause*" inappropriate).

I have reviewed **MANAGEMENT'S INFORMAL A CONTENTIONS**, the **DRT DECISION**, as well as the **CBA** and **JCAM**, (in great detail), and cannot find any convincing authority, or other reference to a prior argument in this case, that the evidentiary standard should be "clear and convincing". Moreover, the above referenced documents are void of any argument that the case should proceed under a *just cause* standard (recognizing that "*just cause*" could be defined as "*clear and convincing*" pursuant to Professor **MITTENTHAL**). ***See***, ***Id***. However, this does not mean that such an argument on the part of the **USPS** should be summarily dismissed as being in violation of the **MITTENTHAL NEW ARGUMENT RULE**—for in a few limited situations, such an argument could be so clearly accepted by the parties and other National Level Arbitrators that the above rule would be held in abeyance.

Moreover, upon examination of the persuasive authority presented by the **USPS**, I find three arbitrators that mention the application of a "*clear and convincing*" evidentiary standard as argued by the **USPS** in this case—**L**. **KLEIN**, **J**. **KLEIN**, and **DUFFY**. ***See***, **L. KLEIN AWARD**; **MCGEE**, Cincinnati, Ohio; C06N-4C-C 12048460 (04/15/2013); **USPS CLOSING BRIEF**, p.24; ("*The allegations involve serious charges of misconduct and therefore require that the union prove the misconduct by clear and convincing evidence*.") ***See***, **DUFFY AWARD**; **BENNETT**, Pasco, Washington; E98N-4E-C 01032626

(09/14/2001); **USPS CLOSING BRIEF**, pp.21-22; ***See***, ***Also***, **J. KLEIN AWARD #2**, **WONDERLY**, C06N-4C-D 11325171 (06/28/2012); p.11 and ***See***, ***Also***, **J. KLEIN AWARD #3**; **CORUM/CURTIS**, Maumee, Ohio; C11-4C-C 14343185 (03/26/2016); **USPS CLOSING BRIEF**, p.24.

It is an accepted practice within the Article 15 process that the principles of precedent, (as outlined in the **JCAM**), are often applied to prior Awards within the same installation, and less frequently to cases within the same or other regions. Although defining the term "precedent" is important, the circumstances in which a Regional Arbitrator is required to follow a prior Award, or his or her level of reliance upon the prior Award, is less clear.

The answer to the reliance question falls into one of two categories, *i.e.*, non-binding precedent (applied by a ruling authority for its persuasive value); or, binding precedent (applied by a ruling authority as mandatory pursuant to specified rules outlined by the parties). (*e.g.*, "*Resolutions and withdrawals at Formal Step A do not establish a precedent* ***unless the parties specifically agree otherwise or develop an agreement to dispose of future similar or related problems***" [emphasis added]. ***See***, **JCAM**, Article 15.2, Formal Step A(f), p.15-6; ***See***, ***Also***, **AN ARBITRATOR'S USE OF PRECEDENT**, Carlton J. Snow, 94 DICK. L. REV. 665 (1990).

Awards between Regional Arbitrators are generally considered non-binding precedent as each Regional Arbitrator serves on the same level of the **CBA** arbitration scheme—and each Regional Arbitrator is deprived of ruling authority over others at the same level. The common practice, however, is for Regional Arbitrators to accept, ***as particularly significant***, Awards from cases with substantially similar facts and issues—more especially, those Awards arising from cases within the same installation that meet the required factual and issue parameters. It follows that cases within the same region may have less precedential persuasion upon an Arbiter's Award—as well as decreasing value as the cited cases extend beyond the region of the current case. My reluctance in stating a specific rule of precedent is due to the accepted practice within the legal and arbitration arenas that the ruling authorities with the same hierarchical authority, absent a specific rule to the contrary, have autonomy in the confidence he or she places

upon a prior ruling—as failure to apply this rational would strip the Jurist or Arbitrator of his or her reasoned judgment. Furthermore, it goes without saying that an Arbitrator (at the same level of authority) should not be bound by Awards that incorrectly apply (or misinterpret) the authority applicable to the case; for blindly following such Awards would lend itself to absurd results—and perpetuate, perhaps exponentially, a nonsensical legal analysis. Some legal scholars have noted that the reliance upon precedent can be based upon a number of factors such as: [22]

(**i**) the similarities of the factual and legal contentions between the current and cited cases;

(**ii**) the proper analysis and reasoning of the ruling authorities in the cited cases;

(**iii**) the geographical proximity of the cited case to the current case—as it relates to the accepted practices within the area or region of the current case;

(**iv**) the number of cases that follow the analysis and reasoning of the cited case;

(**v**) the number of conflicting Awards regarding similar issues addressed in the cited case; and/or

(**vi**) Due Process and Equal Protections concerns.

With the above understandings, I simply cannot bring myself to follow my noted colleagues and their obscure and unsupported Awards—especially considering Arbitrator **J**. **KLEIN** suggests that a **JSOV** violation must be in the same category, (or the conduct would have the same moral implications), "...*as pilferage, physical assault, dishonesty, sexual misconduct or other offenses involving moral turpitude*...". ***See***, ***Id***. at **NOTE 3**, p.16; ***See***, ***Also***, **J. KLEIN AWARD #2**, **WONDERLY**, C06N-4C-D 11325171 (06/28/2012); p.11; ***See***, ***Also***, **J. KLEIN AWARD #3**; **CORUM**/**CURTIS**, Maumee, Ohio; C11-4C-C 14343185 (03/26/2016); **USPS CLOSING BRIEF**, p.24. Moreover, I cannot find where the Awards were derived from any other accepted legal practice, theory, or other

22. The following list is not all inclusive.

authority. This independent interpretation, without more, distorts the arbitration process—and in my mind, will, (in all probability), lead to further confusion (as was done in this case).

In an effort to clear things up, I note that an "objective" standard or analysis means that there is an established benchmark, measurement, or other specific reference point. For example, the requirement that an **USPS** employee work for a specified number of months or years before reaching a certain seniority or pay grade is an "objective" standard. On the other hand, a "subjective" standard is fluid and does not have specific measurement or value. For example, the level of proof could depend upon the severity of the factual allegation, the particular views of the ruling authority, or other factors that would move the needle on the level of proof continuum. In the Article 15 process, this understanding appears to be limited to a *just cause* finding as contemplated by Article 16 and Professor **MITTENTHAL**.

I also note that an arbitrator sits as a ruling authority with his or her individual knowledge, understanding, judgment, and reasoning. This means that the analysis of the evidentiary standard, (or placing weight on a particular set of facts relating to a specific contract provision), could vary from arbitrator to arbitrator, or case to case, (a "subjective" standard)—but I caution that the swaying of the pendulum between Arbitrators and cases should not be as extreme as that of a tire swing in a Gulf Coast hurricane, irrespective of the "subjective" nature of the analysis. Instead, the pendulum should sway ever so slightly—or said in another way, a reference point or line behind the pendulum would be necessary in order for the average person to fully understand or see the movement of the pendulum. I believe that this understanding and self imposed control when weighing evidence, pulls the "subjective" nature of the evidentiary standard closer to an "objective" analysis—and is more closely aligned with the general understandings of Article 15. Clearly this analysis was not appreciated by my distinguished colleagues **L**. **KLEIN**, **J**. **KLEIN**, and **DUFFY**.

