

FREDERICK P. KESSLER
ARBITRATOR
REGULAR PANEL
DAKOTA DISTRICT

In the Matter of the Arbitration
Between

UNITED STATES POSTAL SERVICE

and

Joyce Neuschwander Grievance
Case No. I98C-4I-C 01068905

AMERICAN POSTAL WORKERS
UNION, AFL-CIO

APPEARANCES

For the Postal Service:

Nels Truelson, Labor Relations Specialist

For the Union:

Lyle Krueth, National Business Agent

PLACE OF HEARING

West Fargo, ND

DATE OF HEARING

July 24, 2001

DATE OF AWARD

November , 2001

RELEVANT CONTRACT PROVISION

Article 8.2, 15, and 37

CONTRACT YEAR

1998-2000

TYPE OF GRIEVANCE

Scheduling off days

Award Summary

The Union sought to change the off days of the grievant, a Full-time Regular clerk from Sunday and Tuesday to Sunday and Monday. Management has the burden of showing why it is not practical for the grievant to be entitled to a five day work week after a new Part-time flexible employee was hired. They did not meet the burden.


Frederick P. Kessler

Statement of Facts

The West Fargo Postal facility is a small office. It employs six Postal Clerks. Three are Full-time regulars and three work part-time with flexible schedules. Two of the Full-time regular clerks have Saturdays and Sundays off. The grievant, who is the third Full-time regular clerk, has Sundays and Tuesdays off. She starts work at 5:00 a.m. The other two begin at 9:15 a.m. All of the Part-time Flexible clerks start at 5:00 a.m. All of the Part-Time flexible clerks work on Saturdays with the grievant. The grievant began working as a Full-time Regular clerk for the Postal Service on July 10, 1997.

When the grievant applied for the Full-time Regular clerk position, there were only five clerks assigned to the West Fargo facility. On September 23, 2000, a sixth position was created. Part-time Flexible employee Brian Horn was hired for that job. The new Full-time Regular position was posted with the proviso that the employee would have Tuesdays and Saturdays as off days. The Union did not object to the proviso at the time the position was created.

In the fall of 2000, the Postal Service advised the Union that it was installing a FSM 100 machine in the Fargo Office. As a result of that equipment addition, it would be sorting West Fargo flat mail in the Fargo Post Office.

On November 3, 2000, the Union asked the Postal Service management to repost Joyce Neuschwander's Full-time Regular position to allow for consecutive days off because of the creation of the new Part-time Flexible position. The request was denied. On November 16, 2000, the Union filed a grievance. It was denied on January 4, 2001. After completing the contract mandated steps, the matter was submitted for arbitration on April 24, 2001.

Labor Agreement Provisions

Article 8.2C of the Labor Agreement provides as follows:

ARTICLE 8 HOURS OF WORK

Section 2. Work Schedules

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

Article 15 of the Labor Agreements relates to the grievance procedure. It provides as follows:

**ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE**

Section 2. Grievance Procedure Steps

(a) Any employee who feels aggrieved must discuss the grievance with the employees 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. The employee, if he or she desires, may be accompanied and represented by the employees steward or a Union representative. The Union also may initiate a grievance at Step 1 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....

Article 37, Section 3.A. 4 relates to changing schedule days. It provides as follows:

**ARTICLE 37
CLERK CRAFT**

Section 3. Posting, Bidding and Application

A. Newly established and vacant Clerk Craft duty assignments shall be posted as follows:

* * * *

4. Reposting

- a. When it is necessary that fixed schedule day(s) of work in the basic work week for a duty assignment be permanently changed, the affected assignment(s) shall be reposted.
- b. The determination of what constitutes sufficient change of duties, principal assignment are or scheme knowledge requirements to cause the duty assignment to be reposted shall be a subject of negotiations at the local level

Position of the Union

The Postal Service's claim that the grievance was not timely filed is without merit. The Postal Service argues that it should have been grieved within fourteen days of the original posting. However, since that time the work load and employment requirements have changed in West Fargo. Every day in which "facts" have changed constitutes a new and continuing violation. The Union could not have known what work demands would occur three years later, after the position had been initially posted

The Postal Service decided that additional help was needed in West Fargo. It hired another Part-time flexible clerk. That was a new and unforeseen fact in 1999. The Union could not have known that a new Part-Time Flexible employee was needed, or that a new FMS 100 machine would be installed in Fargo, or that these changes would have an impact on the need for employees in 2000.

The Labor Agreement provides that the normal work week for an employee is five consecutive days. Under certain circumstances that is not always possible. But management must accommodate consecutive work days for employees "as far as practicable", under the Labor Agreement.

