

A R B I T R A T I O N
O P I N I O N A N D A W A R D

STATE OF OHIO
OHIO STATE HIGHWAY PATROL

and

Date May 1, 1987

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

ARBITRATOR: DONALD B. LEACH, appointed through the procedures of the Office of Contract Administration, Department of Administrative Services

APPEARANCES: FOR THE F O P, OHIO LABOR COUNCIL, INC.:
Paul L. Cox, Esq., Attorney for Grievant, F O P,
Ohio Labor Council, Inc., 4222 East Broad Street,
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FOR THE HIGHWAY PATROL:
Lieutenant Darryl L. Anderson, Personnel Labor
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I S S U E

Has the Employer complied with Article 26, Section 26.01 of the Agreement in assigning Grievant, Earl W. Click, a permanent shift that includes one week of 4 P. M. or 12 midnight starting times, for every three weeks of 8 A. M. starting times? If not, what shall the remedy be.

B A C K G R O U N D

The issue stated above is as formulated by the Employer. It is adopted here as stating the issue and pertinent factors accurately and non-prejudicially.

As stated, it is clear that the issue is primarily a legal one, there being no essential dispute about the facts. The issue is a very serious one in terms of the Employer's operations and, for understanding of those matters, a summary of the situation is essential.

The Employer's operations are divided into ten Districts, one being Cuyahoga County alone, the other nine covering several counties each. In each District, there are a number of separate posts, established to give more immediate supervision to all the areas of the State. In each District, one trooper is trained in the use of portable scales to weigh trucks using the more secondary roads of the State.

Generally, there are fixed scales on the main arteries but overloaded trucks avoid them and can only be apprehended effectively by scales that are readily portable from one location to another.

Grievant is the trooper assigned to operate the portable scales in the Employer's District 1, which covers the northwest counties of the State. That area is a particularly critical one in terms of overweight trucks. The State of Michigan permits much greater truck weights than does Ohio. Some routes from Michigan into Ohio are open to such trucks on special permit with restriction of routes to be used. Sometimes, such trucks use other routes not permitted in the permit. Sometimes they simply enter the State on routes in no way connected with the few set aside for the occasional use of such weights.

The use of portable scales is a somewhat technical procedure. The use of surveyor's instruments is required to establish a grade that is level within a set small variation. The scales then must be set so that a truck can drive on to them with each wheel resting on one. The equipment is carried in a van, also transporting two employees of the Employer who, however, are not troopers. The entire operation is under the control of one trooper, the Grievant in this case, trained as above, who operates a regular Patrol Cruiser. He and the van operate throughout the District.

In order better to police the roads for the apprehension of overloaded trucks, it is necessary to patrol them during different periods of the day and night. Where only one shift has an individual assigned to the scales, it is important,

in the Employer's view, that working hours not always be the same in order not to be predictable to truckers with illegal weights who would then operate in the known periods free of that type of policing. Before the collective bargaining Agreement, Grievant's hours of work varied frequently, often being changed on very short notice.

All troopers worked the different shifts at relatively short intervals before the Agreement. A provision was included in the Agreement, however, Section 26.01, as follows:

26.01

Permanent shifts shall be established, Shift assignments will be made by the facility administrator on the basis of seniority on March 1st and September 1st of each year. The assignments made on March 1st will be for the period from September 1st to February 28th, and the assignments made on September 1st will be for the period from March 1st to August 31st. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur. The normal work week shall be forty (40) hours.

Thereafter, other troopers appear to have been scheduled to work one shift for six months, i. e., either the 8 A. M. to 4 P. M., the 4 P. M. to midnight or midnight to 8 A. M. shift. The scheduling of the trooper assigned to the portable scales, however, became a difficult problem at that time.

It was felt that flexibility had to be maintained so that truckers with illegal loads would not avoid apprehension simply by operating in hours when the portable scales trooper was off. On the other hand, the Agreement mandated a different solution to the problem than had been deemed sufficient formerly.