I have said numerous times that "*preponderance of the credible evidence*" is generally defined as: evidence that is credible and relevant in resolution of the ultimate issue(s), as compared and scrutinized against other contradicting testimony or admitted

evidence, and tips the scale when weighed by the fact-finder. Some legal scholars have compared this concept to a 50-50 analysis—plus a feather to tip the scale one way or the other. In other words, in a contract case, I must follow the clear and unambiguous evidentiary standard of "*preponderance of the credible evidence*". However, I recognize that the "scale" example above could be difficult to understand when compared to other evidentiary standards.

Throughout my career, I have heard other seasoned legal practitioners explain to ruling authorities (Judges, Juries, and Arbitrators) that various evidentiary standards are relatable to various heights of fences—the ruling authority determining the necessary height of the fence to satisfy the applied evidentiary standard based upon his or her own knowledge, understanding, judgment, and reasoning of the relevant facts and legal authority presented in each case. In continuing the example, in order to satisfy the particular evidentiary standard, the one carrying the burden of proof must build steps in which to safely cross over to the other side of the fence (establishing a *prima facie case*)—the type, height, and construction of the steps (evidence) depending on the height of the fence (evidentiary standard). In other words, a "probable cause" standard (fence height) most often is placed at a minimum height—and it follows that very little effort and materials (evidence) would be necessary to build steps sufficient to safely cross over to the other side. On the other hand, a "*preponderance of the credible evidence*" standard would require substantially more materials and planning (evidence) in order to construct steps sufficient to safely go up and over the fence—and so forth as the evidentiary standard grows taller (fence height); *i.e.*, "*clear and convincing*", "*just cause*", or "*beyond a reasonable doubt*". [23]

It's also important to remember that an advocate does not know the height that the ruling authority places on the fence for a particular "evidentiary standard", or the quality of the materials and planning necessary to build the steps for a particular type of case. This,

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23. If "*preponderance of the credible evidence*" is defined as 50/50 plus a feather to tip the scale one way or the other", perhaps the fence height in this example would be that of a typical four foot fence. In other words, a lower or higher standard would be clearly visible to the average rancher (or ruling authority) desiring to contain and protect his or her livestock.

according to my understanding, offers the arbitrator more than enough elasticity between the different types of contract cases—thereby rendering various "contract" standards legally ridiculous.[24] While recognizing "the swing of the pendulum" discussion above, these "unknowns" typically result in advocates relying heavily upon prior Awards or Orders of an arbitrator or jurist in order to gain more insight. Moreover, it is a common practice for advocates to "overbuild" and "over engineer" the steps to ensure that they have met their burden of proof. [25] When reviewing prior Awards, however, advocates should consider the following:

> (**i**) whether the issues and authority invoked from a prior case are closely aligned with the case at bar;
>
> (**ii**) whether the analysis of the arbitrator in the prior case is consistent with the analysis of other arbitrators weighing similar factual allegations and issues; and
>
> (**iii**) whether the prior Award properly applied the **CBA**, **JCAM**, **MOU**, and other authority to the factual allegations and issues presented.

Although the application of an evidentiary standard is clearly a Preliminary Issue, the resolution of the issue does not question the jurisdiction of your arbitrator—and therefore, should be reviewed in the light of the **MITTENTHAL NEW ARGUMENT RULE**. As far as I can determine, the phrase "*clear and convincing*" was first raised in the Closing Brief of the **USPS**. ***See***, **USPS CLOSING BRIEF**, pp.4,7,9,10,11,18, and 20. Moreover, the **USPS** prior arguments at the **FORMAL A STEP** states:

> "It is (*sic*) contractual case (*sic*) burden of proof is on Union, ***the Union has the burden of proving by a preponderance of the evidence*** [emphasis added] that the actions of Management of which they complain, constitute a violation of one or more provisions of the National Agreement and/or

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24. Some legal scholars have noted that "*clear and convincing evidence*" is the evidentiary standard necessary for the state to forever remove a child from the care of their parents.

25. I would caution that this general understanding does not mean that an advocate should advance arguments or authorities that are baseless (more especially, Preliminary Issues), or has little or no merit in resolution of the issues presented—for this is taking advantage of the process and exploiting available resources.

Handbooks and Manuals. ***The burden of proof remains throughout a case upon the party affirming a fact in support of his case***. ***The burden of proof itself never shifts*** [emphasis added]. The original party (in the case Union) asserting a fact ***keeps the burden of proving his point by a preponderance of the evidence throughout the hearing*** [emphasis added]." ***See***, **DRT CASE FILE - FORAML A DENIAL**, p.876.

HOLDING: The **USPS** argument that the evidentiary standard to be applied in this case should be "*clear and convincing*" violates the **MITTENTHAL NEW ARGUMENT RULE**; and further, ***is not otherwise supported*** by any credible authority that would void the general understandings and application of the above rule. Therefore, the **USPS** argument is denied, in total—and the case shall proceed as a contract case, and all contested issues shall be decided based upon the accepted evidentiary standard of "*preponderance of the credible evidence*".

E. ***Presentment of the Case*** (***Bad Faith***) -

The **USPS** essentially argues that beginning with the filing of the grievance in this case, the **NALC** has acted in "bad faith" While I am not bashful about resolving contested issues presented to arbitration, I find the issue presented by the **USPS** herein difficult to decide because the issue and arguments themselves fail to:

(**i**) identify or reference the type of Motion the **USPS** is advancing;

(**ii**) identify a specific rule of procedure the **NALC** purportedly violated; or,

(**iii**) identify a specific form of relief sought.

I encourage the parties to consider and follow my previous remarks when preparing and submitting Preliminary Issues to arbitration in the future. Although my concerns directly related to issues advanced by a **GRIEVANT** in the prior cases, I see no reason not to apply the same reasoning to advocates when advancing Preliminary Issues—and irrespective of whether the Preliminary Issue was advanced by the **USPS** or the **NALC**.

"...I have discussed the above concerns before and set forth my thoughts on advancing complaint allegations to arbitration, whereby I wrote:

(**i**) the **GRIEVANT** must allege, clearly and concisely, a violation of the **CBA**, **JCAM**, or other operating manual or procedure. ***See***, **CBA**, Article 19 Handbooks and Manuals, pp.89-90; **JCAM**, Article 19 Handbook and Manuals, pp.19-1-19-4;

(**ii**) the **GRIEVANT** must offer credible and relevant evidence proving the violation occurred to the **GRIEVANT'S** detriment; and,

(**iii**) the arbitrator must be able to fashion an award, monetary or otherwise, that would cure or remedy, (partially, or in whole), the alleged violation.

