

Arbitration Proceedings

Before

Linda Dileone Klein

\* \* \* \* \*

In The Matter Between: \*

The State of Ohio, Department of Transportation \*

and \*

Ohio Civil Service Employees Association, Local 11 \*

AFSCME, AFL-CIO \*

\* \* \* \* \*

Grievance No.: G87-0715

Grievance of Clarence Castellano

Heard: December 16, 1988

APPEARANCES

For the Employer

Michael Duco, Advocate

For the Union

John Porter, Associate General Counsel

Issue

Did the Ohio Department of Transportation violate Section 13.07, paragraph 7 of the Collective Bargaining Agreement by establishing a night patrol in Geauga County? If so, what shall the remedy be?

Applicable Contract Provisions

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement,

the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9.

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

13.07 Overtime - Paragraph 7:

An employee's posted regular schedule shall not be changed to avoid the payment of overtime. . . . .

Facts and Contentions

On January 5, 1987, the following grievance was initiated by Clarence Castellano on behalf of Highway Workers and Equipment Operators employed in Geauga County by District 12 of the Ohio Department of Transportation (ODOT):

"Gauga County started night patrol January 5, 1987 changing five mens' regular work schedule from 7:30 A.M. to 4:00 P.M. to 12 midnight to 8:30 A.M., therefore avoiding the payment of overtime for this shift. Also depriving these men of equal overtime."

The Highway Workers and Equipment Operators normally work Monday through Friday from 7:30 A.M. until 4:00 or 4:30 P.M.; however, depending upon operational needs, they may also be on call twenty-four hours per day seven days per week. To varying degrees, they are involved in performing snow and ice control duties. In the past, when it became necessary to perform snow and ice control duties, these em-

ployees were called out at night on an overtime basis and they were paid time and one half for all hours worked in excess of forty in any given work week.

For a number of years prior to the early 1980's, Geauga County utilized a one man night patrol; one employee was assigned to drive around within the county in a pick-up truck to assess winter weather - related conditions. When this employee retired, another employee performed night patrol duties for one year and then the night patrol was discontinued for several years. During the time frame of the one man night patrol, the employee on duty would notify ODOT if and when it became necessary to call additional workers to come in at night on an overtime basis. For the period of time in which there was no night patrol, Management relied on other sources to determine whether it was necessary to call employees in to work overtime to perform snow and ice control duties. In the winter of 1983-84, the night patrol was resumed with a five man work force.

The specific factors giving rise to the instant grievance occurred in December 1986 when Management began soliciting volunteers for the night patrol for the winter of 1986-87. No employees signed up for the night patrol, consequently, Management made the assignments based upon inverse seniority within each of the five yards. At this point, the affected employees were allowed to volunteer for the yard to which they wanted to be assigned.

The night patrol employees worked from January 5, 1987 until March 14, 1987. The hours of their shift extended from 12 midnight until 8:30 A.M. The work performed by night patrol employees was consistent with the duties listed in their position descriptions.

As stated previously, the instant grievance was initiated to protest Management's decision to establish and maintain the night patrol during the snow season in 1986-87; at the hearing, the Union stated that its claim extends to the 1987-1988 winter season as well.

The Union contends that Management's primary motivation in establishing the five man night patrol was the reduction of overtime costs during the snow season. The Union contends further that "there is a direct correlation between the establishment of a five man night patrol in Geauga County and a reduction in the total number of overtime hours worked by bargaining unit employees of ODOT in Geauga County".

In the past, ODOT generally called two men per yard to come in at night on an overtime basis to perform snow and ice control duties, says the Union, but since the implementation of the five man night patrol, five men are already working, thereby eliminating five opportunities for overtime. The night patrol as it presently exists not only cuts down on the overtime opportunities for those employees who work days, but it also results in a substantial loss of overtime for those employees assigned to the night patrol, because they are automatically bypassed since they are already on duty at night.

The Union submits that Management was unable to provide evidence to substantiate its position that the implementation of the five man night patrol resulted in a more efficient operation; the only result was a significant savings in overtime payments.

Having a night patrol does not cut down on response time, says the Union; most employees live close to their outposts and they can respond to a snow emergency in far less time than the one and one-half hours claimed by Management. The Union maintains that Management's

position is further weakened by the fact that the night patrol only operates five days per week; if the State were truly concerned for the welfare of the traveling public in Geauga County, the patrol would be on duty every night. In addition, night patrol employees who call in sick are not replaced; this suggests that the night patrol is not as important as Management claims.

The Union asserts that the cost of running five trucks all night regardless of weather conditions is expensive and inefficient. The night patrol employees are required to drive around the area for 100 to 150 miles per shift even when it is not snowing; this increases fuel and maintenance costs.

The Union asks the Arbitrator to compare the language contained in Section 13.07, paragraph 7 of the current agreement with the corresponding provision in the old contract; under the prior contract, the parties agreed that "no member shall be required to change his/her work schedule solely to avoid the payment of overtime pay....." The Union contends that under the old contract "management was restricted in changing an employee's work schedule only if management was changing the schedule to avoid the payment of overtime. Under the new contract there could be a number of reasons why management decided to change an employee's work schedule. But if only one among several reasons for changing an employee's posted work schedule is to avoid the payment of overtime then the contract is violated."

The Union acknowledges that there is no guarantee regarding a specified number of overtime hours; however, the contract clearly prohibits management from changing scheduled work hours to avoid the payment of overtime, as was done here. The Union also acknowledges that overtime is still available for some employees; however, the

significant factor in this case is that the implementation and continuation of the five man night patrol has caused a substantial reduction in the amount of overtime available on days and nights; in addition, there has been no corresponding increase in efficiency of operations.