The solution developed by the Employer was the type of schedule involved in this matter. Grievant's schedule is set for six months as is the case of the other troopers. He operates on a four week basis, however, constituting three weeks from 8:00 A. M. to 4:00 P. M. and one week from 4:00 P. M. to midnight or in some 4-week periods, from midnight to 8:00 A. M. To reiterate, Grievant is informed at the beginning of each six month period of the precise schedule of hours and of each day he is assigned to work during that period.

Grievance was filed on June 12, 1986. It noted Grievant's allegation that his work schedule violated Section 26.01. The initial response, dated June 13, was:

"Article 4 of the Contract states...the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. Under paragraph (5) the right and authority to schedule. The Scale Team is a special program of the District operations. Commercial Traffic travels at different hours of the day and night. In an attempt to prevent the movement of Overloaded Vehicles, the Scale Team must occasionally work a Night Shift."

The Level III decision of the Employer, in pertinent part, was:

"The hearing officer finds that the employer is acting within the scope of the labor agreement by requiring the portable scale team to work other than a permanent shift. Due to the uniqueness of their job duties and the training required, it would be self defeating to maintain a permanent shift when dealing with portable scale operations.

As the grievant stated during the hearing, troopers in charge of portable scales are trained to operate a transient (sic) in order to properly survey the lay of the land prior to weighing trucks, and knowing what evidence is needed in preparing for a court case, and numerous other technical skills related to a scale troopers job responsibility.

Since the portable scale trooper has knowledge and skills not ordinarily used by other troopers, his flexibility to work other than a permanent shift is necessary to maintain the integrity of the portable scale team."

C O N T E N T I O N S O F T H E P A R T I E S

F O P POSITION

When Grievant is not working, the roads in his District are not covered by a scales team. While weight violations occur around the clock, the hours when he isn't working, including his days off, never were covered, no matter how his work schedule varied. It follows that nothing is accomplished by changing his working hours around. The great majority of the time, no such patrolling exists anyway.

The decision of another arbitrator does not apply here in that it was made in reference to the Dispatchers, to whom a special provision of the Agreement is applicable.

Unlike the facts in that case, where Dispatchers were always required around the clock seven days a week for operations, the scales Trooper here is not a function performed around the clock.

All troopers, those assigned to regular duties and those assigned to the scales, should be placed on the same footing. Thus, those assigned to scales should work on only one shift in the course of a six-month assignment, just as the other troopers do.

EMPLOYER POSITION

The issue turns on the definition of "permanent" and "rotating" shifts. In a similar case, another arbitrator ruled that the Employer was within its contractual rights to assign one Dispatcher at each post to a schedule with starting times that changed three times a week.

Roberts' Dictionary of Industrial Relations defines shift and various types thereof as:

"A regularly scheduled period of work during the 24-hour day for the plant. The shift has a fixed beginning and ending each day.....

A shift is referred to as a fixed shift when the employees remain on the same schedule for a long period time. (sic) It is referred to as a rotating shift when crews (emphasis added here) change their hours at periodic intervals. It is referred to as a split shift when the daily work schedule is divided into two or more parts, and as a swing shift when it is the rotating or forth (sic) shift in a plant which operates on an around the clock basis in a seven day period. The name is derived from the nature of the operation, since all four shifts or the special shift rotate or swing to different days and hours at specific intervals."

From the definition, Grievant is assigned to a "fixed" shift because he remains on the same schedule for a long time, i. e., six months. He is not on a "rotating" shift which really applies to the operation of a plant with multiple shifts where it is designed to equalize the distribution of day and night work.

"Permanent" shift has no specific meaning under the Roberts' definition but in the unabridged dictionary it is said to be lasting or intended to last without change indefinitely or for a relatively long time.

Here Grievant's shift schedule is set for a relatively long time and it is, therefore, permanent. To have a rotating shift, however, there must be a group of employees who rotate to equalize the better shifts with the less desirable ones. Here, Grievant does not rotate around the clock but changes much more moderately and does not share the relative benefits and detriments of various shifts.

