

ARBITRATION AWARD SUMMARY

OCB Award Number: 239

OCB Grievance Number: 15-03-880131-0012-04-01

Union: FOP Ronald L. Greenwood et.al.

Department: OSHP

Arbitrator: Frank Keenan

Management Advocate: Lt. Darryl Anderson

Union Advocate: Paul Cox

Arbitration Date: 4-4-88

Decision Date: 12-7-88

Decision: Granted

**ARBITRATION
BETWEEN**

**THE STATE OF OHIO, THE OHIO
STATE HIGHWAY PATROL**

AND

**OCB GRIEVANCE NO. 15-03-880131-0012-04-01
(RONALD L. GREENWOOD, et. al.)**

**FRATERNAL ORDER OF POLICE, OHIO
LABOR COUNCIL, INC.**

APPEARANCES:

For the Patrol:

**Lt. D.L. Anderson
Personnel/Labor Relations
Ohio State Highway Patrol
Columbus, Ohio**

For the F.O.P.:

**Paul L. Cox, Chief Labor Council
F.O.P., Ohio Labor Council, Inc.
Columbus, Ohio**

OPINION AND AWARD OF THE ARBITRATOR

**Frank A. Keenan
Labor Arbitrator**

Statement of the Case:

The parties entered into the following stipulations of fact:

1) Grievant Greenwood worked the 2:00 p.m. to 10:00 p.m. shift. He bid on January, 1988 on an 8:00 a.m. to 4:00 p.m. day shift to begin February 14, 1988.

2) Prior to January 30, 1988, Sergeant Myers approached the Grievant and asked him to change his schedule on February 14 and 15 to avoid a double back on those days when he changed shifts. Grievant Greenwood declined to do so voluntarily.

3) On January 30, 1988, the Patrol changed Grievant Greenwood's shift anyway, without Greenwood's consent, for February 14 and 15. This avoided the double back on either day.

4) This same procedure was followed with respect to Trooper Mason at the Granville Post. Mason was on days, 5:00 a.m. to 4:00 p.m. He bid on a midnight shift. His schedule was changed for February 14 and 15, i.e., he continued his old shift hours on these days to avoid a double back.

By way of elaboration, the record reflects that after the Agreement first went into effect on April 24, 1986, the parties mutually agreed to amend Section 26.01 to make new shifts effective immediately for the scheduling period that included March 1st, and September 1st, instead of six months after the shift selection. Thus, the new schedule went into effect on February 14, 1988, for the scheduling period that included March 1, 1988.

Greenwood grieved the extension of his "old" shift by two days, claiming that he should have been put immediately into his "new" shift, and paid a double back as per Section 26.05. As the Patrol notes in its post-hearing

brief, Greenwood's grievance was "...filed as an 'et. al.' grievance due to a second employee, Trooper Mason, being reassigned to work two additional 'day' shifts on the first two days of the new schedule, in order to prevent Trooper Mason from having to double back from a 'day' shift to a 'midnight' shift.

Other matters of note encompass certain of the F.O.P.'s proposals during negotiations and Fact Finder Harry Graham's recommendations with respect to hours of work and work schedules. In this regard the F.O.P. proposed in pertinent part, as follows:

"Article __ Hours of Work and Work Schedules"

C. Duty Assignments

The Employer will post complete duty assignments one year in advance. Work re-assignment by classification may be made to meet the operational needs of the Employer with less than six months notice, but any employees who are re-assigned within that six months will be paid at a rate of time and one half their total rate of pay for the adjusted hours.

Fact Finder Graham had the following to say in his Report:

"Issue 6 - Hours of Work"

Discussion: The major item in dispute in this issue is concerned with the issue of permanent or rotating shifts. During the course of mediation a great deal of time was spent on this issue without securing agreement. No reader of this report or casual observer of the troopers employed by the Ohio State Highway Patrol can be aware of the passion with which troopers dislike rotating shifts. This is one of the most significant issues in dispute between the Parties.

