

In the Matter of Arbitration
between
The Ohio State Highway Patrol
and
The Fraternal Order of Police
Ohio Labor Council Inc.

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) 15-03-900224-028-
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#520

APPEARANCES

For the Patrol:

Sgt. Richard G. Corbin
Robert Thornton OCB
Lt. Michael P. Megison

Advocate
2nd Chair
Post Commander

For the Fraternal Order of Police:

Ed Baker
Timothy S. Errington
Walter Florence

Staff Representative
Grievant
General Counsel

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on October 24, 1990 at the Office of Collective Bargaining before the permanent umpire, Patricia Thomas Bittel, mutually selected by the parties pursuant to Article 20 of the Collective Bargaining Agreement.

The facts of this case are not in dispute. Grievant is a trooper at the Marion post of the Ohio State Highway Patrol. Mid-day on Saturday, February 24 there was a heavy snow in Marion County. As the day progressed, the weather deteriorated, causing a disproportionate number of accidents in the county.

After the Marion County Sheriff declared an emergency, Post Commander Lt. M. P. Megison left his home to assess the situation. While assisting at an accident site, he determined three additional troopers were needed to help out. He designated the three off-duty troopers based on his perception of how close they lived to the post, giving consideration to their regularly scheduled shifts.

Megison forgot one of the troopers had moved, and called on a trooper whose residence was farther from the post than Grievant's. Grievant also had more seniority than any of the troopers called in.

A grievance was filed alleging as follows:

"At 1400 hours during a snowstorm, Lt. Megison and Sgt. Sigler called three additional troopers out from time off to assist. The three troopers that were called out had less seniority than myself. One of the troopers

called out lived farther from the post than I do. Also, according to Article 66 Section 66.04 an emergency was not declared, therefore, call out should have been by seniority."

The remedy requested was eight hours over-time pay and guidelines to be set for call out in similar situations.

CONTENTIONS OF THE UNION

The Union maintains the situation is covered by Article 5 of the Collective Bargaining Agreement. Article 5, Section 5.03, entitled "Bargaining Unit Work", states as follows:

"Management shall not attempt to erode the bargaining unit, the rights of bargaining unit employees, or adversely affect the safety of employees.

Except in emergency situations, overtime opportunities for work normally performed by bargaining unit employees shall first be offered by seniority to those unit employees who normally perform the work before it may be offered to exempt employees. Those normally performing the work shall be defined to mean troopers assigned to a specific post or posts within the geographic area of the assignment.

This Article shall apply to special duty or special assignments which result from requests by private individuals or groups for security or traffic control."

The Union argues there was no Article 66 emergency.

Article 66 defines an emergency as follows:

"For purposes of this Agreement, an emergency will be defined as any situation declared by the Governor of Ohio or the Superintendent of the Highway Patrol or his/her designee, which jeopardizes the health, safety

and/or welfare of the State or any portion thereof, its property and/or the residence."

The Union contends there was no evidence that either the Governor or the Superintendent of the Highway Patrol declared an emergency, nor was there evidence that Megison had been named a designee for the purpose of declaring an emergency. It further argues even if Megison was found to be a "de facto" designee, the situation still mandated Grievant be chosen for the work assignment.

The Union references a memorandum of understanding dated April 26, 1989. The memorandum of understanding concerned Article 5.03 of the Collective Bargaining Agreement and provides in pertinent part:

"The parties ... agree that while the contract states all off-duty assignments shall be offered by seniority, the Employer will base off-duty employment opportunities on the 'good faith equity' principle, without having to attempt to equalize opportunities or opportunity hours.

* * *

Finally, the parties agree seniority will be the deciding factor for off-duty assignments, when all other factors are equal; the Employer retains the right to plan, coordinate, staff and supervise off-duty assignments; and all parties recognize the intent of Section 5.03, which is to give bargaining unit employees first opportunity to man off-duty positions of non-supervisory nature; based on reasonable, logical and objective criteria established by the Employer and reviewable by the bargaining unit.

