Advocate Needs
Consecutive Days Off
Article 8.2

Needs

Disputes of this nature generally fall into two categories:

1) Newly created duty assignments posted with split days off, and
2) Reposted duty assignments which had consecutive days off initially but were reposted with split days off.

It should be remembered we carry the initial burden as this is a contractual dispute. However, once we establish a prima facia case the burden shifts to management to prove the consecutive days off are not practicable. As stated by Levak in case W4C-5D-C-2413, attachment #1, "First, burden of proof is a judicial concept which, when applied in an arbitral setting, designates what party has the obligation of establishing by evidence the ultimate fact or issue to be proved. However, within the context of arbitration, the burden of proof contains two separate components: (1) the initial burden of going forward with the evidence, and (2) the burden of persuading the arbitrator concerning the ultimate resolution of the disputed fact or issue.

Thus, in most contract cases, when a union has established a prima facia case, (i.e., the presentation of evidence, sufficient in quality and quantity to warrant a ruling by an arbitrator in favor of the union), the employer must then come forward with factors that undermine the prima facia case. Of course, if the union fails to present a prima facia case, the employer need present no evidence at all.

Second, in many instances, specific bargaining agreement language will make it clear that the union has a relatively light burden in establishing a prima facia case. This situation occurs where the language of the agreement vests employees with a specific, as opposed to a general, right or where the language sets forth specific general rights, while reserving a specific exception to management.

For example, under ‘senior qualified’ language, a bypassed senior employee need only show that he is senior and was bypassed, and the burden then shifts to management to show that he is not qualified.”

If the job in question is a reposting with split days off your case significantly strengthens. The reason is its history shows consecutive days off are feasible, possible, can be done. The burden would then shift to management to show it was not practicable.

In the past management has had some success arguing practicable is the same as practical. Be sure you point out to the arbitrator the significant difference between the two.

Management has also had limited success arguing economics - normally greater costs and or increased overtime. It is important to point out to the arbitrator the wording of Article 8.2 is not discretionary under normal circumstances. The word ‘shall’ is compelling. If management wants the exception to this - split days off - then they must show why consecutive days off will not work. Money has nothing to do with the obligation. Money or efficiency could only be a factor if part of the contractual language of 8.2. They are not.

Arbitrator Mackenzie in case N7C-1L-C-4201, attachment #2, tells us on page 4, ‘Article 8.2(C) of the National Agreement (and Item 2 of the LMOU) provides that the normal work week ‘shall be consecutive days within the service week...as far as practicable’. (Emphasis added.) By use of the term, ‘shall’ - language of command as opposed to a term of possibility such as ‘may’ - the parties have indicated that five consecutive work days and two consecutive days off is the preferred and required scheduling, subject to the condition that consecutive days of work are to be scheduled ‘as far as practicable’.

While circumstances may render five consecutive work days and two consecutive days off not practicable, the term, ‘practicable,’ implies something more than administrative convenience or mere efficiency. It places an affirmative obligation on management to demonstrate why consecutive days are not practicable if management elects a schedule with non-consecutive days.”

Arbitrator McAllister in case I90C-4I-C-94026813, attachment #3, re-echoes Mackenzie and quotes two other arbitrators on page 6 where he states, "Article 8.2.C states:

> The employees' 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.

The above language does not mandate that an employee is guaranteed five (5) consecutive work days. The language does, however, contain a caveat that as far as practicable the five work days shall be consecutive (emphasis added). Practicable means that which is feasible, possible. In S4C-3W-C-13587, *supra*, Arbitrator Marlatt stated the obvious in holding that the word practicable is synonymous with the word feasible. In that same case, Arbitrator Marlatt held that 'Article 8.2.(C) does not say that employees will be scheduled to work consecutive days if "convenient" or economical".' The same Arbitrator, in S7C-3D-C-8429, *supra*, stated:

> If it is uneconomical to allow consecutive nonscheduled days for employees wherever practicable, then the Postal Service is going to have to sit down with the Union at the bargaining table and seek relief from this obligation, and not attempt to gain such relief through arbitration.

Likewise, Arbitrator Fletcher, in Case C7C-4L-C-19189, *supra*, noted that:

> "Simple convenience or economy of operation does not erase the requirement that Postal Service Management, when scheduling non-consecutive work days, must demonstrate that it is impracticable to do so."

Several arbitrators have turned in our direction when the right arguments and proofs were made. An example of this is a 1994 case by Eaton, W0C-5E-C-15011, see attachment #4. In your case law review you may well find the arbitrator has ruled against us on a similar case. This does not mean all is lost. Strong arbitrators realize they make wrong rulings or improper findings based on poor argument and evidence. Rather than tell them they were wrong, give

them the right arguments and proof and let them know this case is different from the earlier ruling. Read pages 10-14 of this award to see how the Union did the right things and management did the wrong things. On pages 16 and 17 the Arbitrator tells us why he is offering money. A good step in the right direction.

Finally, a couple of additional awards are offered. Attachment #5 is the much quoted award by Marlatt, S4C-3W-C-13587. Be sure to read pages 3 and 4 carefully as two major points are made. Attachment #6 by Axon, W7C-5G-C-33260 offers no money (would not normally use) but gives good argument on pages 10 and 11 on "practicable" vs "efficiency". The argument is good, the remedy is not. Attachment #7 by Fletcher, C7C-4U-C-32853, offers good wording and out-of-schedule overtime (premium). Attachment #8 by Aisenberg, E90C-4E-C-95034701, offers a stronger remedy but more importantly summarizes nine (9) often quoted regional arbitrations, see pages 7-9.