ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 667

OCB GRIEVANCE NUMBER: 15-03-910126-0016-04-01

GRIEVANT NAME: PHILLIPS, LARRY K.

UNION: FOP UNIT 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: KEENAN, FRANK

MANAGEMENT ADVOCATE: CORBIN, LT. RICHARD

2ND CHAIR: KIRSCHNER, PAUL

UNION ADVOCATE: FLORENCE, WALTER

ARBITRATION DATE: JUNE 18, 1991

DECISION DATE: SEPTEMBER 18, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: DID OHP VIOLATE THE CONTRACT WHEN IT PAID TROOPER PHILLIPS 1:29 HOURS DOUBLE TIME AND ONE HALF INSTEAD OF 2:30 HOURS DOUBLE TIME AND ONE HALF WHEN HE WAS SUBPOENAED TO COURT ON HIS DAY OFF, WHICH WAS ALSO A HOLIDAY?

HOLDING: THE LANGUAGE OF SECTION 51.02 B IS THE PRIMARY SOURCE FOR THE ASCERTAINMENT OF THE INTENT OF THE PARTIES. THE LANGUAGE UTILIZED HERE MANIFESTS AN INTENT TO APPLY THE FORMULA THE F.O.P. URGES. GRIEVANT IS TO BE PAID THE DIFFERENCE BETWEEN WHAT HE WAS PAID AND $103.00 FOR HIS 1/21/91 COURT APPEARANCE.

COST: $726.29

ARBITRATION
BETWEEN

#667

THE OHIO STATE HIGHWAY PATROL

AND

O.C.B. Grv. #15-03-910126-0016-04-01
(Grievant Trooper Larry K. Phillips)

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

APPEARANCES:

For the Patrol:

Lt. Richard G. Corbin
Personnel/Labor Relations
O.S.H.P. Headquarters
Columbus, Ohio

For the F.O.P.:

Walter Florence, Esq.
General Counsel
F.O.P., O.L.C., Inc.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

The underlying facts in the case are not disputed. Trooper Phillips, the Grievant in the case, was subpoenaed to appear and testify in a traffic case by the Portsmouth Municipal Court, on January 21, 1991. The time frame of this Court appearance fell within the Grievant's off day hours and, hence, for him the Court appearance was an overtime assignment. Additionally, as the third Monday in January, January 21st was observed as a State holiday and as a contractual holiday under the Collective Bargaining Agreement, as set forth in Article 44 - Holidays, Section 44.01. The time expended on this Court appearance, including the time spent getting to the Court from his home and back, required one hour and twenty-nine minutes.

The Grievant was paid $62.74 for this Court appearance. He believed such was too little, and he grieved, reciting in essence the facts noted above, Articles 44.03 and 51.02, and stating that he ...

"6. Statement of Grievance ...:

... claimed 2:30 (sic) Court overtime on the [01-21-91] date. 01-21-91 is a scheduled State holiday. On 1-22-91 a teletype was sent to payroll to pay me for 1:29 at double time and a half instead of 2:30 (sic) at double time and a half.

7. Remedy Requested: I request that I be compensated for 2 and 1/2 hours at double time and a half as provided by the labor contract."

The Parties are agreed that the Grievant's regular rate at all pertinent times was $16.48.

The cited Contract provisions provide in relevant part as follows:

"Article 44 - Holidays

* * *

44.03 Compensation of Holiday Pay or Compensatory Time

An employee who is required to work a holiday or is called in may choose to receive overtime pay equivalent to one and one half times the hours worked times the total rate or receive compensatory time equivalent to one and one half (1 1/2) times the hours worked.... All overtime worked by an employee on a holiday will be compensated at two and one half (2 1/2) times the total rate of pay or receive compensatory time equivalent to two and one half times the hours worked...."

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Article 51 - Court Leave

* * *

51.02 Compensation

* * *

B. Employees appearing in a court or other official proceedings based on any action arising out of their employment

during their off duty hours shall be guaranteed a minimum of 2.5 hours at their regular rate or their actual hours worked, whichever is greater...."

It is also noted that at least since the outset of the Parties' collective bargaining relationship it has been the Patrol's practice to pay Court Leave pay at the overtime rate of one and one half times the regular rate.