Prior to the Agreement, the regular road troopers rotated shifts, on a weekly or monthly basis. The bargaining position of the F O P was that that practice should be ended. There was mention of special categories in the course of negotiations, such as Radio Technicians and troopers in the aviation section. At no time was Grievant's specialty mentioned.

The parties in the negotiations were unequal in experience in labor relations. The F O P was represented by highly sophisticated individuals. The Employer, however, had never engaged in collective bargaining before and lacked the sophistication of the F O P. Thus, the imprecise wording of the Section 26.01 was adopted. For the same reason, the statement contained in the Level-III decision of the Employer was misphrased in holding that Grievant was not assigned to a "permanent" shift. More precisely, the holding should have been phrased as that Grievant was not working a permanent shift with fixed starting times and also was not working a rotating shift. This is part of the Employer's growing maturity in the use of terminology.

In assigning the Grievant to a permanent schedule with an occasional week of afternoons and midnights interspersed, the Employer has complied with the Agreement and has not created a schedule in which the Grievant "rotates".

D I S C U S S I O N

As the Employer points out, the language of Section 26.01 is not as specific as might be hoped in a more ideal world. Moreover, the facts in this matter reveal that neither party gave detailed consideration to the possible effects of the Section in some areas of the Employer's operations.

Review of the language of the Section shows that shifts are not to change. Literally, shifts didn't appear to have

changed before the date of the Agreement. People were simply moved from one shift to another, the shift hours being relatively constant at all times. In the strict sense, there is a difference between the shift and the activities of an individual within or among them, where more than one shift occurs in a twenty-four hour period.

The Section then provides that shift assignments are to be permanent. That, of course, is more nearly specific in light of the two preceding sentences which describe the methods of assigning individuals to shifts. Some ambiguity creeps in again, however, with the coordinate clause in the next to last sentence which says no rotation of shifts shall occur. If it had said "no rotation of shift assignment shall occur", clarity would have improved. As it is, the language says literally only what the first sentence says, i. e., the shift doesn't change. When the problem really relates to the individual, the stress on "shift" is not crystal clear.

Where ambiguity of contractual language occurs, reference can be made to the actions of the parties under the contract and to the factors bearing on its negotiation. To reverse the process here, the antecedent factors are set out rather fully in the Fact Finder's Report which led up to the Agreement, a copy of which was introduced as a joint exhibit.

The Fact Finder observed that the troopers had worked a shift schedule that rotated frequently and that that practice was bitterly opposed, the troopers feeling that, among other things, it impaired their health by frequent adjustments in their body clocks. It appeared also that the Employer interposed evidence to contradict the validity of the health concerns and expressed favor for the then existing system. The Fact Finder concluded, however, that the F O P's evidence of the health consequences was more persuasive. On that basis, he recommended the language that is incorporated as Section 26.01.

It thus appears that the issue was the change of shift assignments periodically which disturbed the body's clock and that the Fact Finder recommended a contractual device to end that consequence.

Thereafter, the Employer did establish permanent assignment of troopers generally to one shift for a period of six months, i. e., that one person would work 8:00 A. M. to 4:00 P. M. every working day for the entire six months and the same then applied to others on the other shifts.

As was noted at the outset, that type of scheduling did not fit the needs of the Employer's responsibilities respecting the function of the troopers who used the portable scales, and their schedules were regulated differently.

If the Fact Finder's conclusions and the subsequent actions of the Employer generally are taken into consideration, its scheduling of the Grievant appears to violate the contractual provision. His body clock is disturbed twice in every four-week period. He is not assigned to one shift for the entire six months but is required to change shifts on a regular basis, however predictable those changes are.

It must be recognized that that view is contrary to the reasoning of another arbitrator who dealt with the scheduling of Dispatchers in a matter that arose between the same parties. She was dealing with the Dispatcher assignment whose job was to fill in the two days a week when one of the other three Dispatchers was off, so that the fill-in person was required each week to work two eight-hour turns on one shift, two on another and two more on the third, thus changing his shift assignment three times each week.