...When viewing the first step in the analysis process, it must be recognized by the parties that ***all claims and defenses should be firmly grounded in good faith*** [emphasis added]. Failure to apply this good faith rule could reduce the grievance process to absurd and inflammatory claims, and amount to nothing more than throwing a rock at the opposing party. When viewed collectively, the **CBA** and **JCAM** does not support such a mayhem approach to the resolution of disputes. While not holding the advocates to the skill level of a seasoned attorney, I firmly believe the parties can decipher "good faith" as commonly defined.

Likewise, ***the second step in the above analysis would require a good faith approach on the part of the parties when proffering evidence*** [emphasis added]. Simply citing statutes or other authority does not advance the claim. Nor does it help the fact-finder when facts are presented in a global approach. Ideally, a party would cite the alleged violation, legal authority, and then specifically refer to the factual allegations supporting the claim or defense. To do otherwise puts the arbitrator in the position of trying to determine which factual allegation the party intended to associate with each alleged violation or defensive theory. ***In other words, while it is possible (however remote) to randomly fire a round into an old oak tree and hit something for the evening cook pot—its highly probable that such an unreasoned approach will result in going to bed hungry*** [emphasis added].

Once it is established that a contract violation has occurred (as discussed above), the next step in the analysis must be to determine whether an award, as advance by the **GRIEVANT**, could partially or wholly remedy the violation—or otherwise place the **GRIEVANT** in a position he or she would have been in had the violation not occurred. ***It must be noted that the award must have a rational basis to the alleged injury, given careful thought against duplication in remedies or resolutions*** [emphasis added]. ***See***, **SOILEAU AWARD**, Wessler, J16N-4J-C 21071981, pp.15-16; See, Also, **SOILEAU AWARD**, Boyd, 4J 19N-4J-C 21160778,

pp.108-109.

Furthermore, I have reviewed the several **USPS** "bad faith" allegations contained in the Arbitration Record—and in great detail. I find that the only authority cited by the **USPS** to support their arguments of "bad faith" is Article 15.3.A. of the **CBA**, which states:

> "**Section 3**. **Grievance Procedure**—**General**
> A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in resolution of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. At each step of the process the parties are required to jointly review the Joint Contract Administration Manual (JCAM)." ***See***, **CBA**, Article 15, Section 3.A., p.71.

I recognize that the above **CBA** Article might, ***on rare occasions***, be the legal source of a Preliminary Issue, but I cannot extend this possibility to the facts in this case—as such consideration and ruling is unwarranted based upon the prior **STEP B TEAM** inaction. More specifically, the **STEP B TEAM** had the authority to send the case back down for resolution of the issue. This they failed to do, and "passing the buck" to arbitration should not be an accepted practice in the Article 15 process. As I said before, the parties have the right to make demands upon the **STEP B TEAM** in the form of procedural, evidentiary, and discovery rules. While action on the part of the **STEP B TEAM** is not mandatory and must be mutually agreed, the reason for a failure of the **STEP B TEAM** to act could become part of the **DRT DECISION** for the arbitrator to consider, and I have no such evidence before me that the **USPS** made such demands.

I want the parties to completely understand the above discussion. I do not believe that the **USPS** has themselves acted in "bad faith" by presenting the Preliminary Issue to arbitration. I am keenly aware that the presentment of several hundred pages of documents (or two thousand pages of documents, cases, briefs, and arguments) at **FORMAL STEP A** can be overwhelming—as the same happened to me with the Arbitration Record. However, the realities of this case are such that resolution at **INFORMAL STEP A** was all but impossible, and I can only imagine the "wasp nest" we would have to deal with now if the PS8190 supervisor had agreed to the **NALC** demands at such an early stage. I also agree with **MR**. **ATCHLEY** that the rules of arbitration do not require him to

produce all of the supporting documentation at **INFORMAL STEP A**. However, when attempting resolution, surely we all understand that cooperation is necessary—and often such cooperation is not memorialized in specific procedural rules. On the other hand, the **USPS** should recognize that production of such voluminous documentation might become an impossibility considering the strict time constraints contained in Article 15.

I could have very easily ignored the issue altogether. Instead, I chose to write on the subject if for no other reason then to stress that the Preliminary Issue raised by the **USPS** relating to "bad faith" may well be a symptom of the overall problem—without apportioning responsibility to either party at this juncture. With this in mind, I offer the following:

> **HOLDING**: The **USPS** dispositive Motion to Dismiss the grievance based upon the "failure to meet" at the **INFORMAL A** Step, as well as all other **USPS** procedural objections as to the Form 8190 in this case, are denied—*and in total*.

F. ***NALC Dispositive Motions - Colateral Estoppel and Summary Judgment***-

I previously stated that the *Doctrine of Collateral Estoppel* would have been better received if advanced by the **NALC**. Furthermore, I liberally reviewed the Arbitration Record to determine Preliminary Issues that were remotely raised or discussed by the **USPS**—and I reached a final conclusion on those that I identified. In furtherance of my decision in this regard, I determined that the application of Due Process to both parties would demand that I review the Arbitration Record in the same manner on behalf of the **NALC**. I now find that the **NALC** has properly raised Preliminary Issues relating to a Collateral Estoppel bar and request for Summary Judgment.

The **NALC** vehemently asserts that the record contains un-controverted evidence of "continual" and "ongoing" violations of the **JOINT STATEMENT ON VIOLENCE AND BEHAVIOR IN THE WORKPLACE**, the **POSTAL SERVICE'S POLICY ON WORKPLACE HARASSMENT**, the **TENNESSEE DISTRICT WORKPLACE VIOLENCE/ZERO TOLERANCE POLICY**, **SECTION 115.4 OF HANDBOOK M-39** and **ELM SECTION 665.24** as presented in the reformed issue in this case. In furthering these arguments, the

NALC states:

> "The Union made (*sic*) *a prima facia* (*sic*) case through the overwhelming documentation in the case file." ***See***, **NALC CLOSING BRIEF**, p.12; "...and ***Management could never shift that burden back to the Union*** [emphasis added]" ***See***, ***Id***. at p.13; "Management couldn't show the Arbitrator ***that they took the most basic and mandated steps to attempt to correct the environment*** [emphasis added]. The only actions management took were those mandated through the grievance procedure." ***See***, ***Id***.; and "...***the case file speaks for itself*** [emphasis added]. ***The continued and documented history of abuse is not in dispute*** [emphasis added].. Management's inaction regarding getting these supervisors and managers under control is telling. ***Their silence when it came time to defend their actions in the arbitration hearing was deafening*** [emphasis added]." ***See***, ***Id***. at p.13.