The Union maintains Section 5.03 requires overtime to be offered by seniority. Even if Section 5.03 does not, the memorandum of understanding modified the contract making seniority a consideration, contends the Union.

Grievant testified February 24 was his day off and said he was at home. He claimed he called the post at about 1 p.m. to see if anyone would be called in. He said he was told no one would. He said when he went to work on Sunday he learned three troopers had been called in, one of whom lives 12.3 miles from the post; Grievant lives 7.3 miles from the post. As far as Grievant knew, those who were called in did not say an emergency had been declared though there were blizzard-type conditions. Lt. Megison admitted one of the troopers took an hour and a half to get to the post; the Union argued this inefficiency could have been avoided had Grievant been called.

He described the work as an extra duty detail and said management should call out the closest available unit. He stated the time it takes to get to the post is an important consideration while seniority is only a small part of it. Because it was unscheduled overtime, he admitted there was no question of equalization.

CONTENTIONS OF THE PATROL

Management maintains there was no contract violation in this case. It asserts the situation is controlled by Article 27, Section 27.04, entitled Report Back Pay. This Article reads as follows (in pertinent part):

"A. 'Report Back' occurs when a member of the bargaining unit is called to return to work to do

unscheduled, unforeseen or emergency work after the member has left work upon the completion of the regular day's work, but before he or she is scheduled to return to work."

Management notes Section 27.04 does not contain a seniority clause. The very nature of "report back" for "unscheduled, unforeseen or emergency work" mandates employees return to work as quickly as possible, it argues.

The employer is not obligated to offer report backs in the same manner as prescheduled overtime, it contends. It claims Article 5 has no relationship to a report back, having been negotiated to apply to situations involving scheduled special duty assignments for private individuals or groups.

The Ohio State Highway Patrol's major goals include "prompt response to vehicle crash calls and the professional investigation of crashes within the jurisdiction of the Patrol". In a practical vein, it argues a seniority system for report backs would delay the organization's ability to complete its primary mission. The result would impair the Patrol in servicing the community, it asserts, a result never intended by the parties. It further claims the Union is attempting to gain at arbitration what it was unable to get during contract negotiations.

Lt. Megison testified he noticed the weather worsening that day and came out on his own at 2 p.m. At the time he had two others on duty, he said, one sergeant and one trooper. He said while he was driving to a crash north of

the post, he was dispatched to yet another crash site. He stated he could only go ten to fifteen miles an hour.

In terms of whether the situation was an emergency, Megison pointed out that at approximately 4 p.m. the County Sheriff declared a state of emergency. He said on February 24 sixty-five crashes were reported to have occurred. The average was two to three crashes per day in the county and ten to twelve or maybe fifteen in a normal snow.

It is not routine to order people to report back, he explained, rather this happens only a couple of times a year. He claimed he called in those troopers he thought were the closest units to the post. He admitted forgetting one of the troopers had moved from within one mile of the post to a residence much further away. He also admitted one trooper took an hour and a half to get to the post, having gone into a ditch. Another took only ten minutes and the third took an hour and three quarters.

Medison stated he interpreted the Superintendent's rules and procedures to make him a designee, though he admitted his Superintendent had never specifically stated he was his designee, nor had he been given specific authority to declare an emergency.

Lt. Megison distinguished Article 5.03 because he was not offering employees an "opportunity" to work. Rather, he was ordering them back.

Management's operation policies were also admitted into evidence. One on extra duty patrol services stated its

purpose was to address guidelines for use of sworn officers for special events or other functions. The other was the operations policy on scheduled overtime equalization which specifically stated that overtime arising from unscheduled, unforeseen or emergency circumstances is not covered by the policy.

In management's view the operations policy mirrors Section 5.03. The memorandum of understanding, attached to the policy on extra duty services, pertains exclusively to off-duty events from outside individuals or groups, it claims. It stringently maintains Section 5.03 does not apply to the report back situation, and asserted even if it does apply the memorandum is a union waiver of rights to seniority.