The Factfinder has examined the Master's thesis introduced by the Union in support of its position on this issue. For purposes of this report, that thesis has the advantage of having 96 responses from troopers attached to the Ohio Highway Patrol. By contrast, the study submitted by the State is less specific to Ohio. Greater weight is given to the Master's thesis submitted by the Union. It clearly shows that the current system of rotating shifts

is repugnant to troopers. The data is unambiguous. Troopers prefer to have a permanent shift. Their second choice is to rotate shifts on a monthly basis.

Additional support for the position of the Union is found in the Columbus Dispatch of February 9, 1986. On page 18A there is an article headlined "Police shifts set to match body clocks." That article discusses the rotational pattern of police officers in Philadelphia. It is similar to the pattern followed by the Ohio Patrol in that officers rotate weekly. The problems raised by officers in Philadelphia are identical to those described by Ohio troopers. The article points out that rotation may lead to digestive disorders and increased heart attack risk. the City of Philadelphia is changing its rotational pattern to deal with the concerns of its officers. Those concerns have been supported by studies of the body's adjustment to changing shifts through its biological clock.

In its final proposal, given to the Factfinder on February 9, 1986, the State at page 12 accepts the principal of permanent shifts with the caveat that a vote be taken at each post on the question. A two-thirds majority in favor would be required to institute a permanent shift system. This proposal of the State is without merit. The State is well aware of the feeling of troopers on this issue. There exists no need for a vote on this question. The Factfinder recommends to the parties the following language to deal with shift schedules:

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 31. In accordance with this section, shift assignments will be permanent and no rotation of shifts will occur.

It is recommended the normal work week be forty (40) hours.

It is recommended that double backs and split shifts not be worked except in "emergencies." In this connection, it is understood that "emergency" means something other than that referenced elsewhere in the Agreement as being declared by the Governor. When employees are required to work a double back, it is recommended they be compensated at the rate of time and one-half. These proposals are found at the Union's E & H

in Rule 18.

The contract language in fact adopted by the parties is as follows:

ARTICLE 26 - HOURS OF WORK AND WORK SCHEDULES

26.01 Permanent Shifts

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 to 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.

26.05 Double Backs

At any time when the starting times of shifts worked by a member are less than twenty-four (24) hours apart, the members will receive one and one-half (1-1/2) times his or her hourly rate, including premium pay for the second shift worked, except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

The record also reflects that it was an unwritten Divisional Policy to continue an employee's old work hours out until his or her first day off in order to avoid the safety hazard of a fatigued trooper working a double back and in order to avoid the double back payment.

Finally it is noted that in training situations Employees are sometimes allowed to work double backs, due to most training being scheduled during day time hours, and that pursuant to a Decision and Award of Arbitrator Harry Dwonkin, on these occasions no double back premium pay as per Section 26.05 is due.

The Parties' Position:

a) The Patrol's Position:

The Patrol takes the position that "the Employer is contractually discouraged from 'doubling-back' employees," and that "the clear intent of (Fact Finder) Dr. Harry Graham, who authorized the Scheduling Sections in question, was to preclude the Employer from doubling-back troopers, unless an emergency existed.

The Employer's rationale for avoiding an unnecessary double-back goes beyond the economic impact of remunerating the relatively few employees required to double-back at the beginning of a six month shift bid period. The scheduling of a double-back requires an employee to work two shifts within a twenty-four hour period, which gives rise to a health and safety concern which must be addressed. If an employee's six month permanent shift were to change from an "afternoon" to a "midnight" shift, the resultant double-back would require sixteen straight hours of work. In this scenario it is unlikely the Employer would allow an employee to work the "midnight" shift in a fatigued condition, necessitating the use of some form of leave by the affected employee. Clearly, the extension of the grievant's schedule to avoid a double-back was in the best interests of health and safety, a concern shared by both the Union and the Employer."

It is the Patrol's contention that "Through management rights specifically articulated in the agreement, the Employer retains the right to schedule employees, subject to the limitations found in Article 26. Based on both the clear language of the contract between, and the amplifying intent of the parties during the negotiations process, there has been no violation of the contract."