As stated earlier in this Award, the advancement of the *Doctrine of Collateral Estoppel* requires an analysis of four necessary elements as applied to the legal authority and factual allegations presented in this case, to wit:

> (**i**) the ruling authority in the prior case had proper jurisdiction to rule on the "issue" sought to be barred from further consideration in this case;
>
> (**ii**) the issue(s) and factual allegation(s) in the subsequent or current case(s) is/are identical to (or mirror imaged of) the prior relied upon case(s);
>
> (**iii**) the party ***against whom enforcement is sought*** in the current case is the exact same party as in the previous relied upon case(s); and,
>
> (**iv**) the previous relied upon case(s) was/were fully adjudicated to resolution—and not necessarily disposed of on preliminary or procedural grounds (or otherwise settled by the parties); ***and the "issue" sought to be barred from further consideration in the current case was considered and ruled upon—and the prior ruling on the "issue" was essential to the prior Award***. ***See***, **SNOW AWARD**, H4-C 25455; ***See***, ***Also***, **SNOW AWARD**, H4C-4H-C 25455, pp.11-12.

On the other hand, Summary Judgment encompasses the understanding that there is no genuine or material issue of law or fact, and that the moving party is entitled to

judgment. Therefore, before a Summary Judgment can be granted regarding an issue presented to arbitration, the arbitrator must examine the entire Arbitration Record to determine:

> (**i**) whether the record supports a finding that the moving party established a *prima facie case*—without additional evidence or argument; and
>
> (**ii**) the responding party has failed to offer an affirmative defense or other evidence, as solely contained in the record, that would defeat the *prima facie case* finding.

I have noted before that the **USPS** can assert a "General Denial" or "Demurred Response" to a filed grievance. In other words, the **USPS** could respond to the grievance by legally saying "so, prove it". However, the way I interpret Article 15, asserting such an initial response would limit the **USPS** at the **STEP B** Step and arbitration level to simply questioning the veracity of the factual and legal assertions advanced by the **GRIEVANT**. Moreover, the specific requirements of Article 15 would restrict the **USPS** from advancing a "General Denial" or "Demurred Response" at the **INFORMAL A** or **FORMAL A** Steps if other relevant facts or evidence is not known or presented by the **GRIEVANT**. Clearly the intent of the above **CBA** and **JCAM** sections is to prevent what is generally called "dirt bagging" in the legal profession. I have said before:

> "Although I agree with the **USPS** that the **NALC** has the burden of proof in this case, I do not accept the globalization of their statement that the factual allegations necessary to prove a disputed issue rest solely upon the moving party. One need not be a legal scholar to understand that the grievance process spelled out in the **CBA** and the **JCAM** is designed for settlement of disputes. It follows, that in any given grievance, each side may have information that is not readily available to the other side, but could have significant impact on the case at bar. Since formal "legal discovery" is not available, both sides have an obligation to *preserve and present evidence* so that a just and right decision can be made, even if such evidence works against their own position or defense. In other words, this is not a game of "hide the ball", and settlement is an integral part of Article 15 of the **CBA**—even if settlement occurs at the arbitration level. Said in another way, after the days work has been completed, the Arizona evening sun (***and now the Bluff City evening sun***) continues to provide sufficient light for the industrious." ***See***, **SOILEAU AWARD**; Meyer, E16N-4E-C 17216750, pp.19-20; ***See***, **Also**, **SOILEAU AWARD**, Boyd, 4J 19N-4J-C 21160778, p.75..19-

20.

I would add to my understandings above that if the **USPS** is aware of ***any factual or legal defense*** regarding an issue presented to arbitration, Article 15 mandates that the evidence or defense be presented—and irrespective of their "defensive strategy" in the case. Furthermore, I have examined the Arbitration Record in this case extensively. My search has revealed that the **USPS** put forth several Preliminary Issues that, if sustained, would wholly or partially absolve them of responsibility regarding the reformed and modified issue in this case—***but failed to present any evidence in contradiction of the NALC allegations regarding the merits of the grievance***. Therefore, I can only interpret this failure to mean that the **USPS** lacked any credible evidence beyond that which was presented in their Preliminary Issues. After careful review, none of the Affirmative Defenses or other Preliminary Issues advanced by the **USPS** were viable as discussed, *supra*. It follows that the **USPS** is now left with a "General Denial" or "Demurred Response", and the response, in and of itself, becomes conclusory that a contractual violation did in fact occur if the **NALC** establishes a *prima facie case*—and further analysis unnecessary (essentially requiring the issuance of a Summary Judgment).

The relevant portion of Article 14 of the **CBA** states:

> "**Section 1**. **Responsibilities**
> It is the responsibility of management to provide safe working conditions in all present and future installations and to develop safe working force. The Union will cooperate with and assist management to live up to this responsibility." ***See***, **CBA**, Article 14, Section 1; p.58.

The **JCAM** adds to the **CBA** as follows:

> "**Section 1**. **Responsibilities**
> It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Union will cooperate with and assist management to live up to this responsibility." ***See***, **JCAM**, Article 14.1; p.14–1.

When viewing the above **CBA** and **JCAM** Sections in light of Article 3, it clearly provides that the safety of all **USPS** employees is the sole responsibility of the **USPS**; more especially, in development of safety procedures and the monitoring of safety conditions and concerns. It's my further understanding that the **CBA** requires that the **NALC**

participate in the execution of the adopted safety procedures and policies—while recognizing the authority of the **USPS** in providing a safe working environment.

I now turn my attention to the Article 19. Article 19 of the **CBA** and **JCAM** recognizes the contractual enforceability of "handbooks, manuals and published regulations of the Postal Service", and provides:

> "Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions..." ***See***, **CBA**, Article 19, p.89.

> "Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement..." ***See***, **JCAM**, Article 19, p.19-1.

Clearly the intent of Article 19 is to incorporate all " handbooks, manuals and published regulations" produced or published by the **USPS** into the **CBA** and **JCAM**—as if they were copied therein, verbatim. Like I stress in the above discussion concerning Article 3, there is nothing contained in Article 19 that can be the source of a free standing grievance. However, the application of Article 19 is different than Article 3 because it simply serves to *incorporate* various **USPS** publications into the **CBA** and **JCAM**. Therefore, if there is a **CBA** or **JCAM** violation, it would be the specific " handbook, manual and/or published regulations" produced or published by the **USPS** that was violated—not Article 19. If, however, the **USPS** attempted to argue that a particular publication is unenforceable, then the ***counter-argument*** by the **NALC** would be that the incorporation language of Article 19 makes it enforceable as a **CBA** or **JCAM** provision. I make this distinction to stress that the reformed and modified issue specifically raises several "incorporated" contractual obligations that the **NALC** claims the **USPS** violated—more specifically,

> "**JOINT STATEMENT ON VIOLENCE AND BEHAVIOR IN THE WORKPLACE**

We all grieve for the Royal Oak victims, and we sympathize with their families, as we have grieved and sympathize all too often before in similar horrifying circumstances. ***But grief and sympathy are not enough***. ***Neither are ritualistic expressions of grave concern or the initiation of investigations***, ***studies***, ***or research projects*** [emphasis added].

The United States Postal Service as an institution and ***all of us who serve that institution must firmly and unequivocally commit to do everything within our power to prevent further incidents of work-related violence*** [emphasis added].