The factual situation in that case was a compelling one and the conclusion of the arbitrator there was a reasonably practical one under the circumstances. In that it applied to Dispatchers and not to troopers, however, it is not binding here.

She alluded to the Roberts' definition and discussion of shifts as quoted in the Employer's position above. She concluded that the fill-in Dispatchers worked a swing shift but not a rotating one because they do not change hours at periodic intervals, their hours being fixed throughout the six-month period.

She felt further that the Fact Finder's purpose was to eliminate the prior practice of scheduling shifts on a weekly basis and to require a permanent shift system and that at no time did the Fact Finder adopt a system that all shifts have the same starting and ending times. The F O P had not expressed the intention originally, according to her, that each shift should have the same starting and ending time and such understanding was reflected in the Employer's cost analysis of the Agreement which had concluded that no additional costs were involved in the provision, a conclusion that would have been invalid if everyone were scheduled in shifts with the same beginning and ending hours.

Applying her reasoning to this case would require denial of the Grievance because the Grievant was scheduled on a long term basis, it not being necessary to schedule him for the same beginning and ending hours each working day.

It is recognized, of course, that one arbitrator's views must be accorded full respect by another, even when the earlier decision relates to a different set of facts, but under those circumstances, the second is not bound by the decision or reasoning of the first.

The logical consequences of the other arbitrator's position are that the Employer could change all troopers' beginning hours regularly from one shift to another so long as it was scheduled on a permanent basis. In effect, that would violate the thrust of the Fact Finder's conclusion that the individual's body clock became a health factor when his starting hours were changed frequently and would nullify the contractual language that requires assignment to a shift on a permanent basis. More, it would appear that an individual's shift would rotate if his beginning hours changed materially, i. e., by six to eight hours or more at one time.

Likewise, she does not take into consideration the Employer's interpretation of the Agreement in relation to the regular troopers and the change it made in their work assignments after the Agreement went into effect.

The association of crews with rotating shifts would appear to arise from the industrial context in which the custom arose, affecting most of the manufacturing personnel. The essence of the rotation is the movement by an individual or individuals. (The plural is of no consequence in terms of the important factor, which must always be the individual, unless the language clearly requires the opposite.) As to the individual, rotation may be deemed to occur when he moves from one shift to another on a regular basis, be it daily, weekly, monthly or even a longer period. (The period is limited here by express contractual language.)

For the foregoing reasons, I must decline to follow the reasoning of my colleague in this matter.

The result then is that this Grievance must be upheld.

The consequence is an unfortunate one. While the F O P suggested at the hearing that alternatives were available to the Employer, such as training other troopers to operate the portable scales, it is reasonable to conclude that other individuals would have to be employed to operate the van and to help the trooper on the other shift or shifts. The probabilities are that some considerable cost will be imposed on the Employer as a result of this decision or the enforcement of the weight laws in this State will be curtailed.

The enforcement of the weight laws has never been ideal in that all shifts apparently have never been covered. Regardless of the past, however, the effect on the future is one of possible increasing infractions because the period of weight policing will be more predictable and, thus, more easily evaded.

The problems arise from the conflict of a deep desire by the troopers to end the scheduling of rotating assignments to shifts and the resulting contractual provisions, while specialized

problems affecting a few employees were overlooked. It is probable that the effects of the contractual change were not fully anticipated. The result is that the Employer has become faced with incurring unforeseen costs or of curtailing its law enforcement functions with respect to overloads.

While that result is apparent as a probability, an arbitrator, having no power to add to, subtract from or alter the terms agreed on, is powerless to effect a reasonable remedy.

It can only be recommended for the consideration of both parties that they confer to explore possible avenues for solution of the problems now faced by the Employer.

A W A R D

1. Grievance of Trooper Earl W. Click respecting his scheduling as a portable scales operating trooper is upheld.

2. The Employer, hereafter, shall assign the Grievant and other troopers assigned to operate portable scales to one shift during the working days of each in each six-month period.



Donald B. Leach