

REGULAR PANEL ARBITRATION
BETWEEN

UNITED STATES POSTAL SERVICE))	Class Action
and)	Ellinwood, KS
)	
AMERICAN POSTAL WORKERS)	E18C-4E-C 20017449
UNION, AFL-CIO)	Union # EL0119
)	

Before: Angela D. McKee, J.D.

Appearances:

For the USPS:	Traci A. Higginbotham, LRS
For the APWU:	Christine Pruitt, APWU Advocate
Location of Hearing:	Great Bend, KS
Date of Hearing:	August 12, 2020
Briefs Received:	August 31, 2020
Date of Decision:	October 1, 2020
Contract Provision:	Article 37, Article 7
Contract Year:	2015-2018
Type of Grievance:	Reversion

AWARD SUMMARY

The grievance is sustained. The Service violated Articles 37 and 7 of the National Agreement when it reverted the NTFT position at the Ellinwood Post Office. The Service failed to provide the Union a reasonable amount of time to provide input in response to its notice of intent to revert the position, where the Postmaster knew that the Local President was on vacation during the period of time it left open for input. Further, the evidence clearly establishes that almost all of the work performed by the NTFT clerk who retired continued to be performed by PTFs after the position was reverted, and where there was sufficient work to support a clerk position of at least 30 hours in the Ellinwood office. The matter is remanded to the parties to formulate and post an appropriate schedule for a 36 hour/wk NTFT position and, because there are no career employees at Ellinwood to bid on the position, the senior PTF at the facility shall be converted into the job. The converted PTF shall be made whole for lost wages and benefits suffered as a result of the Service's failure to convert her rather than reverting the job.

I. ISSUE

Did the Service violate Articles 37.3.A.1, 37.3.A.2 and/or 7.3.B when it reverted Job #70677722 at the Ellinwood, KS Post Office? If so, what is the appropriate remedy?

II. FACTS/POSITIONS OF THE PARTIES

On September 3, 2019, the Service notified the Union, via certified letter, that Job #70677722, a NTFT clerk position at the Ellinwood Post Office, was under consideration for reversion after its incumbent, Marcia Coleman, had retired on August 30, 2019. The letter, which was received by Local Union

President Jennifer Rountree on September 7, 2019¹, stated that a final decision regarding reversion would be made no later than September 28, 2019. Ms. Rountree went on vacation on or about September 8, 2019 and returned from vacation on September 16, 2019. Ellinwood Postmaster Deb Schultz testified that she was aware Rountree was on vacation. On September 17, 2019, Schultz notified Rountree that the position would be reverted.

Ellinwood is a Level 18 facility with a Postmaster, two carriers, two rural carriers, and, prior to Coleman's retirement, a NTFT clerk. Kristi Green worked as a PTF at Ellinwood while Coleman was in her position, and after the job was reverted. Coleman's full-time position was created, and later modified, as a result of a series of grievances filed after the National Agreement created the NTFT position and added language to Article 37.3.A.1 requiring the Service to make "every effort [] to create desirable duty assignments from all available work hours for career employees to bid." Prior to Coleman's retirement, the Ellinwood NTFT clerk worked 6:30 to 11:30 am and 1:00-2:30 pm, Monday through Friday, and 6:30 to 11:00 am Saturday, for a total of 37 hours per week. These hours included 7.5 hours of cleaning each week. PTF Green continued to work hours necessary to supplement Coleman's schedule.

The Union filed the instant grievance on September 27, 2019. During the Step 1 meeting, PM Schultz told the Union that the position was reverted because management needed the flexibility of using two PTFs instead of a full-time employee in order to staff the operation in the "most economical and operationally advantageous manner." The Union submitted a request for information, seeking among other things clerk time cards and schedules for Pay Periods 4 through 19 of 2019. Management provided some, but not all, clerk schedules and time cards that were illegible due to issues with the copier in the office.