This is a time for a candid appraisal of our flaws and not a time for scapegoating, fingerpointing, or procrastination. ***It is a time for reaffirming the basic right of all employees to a safe and humane working environment*** [emphasis added]. *It is also the time to take action to show that we mean what we say* [emphasis in original text].

We openly acknowledge that in some places or units there is an unacceptable level of stress in the workplace [emphasis added]; *that there is no excuse for and will be no tolerance of violence or any [emphasis in original text]* threats of violence by anyone at any level of the Postal Service; ***and that there is no excuse for and will be no tolerance of harassment***, ***intimidation***, ***threats***, ***or bullying by anyone*** [emphasis added].

We also affirm that every employee at every level of the Postal Service should be treated at all times with dignity, ***respect***, ***and fairness*** [emphasis added]. The need for the USPS to serve the public: efficiently and productively, and the need for all employees to be committed to giving a fair day's work for a fair day's pay, does not justify actions that are abusive or intolerant. "*Making the numbers*" is not an excuse for the abuse of anyone [emphasis in original text]. ***Those who do not treat others with dignity and respect will not be rewarded or promoted***. ***Those whose unacceptable behavior continues will be removed from their positions*** [emphasis added].

We obviously cannot ensure that however seriously intentioned our words may be, ***they will not be treated with winks and nods*** [emphasis added], or skepticism, by some of our over 700,000 employees. ***But let there be no mistake that we mean what we say and we will enforce our commitment to a workplace where dignity***, ***respect***, ***and fairness are basic human rights***, ***and where those who do not respect those rights are not tolerated*** [emphasis added].

Our intention is to make the workroom floor a safer, ***more harmonious***, ***as well as a more productive workplace***. ***We pledge our efforts to these objectives*** [emphasis added]." ***See***, **ARBITRATION JOINT EXHIBIT #4**, M-01242; February 14, 1992. ***See***, ***Also***, **DRT CASE FILE**, p.883.

"**115.4 Maintain Mutual Respect Atmosphere**
The National Agreement sets out the basic rules and rights governing management and employees in their dealings with each other, ***but it is the front-line manager who controls management's attempt to maintain an atmosphere between employer and employee which assures mutual respect for each other's rights and responsibilities*** [emphasis added]." ***See***, **HANDBOOK M-39**, **SECTION 115.4**, p.116.3; and **DRT CASE FILE**, p.922.

"**ELM SECTION 665.24 Violent and/or Threatening Behavior**
The Postal Service is committed to the principle that all employees have a basic right to a safe and humane working environment. In order to ensure this right, it is the unequivocal policy of the Postal Service that ***there must be no tolerance of violence or threats of violence by anyone at any level of the Postal Service***. ***Similarly***, ***there must be no tolerance of harassment***, ***intimidation***, ***threats***, ***or bullying by anyone at any level***. ***Violation of this policy may result in disciplinary action***, ***including removal from the Postal Service***." ***See***, **ELM**, **SECTION 665.24**, p.665.26; and **DRT CASE FILE**, p.923.

"**Postal Service's Policy on Workplace Harassment**
The United States Postal Service (Postal Service™) is committed to providing a work environment free of harassment based upon race, color, religion, sex (Including pregnancy, sexual orientation, and gender identity including transgender status), national origin, age (40 or over), mental or physical disability, genetic information, uniformed (military) service, or in reprisal for an employee's or applicant's complaint about, or opposition to, discrimination or participation in any process or proceeding designed to remedy discrimination. ***The Postal Service's workplace must be one in which all employees are treated with dignity and respect by supervisors***, ***subordinates***, ***and coworkers***. ***Supervisors and managers will take prompt action to prevent***, ***address***. ***and remedy workplace conduct that is contrary to this policy*** [emphasis added].

Prohibited Activities
Harassment is unwelcome verbal or physical conduct, ***which is so severe or pervasive that it interferes with or changes the conditions of one's employment by creating a hostile***, ***intimidating***, ***or abusive working environment*** [emphasis added]. Examples may include, but are not limited to, making offensive or derogatory comments or engaging in physically threatening, intimidating, or humiliating behavior based upon race, color, religion, sex (including pregnancy, sexual orientation, and gender identity including transgender status), national origin, age (40 or over), mental or physical disability, genetic information, past, present, or future

uniformed (military) service, or in reprisal for an employee's or applicant's complaint about or opposition to discrimination or participation in any process or proceeding designed to remedy discrimination. These activities are prohibited by the Postal Service's policy and may amount to harassment in violation of federal antidiscrimination laws. Violation of this policy may result in disciplinary action up to and including termination. The Postal Service is committed to providing Its employees a safe, productive, and inclusive workplace and will tolerate nothing less.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature such as, but not limited to: making or threatening to make employment decisions based on an employee's submission to, or rejection of, sexual advances or requests for sexual favors; deliberate or repeated unsolicited remarks with a sexual connotation or physical contact of a sexual nature that is unwelcome to the recipient; or behavior that creates a sustained hostile or abusive work environment so severe or pervasive that it unreasonably interferes with or changes the conditions of one's employment.

Although not every instance of inappropriate behavior may fit the legal definition of harassment, such behavior in the workplace undermines morale and violates the Postal Service's standards of conduct. Disciplinary action may result even if the conduct does not constitute harassment under the law.

Management Responsibility

All managers and supervisors are responsible for preventing harassment and inappropriate behavior that could lead to illegal harassment, and must respond promptly when they learn of any such conduct. Any manager or supervisor who receives a complaint must see that a prompt and thorough investigation is conducted. Investigations of all forms of harassment must be done in accordance with the "Initial Management Inquiry Process (IMIP)." [emphasis added]. Materials are available In Publication 552, *Manager's Guide to Understanding, Investigating, and Preventing Harassment* (emphasis in original text). ***When harassment or inappropriate conduct is found, managers must take prompt and effective corrective action*** [emphasis added].

Employees Rights and Responsibilities

Postal Service employees who believe that they are the victims of harassment prohibited under this policy (*i.e*., harassment based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity including transgender status), national origin, age (40 or over), mental or physical disability, genetic information, uniformed (military) service,

or in reprisal for an employee's or applicant's complaint about or opposition to discrimination or participation In any process or proceeding designed to remedy discrimination) or who have witnessed such harassment or inappropriate conduct, should bring the situation to the attention of a supervisor, a manager, or the manager of Human Resources. Refer to Publication 553, *Employee's Guide to Understanding, Preventing, and Reporting Harassment* (emphasis in original text) for further information. In accordance with this policy, supervisors, managers, managers of Human Resources, or the next higher level manager (HQ and HQ-field units) are responsible for ensuring that direct and prompt action is taken to investigate and, where appropriate, remedy such misconduct when brought to their attention. The Postal Service will protect the confidentiality of harassment complainants to the fullest extent possible.