The Patrol takes the position that Section 26.01 "does not prohibit the Employer from assigning troopers to some other starting time than one originally posted for bid." In support of its contentions it points to arbitration awards it characterizes as construing Section 26.01 so as to permit: the creation of a shift with different startups and ending times (Modjeska); the right to change a trooper's schedule in order to attend training (Dwozkin); and the right to permanently change a trooper's shifts due to operational needs, i.e. manpower needs (Leack).

The Patrol further contends that "one cannot finalize the State's position in this case without analyzing the Union's proposed remedy. Although moot by lack of a contractual violation, it is interesting to note the remedy sought is identical to a demand sought by the Union during negotiations, which they failed to gain. As indicated in paragraph "C" of the Union's initial demand. This demand remained on the table at fact-finding. Dr. Graham considered the demand, but rejected it.

Two significant inferences must be drawn from this failed goal. First, the Union is attempting to gain as a remedy that which they failed to achieve at bargaining. After initially bidding on a "day" shift, the grievant was re-assigned an "afternoon" shift for two days. Now, the Union asks he be paid at the rate of time and one-half his regular pay for the adjusted hours.

More subtle, but perhaps more important, the very demand, as presented by the Union, reveals the fact the Union was aware at the bargaining table there would be times the Employer would reassign troopers after initial scheduling. This fact cannot be held in isolation in contrast with their demand for permanent shifts. That demand was present in their very next paragraph of their initial proposal and remains in Section 26.01.

The Union sought to secure permanent shifts. They were successful, as manifested in Section 26.01. The Union sought to preclude the Employer from doubling-back troopers on a routine basis. They were successful, via Section 26.05. The Union sought to secure absolute assurance of starting times in their permanent shifts, but failed. They now seek that failed goal through the remedy sought here."

The Patrol asserts in conclusion that the grievant has been granted the right to bid on a permanent shift, by seniority. That shift does not rotate. The grievant did not double back, consequently he is not subject to double-back pay. The assignment of the grievant to the "afternoon" shift on the two days in question remains a management right."

So it is that the Patrol urges that the grievance be denied.

b) The F.O.P.'s Position:

The F.O.P. takes the position that "the Employer violated Section 26.01 by rotating the Grievant's shift on the dates of February 14 and 15, to avoid paying the Grievant for a double back. ...Beginning his new shift on February 14th as all other troopers did, would have caused a double back situation for which the Grievant should have been paid time and one-half.

To avoid paying the grievant for a double back, the employer unilaterallyextended (the Grievant's) previous shift for two extra days. This action is a violation of the clear language of Section 26.01 of the ...Agreement."

It is the F.O.P.'s contention that "the contract requires that the new schedule begin on the first day of the pay period that included March 1st. That day was February 14th. The Employer changed the Grievant's schedule for two days even though the contract prohibits it. This was the purpose of

establishing permanent shifts, to prevent the employer from rotating an employee's shift."

Pointing out that the Employer allows double-backs for training, the F.O.P. asserts in essence that little weight can therefore be given to the Patrol's fatigue-and-safety factor contentions.

The F.O.P. asks rhetorically: "Can the Patrol unilaterally implement a procedure which changes an employee's permanent shift after it has been selected to avoid the payment of premium pay?"

It is the F.O.P.'s position that "intent evidence" is not relevant because "the contract language is not ambiguous."

So it is that the F.O.P. urges "the Arbitrator grant (the) grievance and award the Grievant, and all others so affected, time and one half for all hours that would have been a double back on February 14 and 15, 1988."

ISSUE:

The stipulated issue is as follows:

"Was the Employer correct in assigning the grievant to work 2 P.M. - 10 P.M. on the first two days of the permanent shift assignment beginning February 14, 1988? If not, what shall the remedy be?"