It is "practicable" to change the work week to consecutive days. Installation of the FSM 100 has reduced the amount of flat volume work on both Saturdays and on Mondays in West Fargo. Mondays are now substantially the same as Tuesdays or any other days of the week.

The Full-time Regular Clerk position should be reposted, with a work schedule of five consecutive days. Neuenschwander should be made whole for the days she should have worked but for the new position.

Position of the Postal Service

The Union did not file the grievance within the fourteen days required under Article 15, Section 2 of the Labor Agreement. When the position was first created, the Union knew what days off the grievant would have. She chose to apply for the position as posted. The claim that the situation changed because a sixth clerk was added is merely a smokescreen. It is an attempt to make something out of nothing. The new position was created because of overtime demands.

The language of the Labor Agreement refers to the assignment of employees to five consecutive work days "as far as practical". "Practical" does not mean "possible". It means the Postal Service should assign an employee to five consecutive if it is convenient. Management has concluded that it not "practical" to make the changes the Union wants. The Postal Service is not obligated to acquiesce to the request of the Union.

The only days that could be altered in order to give Neuschwander two consecutive days off are Saturday and Monday. Those options are unacceptable to the Post office. Monday has always been the busiest day in West Fargo, as in most Postal facilities. No one is works on Sundays, so the employees must catch up with the extra mail which accumulates. Mondays are also the day with the highest percentage of absenteeism, as people try to overstay the weekend. The Union's argument that Tuesdays are equally busy is not valid. That day is unusually busy only after a Monday holiday.

None of the other Full-time Regular clerks are assigned to work on Saturdays. This means that the office is already operating with only four persons, two-thirds of its clerk craft employees on Saturday. To reduce the workforce to only three of the facility's employees will impair the service that the public deserves.

The new Part-time Flexible clerk was hired by management to reduce overtime at West Fargo. Overtime work requirements are not disproportionate on any particular day. The creation of the new position had nothing to do with work hours scheduled for Saturdays.

The Union has failed to show that the Postal Service had a duty to act to change the grievant's hours. Any remedy suggested by the Union must be rejected because there was no violation of the Labor Agreement. The grievance should be denied.

Decision

When the third Full-time Regular position was created in West Fargo, there were only five employees working at the Post Office. Based on the circumstances then existing there was a need to have at least three clerks at the facility on Saturdays. Sorting flats was a substantial task that required the presence of all five clerks on Mondays. Therefore, it was appropriate to create a position that did not have five consecutive work days.

Workloads change at postal facilities because of technological changes, population growth, and service demands. Metropolitan Fargo has been one of the few areas that grew in North Dakota during the 1990's. That fact was recognized when an additional Part-time Flexible clerk position was assigned to West Fargo, a suburb of Fargo, in 2000.

The change in duties, triggered by hiring an additional Part-time flexible clerk, is sufficient to overcome any timeliness challenge to the grievance. The Union filed the grievance promptly after it became apparent that the work day, and work hours, could be adjusted to accommodate the split off day situation for Newschwander.

The Union argues that evidence of hiring a new Part-time flexible clerk, and the decision in the Fargo Postal facility to sort some of the West Fargo flats with the new FMS 100 in Fargo, was sufficient to compel the Postal Service to show that any change was not "practicable". This evidence alone establishes a prima facie case for requiring a reposting of the position. The burden of going forward now switches to management to show it would not be practicable. Arbitrator Ernest E. Marlatt in Case S4C-3W-C 13587 supports their argument. He wrote:

In essence, the issue comes down to the question of the burden of proof. Initially, the Union has the burden of proof in a contractual dispute, and even Arbitrator Collins assumed that the Union had to prove that it would be "practicable" to establish a bid job with consecutive days off. This, however, is not a correct analysis of the burden of proof. The Union, as the charging party, has the burden of opening the hearing and establishing it prima facie case. The Union did this by proving that the Grievant's work week did not consist of five consecutive days, and that it would be possible to restructure the bid job at the Mt. Dora Post Office whereby the Grievant would be provided an opportunity to bid for consecutive days off. At this point, the burden of proof shifted to the Postal Service to prove that this would not be "practicable." Any party to a contract alleging that its acts fall within an exception to the general terms of the contract must prove the existence of the exception. A well-known example of this occurs in the case of the promotion of an employee with less seniority than another qualified applicant who grieves his nonselection; in such case, the Union has only to prove that its grievant was a qualified applicant and that he or she had greater seniority than the selected applicant. Thereupon, the burden of proof shifts to the employer who must offer evidence to prove that there was "an appreciable difference" in the qualifications of the applicants and that the junior applicant was better qualified than the senior employee.