Employment discrimination or reprisal for engaging in an Equal Employment Opportunity (EEO)- protected activity is prohibited. Employees may request pre-complaint counseling through the online Postal Service EEO efile application at https://efile.usps.com or In writing by providing their name, Social Security or employee identification number, address and telephone number to: National EEO Investigative Services Office-EEO Contact Center, Post Office Box 21979, Tampa, FL 33622-1979. ***In addition, bargaining unit employees may seek relief through the relevant grievance-arbitration procedures*** [emphasis added] and if applicable, non-bargaining unit employees may use the grievance procedures described in Section 652.4, ***Employee and Labor Relations Manual*** [emphasis in original text].

Allegations involving any possible criminal misconduct should, at a minimum, be reported to law enforcement authorities as fellows: any physical misconduct relating to workplace harassment (i.e any physical assault, threat of a physical assault, or stalking) should be reported to the United States Postal Inspection Service (USPIS); use of any electronic device, computer, or Internet to transmit threatening or harassing communications, obscene or indecent images and materials, should be reported to the Office of Inspector General (OIG).

Reprisal against employees who raise a claim of harassment, report inappropriate conduct, or provide evidence in any investigation is illegal and can result in disciplinary action, and should be referred to the USPIS or OIG as appropriate.

The Postal Service does not tolerate any type of harassment, inappropriate conduct, or reprisal in the workplace [emphasis added]." ***See***, Letter From Megan J. Brennan, Postmaster General, CEO; **POSTAL**

SERVICE'S POLICY ON WORKPLACE HARASSMENT; March 26, 2020; and **DRT CASE FILE**, pp.85-86.

"**Overview of Steps** [emphasis in original text]
When encountering a harassment complaint or situation, ***your role as a manager is to stop, listen, inquire, and try to resolve the harassment complaint*** [emphasis in original text]. Keep in mind that the employee is addressing a sensitive topic.
RESPOND PROMPTLY [emphasis in original text] to the complaint regardless of its form or content. Remember that you could receive a complaint with no prior warning. Any report of harassment is enough to start an inquiry." ***See***, **NALC HEARING EXHIBIT #1**; ***Management's Guide to Understanding***, ***Investigating***, ***and Preventing Harassment*** - GUIDE #1 Respond Promptly, (page number unknown).

"**POST ON ALL EMPLOYEE BULLETIN BOARDS** [emphasis in original text]
Postmaster/Managers: Ensure that employees receive this as a mandatory stand-up talk. This talk can be used as a Daily Plan 5. No certification form is required for this specific talk: however, managers must document locally that the talk has been delivered. [emphasis in original text]

This policy is not new, ***but is being reissued*** [emphasis added].

The Tennessee District is committed to providing a safe work environment for all our employees. ***There is Zero Tolerance for threats, assaults or other acts of violence in our workplace*** [emphasis added]. Making our workplace safe and secure from all types of violence is the obligation and responsibility of all employees. ***Employees are expected to immediately report threats of physical harm or assaults to local management for investigation and action***. ***Management is expected to act on all such reports as well as their own observations of such behaviors*** [emphasis added].

In addition to local management, all threats of physical harm, and assaults are to be reported immediately to the Postal Inspection Service at 877 876-2455, 24 hours a day, and the Tennessee District Threat Assessment Team. The Team Leader for the Tennessee District Threat Assessment Team is the Manager of Human Resources who can be contacted at 615-885-9260, during office hours. During non-office hours and weekends, the POOM and/or Plant Manager needs to be notified. They will advise the Human Resources Manager.

Local management will conduct the investigation into the reported threat or assault. ***This investigation will include statements from the***

employee reporting the threat and all parties**, **including witnesses that may have observed or overheard the incident [emphasis added]. This information will be provided to the Threat Assessment Team for review and consultation. The Threat Assessment Team, in conjunction with the Inspection Service and local management, will assess the immediate risk of potential violence from the individual(s) involved and will develop necessary risk abatement procedures to minimize the chance for subsequent aggressive actions.

Violence is not limited to fatalities or physical injuries**. **We recognize that any intentional words or actions which demean or provoke another can escalate and result in injury if not immediately and appropriately addressed**. **Threats**, **harassment**, **bullying**, **domestic violence**, **stalking**. **intimidation and other forms of behavior and physical violence may**, **if left unchecked**, **result in more serious violent behavior**. **Supervisors**, **managers and postmasters are responsible for recognizing and correcting violations of any of these behaviors**. **Supervisors**, **managers and postmasters should consult with Labor Relations**, **the Inspection Service and the Threat Assessment Team for guidance on any specific situation [emphasis added].

At all times**, **the primary effort will be to ensure the safety of all postal employees [emphasis added]. ***See**, **Tennessee District Workplace Violence/Zero Tolerance Policy***, **DRT CASE FILE**, p.886.

I want to stress the importance of the above "handbook, manual and published regulations" that are "incorporated" into the **CBA**, and ask the parties to consider only the portions I emphasized above—as if it were its own **CBA** or **JCAM** Article. [26]

"*...**grief and sympathy are not enough**. **Neither are ritualistic expressions of grave concern or the initiation of investigations**, **studies**, **or research projects**...**all of us who serve that institution must firmly and unequivocally commit to do everything within our power to prevent further incidents of work-related violence**. **It is a time for reaffirming the basic right of all employees to a safe and humane working environment**.*

***We openly acknowledge that in some places or units there is an unacceptable level of stress in the workplace**...**and that there is no excuse for and will be no tolerance of harassment**, **intimidation**, **threats**,*

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26. I take full responsibility for the summary. Should anyone be offended by my analysis, the parties are free to cite the following as the **SOILEAU WORKPLACE SAFETY AND VIOLENCE SUMMARY**.

or bullying by anyone. We also affirm that every employee at every level of the Postal Service should be treated at all times with dignity, respect, and fairness. Those who do not treat others with dignity and respect will not be rewarded or promoted. Those whose unacceptable behavior continues will be removed from their positions. We obviously cannot ensure that however seriously intentioned our words may be, they will not be treated with winks and nods. But let there be no mistake that we mean what we say and we will enforce our commitment to a workplace where dignity, respect, and fairness are basic human rights, and where those who do not respect those rights are not tolerated.

Our intention is to make the workroom floor a safer, more harmonious, as well as a more productive workplace. We pledge our efforts to these objectives...but it is the front-line manager who controls management's attempt to maintain an atmosphere between employer and employee which assures mutual respect for each other's rights and responsibilities. The Postal Service is committed to the principle that all employees have a basic right to a safe and humane working environment...there must be no tolerance of violence or threats of violence by anyone at any level of the Postal Service. Similarly, there must be no tolerance of harassment, intimidation, threats, or bullying by anyone at any level. Violation of this policy may result in disciplinary action, including removal from the Postal Service. The Postal Service's workplace must be one in which all employees are treated with dignity and respect by supervisors, subordinates, and coworkers. Supervisors and managers will take prompt action to prevent, address. and remedy workplace conduct that is contrary to this policy.