DISCUSSION AND OPINION:

As a logical starting point it is noted that the Patrol's characterization of the contract as precluding double backs "unless an emergency existed," is inaccurate. Rather, the contract at 26.05 does not "preclude" double backs; it merely discourages double backs by providing an economic disincentive when they occur, and suspending even this disincentive

"in local emergency situations." Moreover, Section 26.05 has already been construed for the parties by Arbitrator Harry Dworkin in his decision concerning Grievance #86-04, wherein he observed in pertinent part as follows:

"...the Arbitrator's decision must be consistent with the clear, and unambiguous language of Section 26.05, which contains no language that would suspend operation of the "double back" provision. On the contrary, the language declares, without exception, that, "at any time when the starting time of shifts worked by a member are less than 24 hours apart", the individual officer shall receive "double back" pay. The parties were fully aware that any expectations to the foregoing should be set forth, as indicated by the fact that "double back" pay was declared inapplicable in emergency situations. In view of the unqualified language of the "double back" pay provision the Arbitrator must conclude that such condition, and term of employment became effective as of April 28, 1986, notwithstanding the change from rotating shifts to double shifts was not implemented until Jun 8, 1986. There appears to be both reason and logic in support of the Employer's claim that a "transition" period was necessary; however, the contract does not indicate that it was the intent of the parties to suspend payment until the permanent shift system had been implemented, and the Arbitrator is precluded from adding such condition to the agreement.

Section 26.01, mandates that permanent shifts shall be established on the basis of seniority within each district; assignments to permanent shall be made on March 1, and September 1, of each year. The Arbitrator is aware that in implementing the language of Section 26.01 instances may occur in which a successful bidder for another permanent shift may commence his new shift less

than 24 hours from the start of his prior shift, and therefore may assert a claim for "double back" pay. Although it may be argued that it is unfair for an officer to impose a "double back" pay obligation on the Employer by reason of his voluntary bid into another shift, inasmuch as the result follows from the negotiated language of the agreement/^{it} is outside the Arbitrator's authority to take cognizance of the alleged "hardship" or "unfairness". The decision must be based on the negotiated language of the agreement. In event the parties should wish to address this aspect of the case based on their experience, the matter should be presented at the bargaining table. "

Arbitrator Dwozkin's observations with respect to Section 26.01 are apparently viewed as "dicta" by the F.O.P., for the F.O.P. does not argue that these pronouncements concerning 26.01 are binding on the undersigned and hence dispositive of the instant issue. In any event, the issue as to the meaning of Section 26.01 is clearly joined here. In my judgment the plain and unambiguous language¹ of Section 26.01 clearly provides that the Employer will assign troopers to permanent shifts of six months duration.² Here the Patrol seeks to foreshorten the duration of the contractually mandated permanent shift by two days, for purposed safety and economic reasons. No such exceptions are set forth in Section 26.01, nor elsewhere, such as in 26.05, in the Parties' Agreement. Nor has an exception for such been carved out by arbitral decision.³

1 Given the clarity and lack of ambiguity in the language utilized by the Parties, as the F.O.P. contends, intent evidence is not properly considered.

2 In my judgement sound analysis is not advanced by delving into what constitutes a "rotation" and whether such occurred here.

3 A careful reading of all of the evidence...

The economic exception urged, namely the need to otherwise pay double back pay as per Section 26.05, is likewise unpersuasive. To the contrary, as Arbitrator Dwozkin correctly observed in #86-04, the payment of double back pay in the circumstances presented here "follows from the negotiated language of the Agreement and it is outside the Arbitrator's authority to take cognizance of the alleged 'hardship' or 'unfairness'."

In summation, having promised in Section 26.01 to award permanent shift assignments of six months duration, the Patrol was simply not at liberty to unilaterally shorten said assignments by two days, at least not for the safety/economic reasons advanced here. This being so, the issue raised must be answered in the negative. Accordingly, the grievance must be sustained.

Award:

For the reasons more fully set forth above, the grievance is sustained. Hence, the Grievant, and others so situated, are to be paid time and one half for all hours that would have been a double back on February 14 and 15, 1988, in the event, as required, they were assigned immediately to their "new" shifts.

Dated: December 7, 1988



Frank A. Keenan
Arbitrator

none apply to the situation presented here. In this regard I note that the Patrol makes no contention, for example, that the safety factor here comes within the "operational needs" exception to 26.01 carved out by Arbitration Leach in the face of the rather compelling circumstance with which he was faced. Suffice it to say that in light of the allowance of double backs in other contexts, as shown here, no such compelling circumstances based on safety have been established, which arguably might warrant carving out yet another "exception."