After Schultz denied the grievance at Step 1, Rountree emailed the Step 2 appeal form to Doug Howell, as she was instructed to do by Schultz. Howell never responded. A Step 2 meeting was never scheduled. Rountree appealed the grievance to Step 3 and argued that, by failing to hold a Step 2 meeting, the Service was restricted to the contentions it raised at Step 1.

At the hearing, PTF Green testified that after Coleman's job was reverted the Postmaster changed the clerk start time to 6:40, rather than 6:30 am, eliminated one hour of work per week. Otherwise, she said, clerk work hours have not been reduced since Coleman retired. The window remains open from 8:00 am to 4:00 pm, with a 1.5 hour closure for lunch. Green said that, after the window closes, reports must be run carriers cleared, which normally results in the last person leaving at 4:15 pm. Green testified that she works 6:40 to 11:30 am, and another PTF works from 1:00 to 3:00 pm or later.

¹ The letter was mailed to the Great Bend Post Office general address, not to the Union's PO box at Great Bend.

Postmaster Schultz testified that she made the decision to revert Coleman's NTFT position based on data regarding earned hours, which is provided by the district. She explained that reduced mail volume, fewer retail transactions, and more automation have resulted in the Ellinwood office being assigned fewer earned hours for clerks. She acknowledged that, after Coleman retired she requested a second PTF to supplement Green's hours, but did not get one until 2020. Schultz said that Green works 6:40 to 11:30 am, or until 1:00 pm, depending on when she does cleaning. She said that another PTF works either two or three hours each afternoon during the week.

Union Argument

- The Service violated Article 37.3.A.2 by reverting the NTFT position without allowing the Union reasonable time to provide input after being notified of the intent to revert.
- This case is about the retention of a full-time duty assignment, not a maximization case about creating a full-time assignment.
- In a reversion case, the key is whether or not the work previously performed by the full-time incumbent actually went away.
- The evidence shows that, after Coleman retired, the Ellinwood office experienced only a 10 minute reduction in work hours each morning.
- Pursuant to the National Award in Case No. 11311239, the window in an office must be manned the entire time it is open. In Ellinwood, that is 6.5 hours a day, Monday through Friday, and 4 hours on Saturday. Clerks continue to report for work at 6:40 am, six days per week. The Ellinwood office is allotted 7.5 hours of cleaning time each week. This shows that there is more than enough clerk work to support the 37 hr/week NTFT job Coleman previously held.
- The Service's desire to have more flexibility or cost containment by using PTFs is inconsistent with the contractual mandate that it make every effort to create desirable full-time positions from "all available work."
- The facts establish that Management violated the contract and acted unreasonably when it reverted the NTFT assignment vacated by Marcia Coleman on August 31, 2019.
- As a remedy, the Union requests that the reverted position be re-created and assigned retroactively to PTF Green with appropriate compensation for lost wages and benefits.

Management Argument

- Management exercised its right, under Article 37.1.F, to revert a vacant position.
- The JCIM outlines the steps that are required when reverting a position – (1) give the Union the opportunity to provide input prior to making a final decision; (2) make the final decision within 28 days of the position becoming vacant; and (3) post a notice advising of the reversion and the reasons therefore. The Service complied with all requirements.

- There is nothing in Article 37.3.AA.1 that states Management must create duty assignments or that management must post vacant duty assignments. In fact the provisions outlines in Article 37.3.A.1 specifically exclude duty assignments that have been reverted.
- Article 7.3 applies to converting a PTF position to a full-time position, and requires evidence that the PTF works 8 hours within 10 on the same 5 days each week over a six month period.
- The Union has failed to establish that there are at least 30 hours necessary to justify a NTFT assignment.
- Postmaster Schultz testified that she relied on declines in mail volume, retail transactions, and earned hours in coming to the decision that fewer clerk hours were needed to sort and distribute
- In order to prevail on this grievance, the Union must prove that Management's decision to revert was done in an arbitrary and capricious manner. Here, the evidence shows that the decision to revert the position was made for legitimate business reasons in order to maintain the efficiency of the operations in the most economical manner possible.
- The Service allowed the Union ample time to provide input. The Union did not offer input or request additional information from Management.
- The Union failed to provide any evidence that the same amount of work still existed after the NTFT position was reverted.
- During arbitration the Union introduced new evidence that was not presented during the grievance process. This evidence should not be considered by the Arbitrator.
- The grievance should be denied.