Harassment is unwelcome verbal or physical conduct, which is so severe or pervasive that it interferes with or changes the conditions of one's employment by creating a hostile, intimidating, or abusive working environment. All managers and supervisors are responsible for preventing harassment and inappropriate behavior that could lead to illegal harassment, and must respond promptly when they learn of any such conduct. Any manager or supervisor who receives a complaint must see that a prompt and thorough investigation is conducted. Investigations of all forms of harassment must be done in accordance with the "Initial Management Inquiry Process (IMIP). When harassment or inappropriate conduct is found, managers must take prompt and effective corrective action. In addition, bargaining unit employees may seek relief through the relevant grievance-arbitration procedures

Allegations involving any possible criminal misconduct should, at a minimum, be reported to law enforcement authorities as fellows:

any physical misconduct relating to workplace harassment (i.e any physical assault, threat of a physical assault...should be reported to the United States Postal Inspection Service (***USPIS***). ***The Postal Service does not tolerate any type of harassment, inappropriate conduct, or reprisal in the workplace...*** ***your role as a manager is to stop, listen, inquire, and try to resolve the harassment complaint***.

This policy is not new, but is being reissued. There is Zero Tolerance for threats, assaults or other acts of violence in our workplace. Employees are expected to immediately report threats of physical harm or assaults to local management for investigation and action. Management is expected to act on all such reports as well as their own observations of such behaviors. Local management will conduct the investigation into the reported threat or assault. This investigation will include statements from the employee reporting the threat and all parties, including witnesses that may have observed or overheard the incident.

Violence is not limited to fatalities or physical injuries. We recognize that any intentional words or actions which demean or provoke another can escalate and result in injury if not immediately and appropriately addressed. Threats, harassment, bullying, domestic violence, stalking. intimidation and other forms of behavior and physical violence may, if left unchecked, result in more serious violent behavior. Supervisors, managers and postmasters are responsible for recognizing and correcting violations of any of these behaviors. Supervisors, managers and postmasters should consult with Labor Relations, the Inspection Service and the Threat Assessment Team for guidance on any specific situation. At all times, the primary effort will be to ensure the safety of all postal employees.

In this case, an assertion that the prior complaints are "ongoing" or "continual" centers around the affirmative acts of the **USPS** once they knew, or should have known of the problem. The **DRT CASE FILE** contains several cases dating from September 17, 2015 through April 29, 2022, that should have apprised the **USPS** of the violence and abhorrent behavior on the part of **USPS** employees. Furthermore, "the Notice of such conduct" to the **USPS** is clearly within a zone of reasonableness—and is not so stale or remote as to cut-off the application of the Notice relating to the "ongoing" or "continual" contract violations (as alleged in the filed grievance in this case). More specifically, the parties should closely consider the following:

1. "...***violent environment*** [emphasis added] with Supervisor."

"...maintaining a ***mutually respectful*** [emphasis added] atmosphere between employer and employees." "...***hostile manner*** [emphasis added] contrary to the Service's Zero tolerance policy for violence in the workplace." ***See***, **STEP B DECISION**; C11N-4C-C 15287328 (09/17/2015); p.149-150;

2. "...***cease and desist*** [emphasis added] to Supervisor."...creates a ***hostile work environment*** [emphasis added] by the way she conducts herself on the workroom floor." "...***demeaned and bullied*** [emphasis added] while they are attempting to do their work." "...obligation to ***maintain respect and dignity*** [emphasis added] for all employees." " ***See***, **STEP B DECISION**; Class Action, C11N-4C-C 15260218 (09/18/2015); p.154-155;

3. "...***bullied and harassed*** [emphasis added] grievant when he returned from the street." ***See***, **STEP B DECISION**; C11N-4C-C 16094854 (4/06/2016); p.242;

4. "...maintain an atmosphere of ***mutual respect*** [emphasis added] on the workroom floor." "...***threatened*** [emphasis added] when working in the post office." ***See***, **STEP B DECISION**; C11N-4C-C 16135550 (05/11/2016); p.197;

5. "...maintain an atmosphere of ***mutual respect*** [emphasis added] on the workroom floor." "...refrain from ***demeaning*** [emphasis added] an employee while discussing work performance and will maintain an atmosphere of ***mutual respect*** [emphasis added] in future discussions." ***See***, **STEP B DECISION**; C11N-4C-C 16127375 (05/19/2016); p.201;

6. "...maintain an atmosphere of ***mutual respect*** [emphasis added] ..." "...failure to do so will result in ***escalated remedies to ensure compliance*** [emphasis added] with this directive." "...be ***removed from her position*** [emphasis added] until she has had proper training." ***See***, **STEP B DECISION**; Class Action, C11N-4C-C 16127365 (05/20/2016); p.159;

7. "...maintain an atmosphere of ***mutual respect*** when dealing with each other." "...failure to do so will result in ***escalated remedies to ensure compliance*** with this directive." "...uses her authority to deal with grievant in a hostile manner." "...be ***removed from her position*** until she has had proper training." " ***See***, **STEP B DECISION**; Class Action, C11N-4C-C 16127319 (05/20/2016); p.163-164;

8. "...laid hand on the grievant and did not immediately remove her hands after being asked to." "...maintain an atmosphere of ***mutual respect*** [emphasis added] ." "...put her hands on grievant's shoulders and started to ***push and shove her*** [emphasis added] ..." ***See***, **STEP B DECISION**; C11N-4C-C 16463541 (07/11/2016); p.218;

9. "...***cease and desist*** [emphasis added]..." "...created a ***hostile***, ***intimidating and abusive working environment*** [emphasis added] for the grievant...***threatened the grievant's job***, ***held her against her will*** [emphasis added] in the Manager's office, ***failed to report to the Postal Inspector of the threat on her life***, [emphasis added] put her off the clock for five days for ***leaving under distress*** [emphasis added] and ***belittled*** [emphasis added] her in front of other employees." ***See***, **STEP B DECISION**; C16N-4C-C 18477681 (12/13/2016); p.176-177;

10. "...***cease and desist*** [emphasis added] the practice of instructing and assisting carriers to manually manipulate their actual clock rings to reflect the inaccurate and improper recording of time." ***See***, **STEP B DECISION**; C16N-4C-C 1800928 3 (12/29/2017); p.168;

11. "...treated grievant in a ***disrespectful manner***. [emphasis added] " "...***cease and desist*** [emphasis added] from violating Section 115 of the M-39 Handbook." "...causing a ***hostile work environment***, [emphasis added] and this is not the first time." ".;.constant ***harassment of carriers***. [emphasis added] " "...***intimidate***, ***harass or threaten carriers*** [emphasis added] on a daily basis." ***See***, **STEP B DECISION**; C11N-4C-C 17551720 (09/22/2017); p.171;

12. "...***cease and desist threatening*** [emphasis added] to or disapproving sick leave which has scheduled and approved in advance." ***See***, **STEP B DECISION**; Class Action, C16N-4C-C 18135187 (04/04/2018); p.92;

13. "...***cease and desist*** [emphasis added] in failing to comply with signed grievance settlements." ***See***, **STEP B DECISION**; Class Action: C16N-4C-C 18141397 (04/05/2018); p.246;