Ashtabula County has a snowfall rate which is similar to Geauga County, says the Union, but the night patrol is not utilized there. This suggests that the amount of snowfall is not the controlling factor when considering whether a night patrol is required for efficiency, claims the Union; in this instance, the night patrol was designed to avoid the payment of overtime.

The Union asks the Arbitrator to review the Holton and Kinney decisions when determining whether the affected employees scheduled hours of work were changed to avoid the payment of overtime.

The Union requests that its position be upheld.

The State insists that the five man night patrol was established to fulfill the mission of ODOT, which is to maintain safe roadways for the motoring public; in the winter months, the emphasis is on snow and ice control. The State contends that this mission can best be served by having employees on duty throughout the night during the heavy snowfall season; this ensures that road conditions will be monitored continually and that hazardous situations will be corrected quickly.

The State submits that the night patrol was scheduled to meet operational needs; it was not done to avoid the payment of overtime. The State submits further that the record clearly shows that overtime was still available for most employees after January 5, 1987.

The State contends that the Union failed to establish that the affected employees' schedules were changed in order to avoid payment of overtime; accordingly, there is no violation of the collective bargaining agreement here.

#### OPINION

In the winter months, the primary responsibility of ODOT is to keep the highways safe for the traveling public. In order to fulfill that obligation, emphasis must be placed on the performance of snow and ice control duties. This is especially the case in geographical locations like Geauga County where the snowfall averages over 100 inches per year and where "lake effect" snowfall causes the area to be hit harder than most other areas. Many Geauga County residents commute to Cleveland Monday through Friday and it is essential for roadways to be clear when the morning rush hour begins.

In order to accommodate the traveling public, the Ohio Department of Transportation determined that the roads of Geauga County needed to be patrolled during the early morning hours. This determination was made in accordance with the Management Rights provision of the collective bargaining agreement. The Employer retains the right to manage its operation in a manner which is consistent with the various provisions set forth in the agreement. The inherent rights of Management include scheduling work, assigning employees and operating efficiently. Management's authority in this regard has been recognized by many Arbitrators, including Arbitrator Pincus in the Kinney decision. Arbitrator Pincus held that the State has the right to establish work schedules and to alter original work schedules based upon operational

needs. This Arbitrator agrees with his conclusions and is of the further opinion that the provisions of Article 13 suggest that the parties anticipated that work schedules would be changed.

Section 13.07, paragraph 7 restricts Management's right to change a work schedule when it can be shown that the schedule was arbitrarily changed to avoid the payment of overtime, as in the Holton case. The wording of Section 13.07, paragraph 7 further suggests that the Employer may change employees' work schedules for operational reasons.

In the instant case, the underlying objective in changing the schedule of Highway Workers and Equipment Operators in Geauga County was to better serve the traveling public. Section 13.01 defines the work week in a manner which allows for a flexibility in scheduling; this suggests that work shall be scheduled in order to meet operational needs. When this provision is read in conjunction with Section 13.07, paragraph 7, it is clear that Management may establish schedules and alter them as long as the primary intent is not the avoidance of overtime. Section 13.07 does not guarantee employees a certain amount of overtime; nor does it bar Management from implementing schedule changes based upon operational requirements, even though those changes may result in less available overtime for the affected employees.

In this case, overtime opportunities were somewhat reduced by the schedule change, but there was no evidence to show that avoidance of overtime was the motive for implementing and maintaining a five man night patrol. Moreover, the evidence establishes that there was operational justification for the change.



The Employer gave advance notice of the implementation of the night patrol, and the change was to be maintained throughout the winter months with the heaviest snowfall. The employees whose schedules were changed performed the duties listed in their position descriptions and their absence from the day shift did not result in inefficiency between the hours of 7:30 A.M. and 4:30 P.M.

In order to contend with the inclement weather and the problems created by lake effect snow, the determination was made to establish a five man night patrol. One employee would work out of each yard in Geauga County from midnight until 8:30 A.M. so that all areas of the county would be monitored. The night patrol employees drove around their assigned areas treating icy spots, plowing snow and informing ODOT about road conditions. Because these employees were already on duty, response time could be cut significantly if a storm suddenly developed. Because these employees were already on duty, ODOT had direct knowledge of road conditions and could better determine when it was necessary to call additional employees in on an overtime basis. In this regard, a review of the evidence clearly demonstrates that overtime was offered to night patrol employees. For example, the grievant was offered 107 hours of overtime while on night patrol and he worked 91 hours. Two of the night patrol employees did not work overtime during this period; overtime was offered but they either refused or were not available when called. The other two night patrol employees worked considerable overtime. The evidence also suggests that day shift employees worked overtime during the period at issue. An incidental side effect of the establishment of the night patrol may have been a reduction in the total number of available overtime hours, but this is not evidence that avoidance of overtime was

intended.

Many residents of Geauga County commute to Cleveland Monday through Friday, as shown by the traffic surveys, and it was reasonable to deploy the night patrol on week nights rather than on week-ends in order to accommodate those needs.

Ashtabula County does not have a comparable number of residents commuting to Cleveland, and it is in another ODOT District, consequently, the absence of a night patrol in Ashtabula County does not mean that a night patrol is not needed to meet operational requirements in Geauga County.

Having a night patrol provides the added benefit of having well rested employees on the road during night time snow emergencies.

The cost of operating five trucks at night is far outweighed by the increase in road safety and the effectiveness of snow and ice removal.

The State has shown that the primary intent behind the establishment of the night patrol was to meet operational needs and to increase efficiency. The evidence presented by the Union did not demonstrate that the schedule was changed to avoid the payment of overtime.

AWARD

The grievance is denied.

  
Linda Di Leone Klein

Dated this 6<sup>th</sup> day of February, 1989  
Cleveland, Ohio