III. OPINION

There are two issues raised by the parties at arbitration and in their closing briefs which are not determinative of the final outcome of this case, but which should be addressed before discussing those issues that are outcome-determinative.

First, both parties have asserted that the other side raised new argument at the hearing. The Union's position is that the Service is limited to the arguments it laid out at Step 1 of the grievance process because its Step 2 designee failed to respond to the Step 2 appeal or schedule a Step 2 meeting. The evidence shows that Rountree emailed the Step 2 appeal to Doug Howell – the person who Schultz identified as the Step 2 designee – in a timely manner. Rountree testified that she used the email address provided to her by Schultz. Schultz testified but offered no rebuttal to Rountree's assertion in this regard. It is undisputed that Howell failed to respond. The Service attempts to justify its failure to hold a Step 2 meeting by arguing that there is no evidence Howell ever received or opened Rountree's email, which was sent from an external email account.

The Service has offered no support for the argument that its failure to open correspondence from a Union official excuses failure to abide by the grievance procedures set forth in the contract. The undisputed evidence is that Rountree used the email address provided to her by Schultz, and the Service offered no proof that Howell was not the correct Step 2 designee, or that the email Rountree used was incorrect. I take judicial notice that many Union advocates use non-usps.gov email addresses for their Union business and, again, the Service has not provided authority for the proposition that using an external email address excuses Management from its obligation to be responsive.

The Service argues that the Union attempted to introduce new evidence at the hearing. However, it has not identified the supposed new evidence, other than objecting to Exhibit U-2, which it claims falsely represents actual hours worked by adding leave hours in with hours worked. To the extent the Service is claiming that U-2 is new evidence, I will disclose here that Exhibit U-2 has played no part in my decision in this case – I have relied on the witness testimony.

The second non-determinative issue is the Union's assertion that the Service violated 37.3.A.2 by failing to allow reasonable time for the Union to provide input on the proposed reversion. I find that there was a violation. The Union received the notice from Schultz (which was mailed to a general address, not to the Union's PO box) on September 7. Rountree was either on leave as of that date or left for vacation the following day. The Service notified the Union of its decision to revert – a decision that did not have to be made until September 28 – on September 17, the day Rountree returned from vacation.

Schultz testified that she knew Rountree was on vacation but assumed she would use her time off to provide the Union's input. This seems like a misplaced, if not bad faith, assumption. Although the Service is not required to leave the decision open for a specific period of time, the contract does require it to allow the Union to provide input. Contractual obligations over which Management retains discretion must still be exercised in a reasonable, good-faith manner. Here, the Service did not provide a reasonable time for the Union to respond, given that Schultz knew Rountree was on vacation.

Having found a violation, I am not persuaded that such a finding requires the remedy that the Union seeks in this case – an order that the reversion be rescinded. At most, such a finding would reasonably require remanding the matter to the parties with an order that the Union have a meaningful opportunity to provide input. It seems safe to assume that in this case the Service's ultimate decision would not have changed, based upon its insistence that "earned hours" are the appropriate baseline for deciding whether to revert a full-time position.

In the parties 2010-2015 National Agreement, Article 37.3.A.1 was amended to include the following language: “Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.” Since that time, numerous regular panel arbitrators have determined that the newly-included language requires the Service to make every effort to retain full-time assignments, rather than reverting them, when there is sufficient work to support them, in lieu of relying on PTF or other part time labor to perform the duties previously performed by career employees. *See, e.g.*, Case Nos. J15C-4J-C 17481619 (Stallworth, 2018); C15C-4C-C 17488181 (Licata, 2018). The job vacated by Coleman was a 37 hr/wk NTFT position. The Service argues that decreased mail volume, retail transactions, and “earned clerk hours” designated by the District support its determination that current operational circumstances no longer support the existence of a full-time duty assignment at the Ellinwood office. The Service has not provided any authority for the argument that “earned hours” must be the baseline. Indeed, it is unclear to me what import “earned hours” actually have where, for instance, the number of clerk hours allotted to Ellinwood for window coverage *vastly* undercuts the number of hours that the window is open and, according to Arbitrator Das’ 2013 award, must be manned.