14. "...***cease and desist*** [emphasis added] violation of the M-41 Handbook and USPS POM..." ***See***, **STEP B DECISION**; Class Action, C16N-4-C 18177076 (05/02/2018); p.95;

15. "...failed to maintain a ***mutually respectful atmosphere*** [emphasis added] which possibly resulted in injury to the grievant." "...***slammed***

a door in grievant's face [emphasis added] causing injury to her wrist which required medical attention and continued therapy." ***See***, **STEP B DECISION**; Class Action, C16N-4C-C 19030413 (12/13/2018); p.145;

16. "...***cease and desist*** [emphasis added] this practice and is instructed to immediately contact a local inspector or inspector in charge when a postal employee reports a ***threat of death or bodily injury***. [emphasis added] " "...showed no ***regards or concern*** [emphasis added] to the employee's safety..." ***See***, **STEP B DECISION**; C16N-4C-C 19079274 (02/05/2019); p.181;

17. "...***threaten to terminate*** [emphasis added] the grievant for reporting reoccuring on -the-job injury." ***See***, **STEP B DECISION**; C16N-4C-C 19079274 (02/05/2019); p.181;

18. "...***cease and desist*** [emphasis added]" "...bullying, intimidating, harassing, being isrespectful and unprofessional and is exhibiting behavior unbecoming of a Postal employee." ***See***, **STEP B DECISION**; Class Action, C16N-4C-C 119266824 (08/09/2019); p.100-101;

19. "...***harassing***, ***intimidating and threatening*** [emphasis added] Letter Carriers." ***See***, **JOINT STEP A GRIEVANCE FORM**; Class Action, C-398-20-J 20243605 (04/30/2020); p.105-106;

20. "...continues to ***harass***, ***threaten and intimidate*** [emphasis added] the grievant." "...***cease and desist*** this practice." ***See***, **STEP A GRIEVANCE FORM**; C16N-4C-C 20333253 (08/11/2020); p.186-188;

21. ***See***, **PRE-ARBITRATION SETTLEMENT**; Class Action, C16N-4-C 20243603 (10/06/2020); p.104;

22. "...***harassing*** [emphasis added] the grievant for not completing his new assignment in 8 hours." ***See***, **JOINT STEP A GRIEVANCE FORM**; C-792-20-W C16N-4C-C 21042741 (12/10/2020); p.123-124;

23. "...continues to use ***inappropriate behavior***, ***demeaning language and harassing tactics*** [emphasis added] against Letter Carrier." ***See***, **JOINT STEP A GRIEVANCE FORM**; Class Action, C16-N-4C-C (01/05/2021); p.129-131;

24. "...***failing to comply with prior settlements*** [emphasis added]." "...***cease and desist*** [emphasis added] future violations." "... maintain

an atmosphere between employer and employee which assures ***mutual respect*** [emphasis added] for each other's rights and responsibilities." ***See***, **JOINT STEP A GRIEVANCE FORM**; C19N-4G-C 21161620 (03/25/2021); p.137-139;

25. "...***belittled***, ***disrespected***, ***intimidated and was abusive*** to grievant over the workroom floor." ***See***, **JOINT STEP A DECISION**; 4G 19N-4G-C 21275431 (06/24/2021); p.204-206;

26. "...promoting ***violence, making threatening comments and using unprofessional language*** on the workroom floor creating a ***hostile work environment***." ***See***, **JOINT STEP A GRIEVANCE FORM**; Class Action; 4G 19N-4G-C 21396396 (09/22/2021); p.210-212;

27. "...***failing to comply with prior settlements*** [emphasis added]." "...***cease and desist future violations*** [emphasis added]." ***See***, **STEP B DECISION**; 4G-19N-4G-C 22087572 (02/14/2022); **NALC EXHIBIT #2**; and

28. "...failed to maintain an environment of ***mutual respect*** when engaging with Letter carriers..." "...creating a ***hostile and unsafe atmosphere*** on the workroom floor..." ***See***, **STEP B DECISION**; C19N-4G-C 22155291 (04/29/2022); **NALC EXHIBIT #2**.

If the above could somehow be interpreted as a lack of Notice of **CBA** prohibited behavior in the Memphis Installation; or the behavior was not "ongoing" or "continual"; I note the following additional "Notices" the **USPS** received:

1. Petition (with corresponding e-mail) from John T. Walker, Jr. (**NALC** Branch 27 President) to Chris Alexander (District Manager) complaining of Reshia Braswell (signed by 21 **NALC** members at Mendenhall Station). ***See***, **DRT CASE FILE**, pp.132-135;

2. Letter dated October 21, 2021 from John T. Walker, Jr. (**NALC** Branch 27 President) informing the **USPS** that several **NALC** members wanted to meet with District Manager Chris Alexander. ***See***, **DRT CASE FILE**, p.136;

3. Letter dated January 5, 2020 from Steve Lassan (**NALC** National Business Agent-Region 8) to District Manager Chris Alexander and others regarding the work environment at the Mendenthall Station. ***See***, **DRT CASE FILE**, pp.358-359; and

4. Letter dated November 8, 2021 from John T. Walker, Jr. (**NALC** Branch 27 President) to Jason regarding the work environment/climate in Memphis. ***See***, **DRT CASE FILE**, p.862.

Considering the entire Arbitration Record, it is apparent that the **NALC** seeks to bar, pursuant to the Doctrine of Collateral Estoppel, any and all arguments and evidence contesting the "ongoing" or "continual" violations of the **CBA** and **JCAM** relating to workplace violence and behavior. I have considered the application of the required elements to invoke the Doctrine of Collateral Estoppel, and see no reason to revisit Element #1, #3, and #4. Upon review of Element #2, I note that, taken collectively, the complained of conduct in the prior cases is an exact duplicate of the conduct complained of herein—and more importantly, the **USPS** has not taken one affirmative Step to reduce or stop the violence and other prohibited conduct in the Memphis Installation. Therefore, I issue the following:

HOLDING: The **USPS** is barred from advancing any evidence or argument that the complained of conduct is not "ongoing" or "continual".

I now consider whether a Summary Judgment on the single issue presented to arbitration is warranted. I find that the entire Arbitration Record contains more than sufficient evidence to establish a *prima facie case* that the **USPS** did in fact violate the several **CBA** provisions contained in the reformed issue. I further find that the **USPS** failed to offer any credible evidence to question the truthfulness or veracity of the evidence contained in the Arbitration Record—and the **NALC** engineered and constructed steps of such sufficiency, that I have absolute and complete confidence in my safety as I go up and over the fence of *preponderance of the credible evidence*. Therefore, I further issue the following:

HOLDING: The **NALC** request for Summary Judgment relating to the reformed issue in this case is **GRANTED**, and in its entirety.

Further Award based upon the rulings herein will be forthcoming.

By: */S/ Troy D. Soileau*
TROY D. **SOILEAU**, Arbitrator