It claims Section 66 has nothing to do with Section 27.04 and was not referenced by it. Clearly, people can be ordered back to perform any unforeseen, unscheduled work, it insists.

The case does not involve an overtime opportunity, contends the Patrol, rather the post needed additional employees immediately. If the parties had intended to require that reports back be according to seniority, they would have said so, it claims, arguing the Union is trying to obtain seniority when it has not been able to negotiate it successfully into the Collective Bargaining Agreement. In essence the Union is asking for an addition to the

contract, argues management, stating seniority would create problems in practicality.

DISCUSSION

The threshold question in this case is whether Article 5.03 applies to report back situations. Article 5.03 states that except in emergency circumstances, overtime opportunities will be offered by seniority. The key question, then, is whether the report back is an overtime opportunity within the meaning of this provision.

Article 27.03 regarding equalization of overtime, by its terms, applies to "scheduled overtime opportunities". By contrast, Article 27.04 regarding reports back, makes no use whatsoever of the term "opportunities". The use of the term "opportunities" in Article 27.03 ties with Article 5.03 which also speaks of "opportunities". The failure to use this term in Article 27.04 tends to distinguish it from other overtime situations to which Article 5.03 and 27.03 apply.

It follows that the Parties intended a distinction between scheduled overtime opportunities and mandated reports back. The distinction is natural in view of the realistic need for a quick response to poor highway conditions. It is further recognized in Article 27.01 which states "because of the unique nature of the duties and emergency response obligations of the division, management

reserves the right to assign employees to work overtime as needed." Article 5.03's requirement that "overtime opportunities" be offered by seniority therefore refers to scheduled overtime opportunities.

The exception for emergency circumstances (as defined by Article 66) permits the employer to schedule overtime opportunities without constraints as to seniority in the event of emergency. Neither the Article nor its exception was intended to apply in the report back situation.

A primary goal of the Highway Patrol is to provide prompt response to vehicle crash calls. Indeed, a fundamental purpose of the organization is to provide fast, effective help in response to foul weather, highway dangers and vehicular accidents. The parties have recognized this in segregating the report back situation from other overtime opportunities.

Article 27.04 is the most specific provision applicable to the situation of mandated reports back, a situation which has already been identified as distinguishable from scheduled overtime opportunities. One of the basic precepts in contract interpretation is that a specific provision takes precedence over a more general one. Because Article 27.04 is specifically applicable to the situation in this case, its terms take precedence over other terms of the contract which are more general in nature. Significantly the concept of seniority is neither mentioned nor contemplated by Article 27.04.

In the situation involved in this case, the Lieutenant chose the employees for overtime while he was at an accident site attending to a crash. He made the selection by memory and called them in over the radio. This is not an unusual scenario in the situation of foul weather. Indeed, it is predictable that commanders will be forced to make report back selections without the benefit of seniority lists or other data.

A precept in contract interpretation is that the Arbitrator should seek to avoid the unreasonable or burdensome result. In this case, it would be unreasonable and burdensome to apply Article 5.03 to report back situations, requiring that they be done by seniority. Grievant even admitted in his testimony that the concept of seniority was not critical to the call back situation.

Articles 5.03 and 27.03 deal with scheduled overtime opportunities and do not apply to reports back. Rather, section 27.04 was intended by the parties to be controlling in the report back situation. This interpretation reflects the reality of the operational needs of the Highway Patrol. Implementing the requirement that reports back be by seniority would hamper the fundamental effectiveness of the organization.

There is no doubt that the Post Commander made a mistake. He called in people who lived further from the post than was necessary, resulting in delay in servicing the community. However, there is no requirement anywhere in the

contract for the Post Commander to call persons who live closest to the post. It follows that there is no remedy under the contract for failure to do so. While clearly the Post Commander made a mistake which inhibited the performance of the organization, there was no breach of the parties' Collective Bargaining Agreement.

AWARD

The grievance is denied.

Respectfully Submitted,

Patricia Thomas Bittel
Patricia Thomas Bittel

November 23, 1990