Many of cases cited by the Service involved the question of whether Management was required to create a new full-time position, not whether it was permitted to revert an existing duty assignment. Other cases that did involve reversion were decided prior to the inclusion of the “every effort will be made” language in the 2010 contract, or the creation in the 2010 agreement of the NTFT position, which can consist of fewer than 40 hours per week on a variable schedule. In a 2018 National award, cited by Management, Arbitrator Das highlighted the important distinction, stating that “Article 37.3.A.1 may require the Postal Service to modify and repost an existing duty assignment. The language does not, as the Union contends broadly require that the Postal Service create (and maximize) career duty assignments from available PSE and other work hours . . .” (Emphasis added).

The Service’s characterization of this case as seeking creation of a new career position is misplaced. This is a reversion case, and the issue is whether a career position that existed should have been eliminated. Arbitrators in cases referenced above have made clear that reversion cases are distinct from maximization cases seeking creation of new career positions, and that the “every effort will be made” applies to reversion decisions such that full time duty assignments should not be reverted if the work the previous incumbent performed still exists. These parties agreed in 2011 that work previously performed in Ellinwood by PTFs *should be* consolidated into a full-time NTFT duty assignment. The question now is whether, as of the time Coleman retired, the amount of clerk hours worked in Ellinwood was sufficiently lower to justify elimination of the job she had held for eight years.

Coleman's duty assignment was 37 hours per week. The evidence presented at the hearing established that clerks continue to work in the Ellinwood office from 6:40 am until 4:00 pm, with some amount of break in the middle of the day. According to Schultz, there is a clerk in the office from 6:40 until 11:30 am (or sometimes until 1:00 pm, depending on when the cleaning is done) and again for two or three hours in the afternoon. On Saturdays there is a clerk in the office from 6:40 until 11:30 am. It is undisputed that the window is open for 6.5 hours per day, during which time it must be manned.

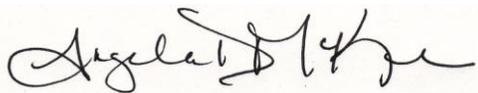
By my math, this evidence clearly establishes that there are well over 37 hours per week of clerk work in the Ellinwood office. At most, the office has shaved one hour per week off of the schedule that Coleman worked by changing the clerk start time to 6:40 am. The Service chooses to have this work performed by multiple PTFs rather than primarily by one career employee, presumably because, as Schultz stated at Step 1, this arrangement provides flexibility and is economically advantageous. PTFs are paid less than career employees. Although Article 37 gives Management the right to revert vacated positions, its discretion is not unfettered, and must accord with other provisions of the agreement, including the "every effort will be made" language.

This is a straight-forward case because the evidence is relatively simple and easy to interpret. The Union met its burden to prove that the Service violated Article 37.3.A.1 when it reverted a vacated NTFT job for which almost all of the duty hours were still necessary to operate the Ellinwood Post Office.

IV. AWARD

The grievance is sustained. The Service is ordered to reinstate the NTFT position at Ellinwood. However, because the Service was entitled to adjust the position's duty hours before reposting it, the matter is remanded to the parties to formulate and post an appropriate schedule for a NTFT position of at least 36 hours per week. Because there are no career employees at Ellinwood to bid on the position, the senior PTF at the facility shall be converted into the job. The converted PTF shall be made whole for lost wages and benefits suffered as a result of the Service's failure to convert her rather than reverting the job. Back pay does not include out of schedule pay, but only the difference between the number of hours she worked and 36 hours, and the full-time vs. PTF pay differential.

I will retain jurisdiction for 90 days to answer any questions with respect to the remedy.



Angela D. McKee, J.D.
Arbitrator