In this case, the general rule stated in Article 8.2(C) is that employees be scheduled to work five consecutive days. This is a very important contractual right for Postal employees. Almost all private sector employees work a five consecutive day week, even employees who are not represented by Unions. Split nonscheduled days are highly disruptive to family life and personal business. Article 8.2(C) recognizes the need for such consecutive scheduling, but also recognizes that there may be Postal installations which have so few employees that split nonscheduled days are the only practicable way to provide postal services to the public. However, it is up to the Postal Service to establish that service would be impaired. It is not enough to show that consecutive-day schedules would result in the need for more overtime, or would reduce the efficiency of the work force. Article 8.2 (C) does not say that employees will be scheduled to work consecutive days if "convenient" or "economical." It says they will be scheduled to work consecutive days "as far as practicable." The word "practicable" is synonymous with the word "feasible", and although it is not as strong as "possible", it refers to something which can be made to work.

Arbitrator Lamont E. Stallworth, in Case C7C-4J-C-4770 endorses this view. He indicated the Postal Service must show as follows:

Thus, the Service cannot fulfill its burden of proving that it was not “practicable” to schedule consecutive days-off, by relying solely on administrative convenience, efficiency, economy, or the need to reduce overtime. Instead, Management must demonstrate that consecutive days off would actually have a negative impact on its ability to deliver service to the public.

Both the Union and the Postal Service have submitted evidence showing the workloads at West Fargo for Mondays and Tuesdays. There is no argument that Neuschwander should be given a Saturday off day. The only issue is whether her off day could be moved from Tuesday to Monday. The Postal Service contends that the heavier mail volume on Mondays requires her presence on that day. It is inefficient, and would impair the economy of operation at West Fargo, to change her schedule to a five consecutive day work week. They contend that inefficiency is a consideration in scheduling the hours of work for employees in small Post Office facilities.

The Postal Service relies on the decision in Case No. C90C-4C-C 97014511/97014515/966004/966006, where Arbitrator Kathleen Jones Spilker addressed the issue of shifting burden of proof. She wrote as follows:

The Union’s assertion that once a workable alternative schedule is demonstrated, the burden shifts to management to prove that such an alternative schedule was not feasible must be dismissed. Management is not required to demonstrate that alternative schedules are unfeasible in order to meet the requirements of Article 8.2.C. Rather, the only showing that management must make is that a schedule of five consecutive workdays is not practical, taking into consideration questions of efficiency and economy of operation....As long as the schedule change was based on legitimate business and operational considerations, it is a proper exercise under Management’s rights under Article 3.

Arbitrator Irene Donna Thomas, in Case No: A94C1AC98092106-98679, A94C1AC98087849-98653, wrote that the burden of proof did not shift to management, but that a presumption was created instead. The effect of the presumption is as follows:

A presumption imposes on the party against whom it is directed, in this case the employer, the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the grievance procedure upon the union.

A presumption is sufficient to get the union (or the employer if this were an employers breach of contract case) past the initial threshold burden of showing that the employer failed to schedule consecutive days off "as far as practicable." If the employer offers no evidence contradicting this presumed fact, from proof of the basic facts, i.e., an employee has non-consecutive days off and there exists the possibility of an alternative, practical work schedule. Therefore, once the union has made its *prima facie* case, the burden of producing information is sufficient to rebut the union's *prima facie* showing that it was practicable to schedule consecutive days off shifts to the employer. Of course, it would behoove the employer to present sufficient evidence to establish that it met its contractual burden to schedule employees with consecutive days off "as far as practicable."...But the Union retains the ultimate burden to persuade an arbitrator that the employer failed to schedule consecutive days off "as far as practicable".

The Union has shown that there is no significant difference in the clerk's workload between Monday and Tuesday. The Postal Service has shown that Tuesday is the lightest day the week at West Fargo in some weeks. Evidence has also been offered that on some Tuesdays the clerks workload is heavier than on Mondays. The generally lighter load on Tuesdays easily could be adjusted through the assignment of Part-time Flexible employees to work on the days with more mail. Most important, I have not been convinced that the service to the public would be impaired by reposting the Full-time Regular clerk position to a job with consecutive work days.

The Union has convinced me that the third Full-time regular clerk position is entitled to be given a five consecutive work week. The request for the reposting will be granted.

Award

The grievance of the Union is granted. Neuenschwander will be granted Mondays as her off day instead of Tuesday. She will be awarded out of shift pay from the time that the grievance was filed to the date that the new schedule is implemented.

Dated at Milwaukee, WI, this
3rd day of December 2001.



FREDERICK P. KESSLER
Arbitrator