The Parties' advocates stipulated that the issue is:

"Was the Grievant properly compensated for his job related Court appearance on January 21, 1991, according to Article 51.02 B., and 44.03 of the collective bargaining agreement? If not, what shall the remedy be?"

The F.O.P.'s Position:

The F.O.P. takes the position that although the Contract "does not squarely address" the matter of an overtime call-in for Court duty on a holiday, i.e., although there is no separate Contract provision expressly addressing the matter of Court Leave pay for Court appearances on a holiday, nonetheless the clear and unambiguous provisions of Sections 44.03 and 51.03 B each clearly apply to the uncontroverted underlying facts present here, and hence these provisions must be read together and in conjunction with one another. The F.O.P. in essence contends that the circumstances present here trigger both provisions and hence both are applicable. It is the F.O.P.'s

position that upon reading Section 44.03 and 51.02 B. together, it becomes clear that the Grievant is entitled to be compensated for the 1.50 hours expended on a Court appearance on an overtime basis for him on January 21, 1991, a contractual holiday, at his base rate of $16.48 times double time and a half times 2 1/2 hours, or $103.00.

The F.O.P. contends that the language as written and set forth in Sections 44.03 and 51.02 B. supports its position. It's a cardinal rule of Contract interpretation, apart from what the Parties discussed or did not discuss in negotiations, to turn to the language utilized by the Parties. And the language of Sections 44.03 and 51.02 B. supports what the Grievant seeks. The F.O.P. contends that the 2 1/2 hour minimum guarantee of Section 51.02 B. must be seen and read in conjunction with the overtime on a holiday provision of Section 44.03. This is so argues the F.O.P. because the circumstances present here are not specifically just overtime on a holiday or are they specifically just a Court appearance, but rather, they are both.

At $103.00 the F.O.P. contends that its construction is not a budget breaker nor is it such a windfall as to be fairly characterized as "absurd." In fact, argues the F.O.P., the matter of overcompensation is simply not an issue here. Rather, the issue is, does the Contract language support the position taken by the F.O.P., and, as seen above, the F.O.P. asserts that it does.

The F.O.P. contends that if the Parties here included language that supports the result sought and such a result is in fact doable, then the result sought cannot be characterized as absurd.

So it is that the F.O.P. argues that the grievance ought to be sustained.

The Patrol's Position:

The Patrol's position, gleaned from its answers to the grievance, its opening statement, and its closing argument, is that "there has been no violation of the Collective Bargaining Agreement."

It is the Patrol's position as set forth in it's Level III answer, that "the Grievant was compensated in accordance with the language in Article 51.02. He received minimum Court appearance pay (2 1/2) hours at one and one half times the regular rate. This amount is equal to the amount he would have received by following the holiday overtime pay provision or one hour and twenty-nine minutes at two and one half times the regular rate." The Union's suggested formula, however, "results in a windfall payment not anticipated or intended by the contracting parties." It is the Patrol's contention that "[t]he Union and the Grievant are attempting to apply contract language for purely pecuniary reasons. The goal here is not to obtain fair and reasonable compensation for work performed, but to apply language found in two separate articles to produce an unreasonable result." In conjunction with this latter contention, the Patrol points to the arbitral standard for interpreting contract language[1] which provides that:

> "When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonessential results, while an alternative

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[1] Citing: How Arbitration Works, Elkouri & Elkouri, BNA Books Inc., Fourth Edition, 1985, Washington, D.C., Page 354, and cases cited at footnote 70 thereof.

interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used."

The Patrol urges the application of that standard here, and, of course, argues that its application would result in adoption of its construction. The Patrol also points out the Elkouri's observation that "Arbitrator Harry H. Platt found arbitral surgery justified where necessary to prevent absurd results, and quotes, as do the Elkouris, Arbitrator Platt's views in Evening News Association, 50 LA 239, 245 (1968) to the effect that:

> "Experience teaches that contracting parties are not always absolutely precise, nor can they be expected to be, in their agreement formulations. Not infrequently, words or phrases are unthinkingly included which, if construed according to their literal meaning would produce results in opposition to the main purpose and object of a provision. This is often true when, as here, some of the language used was drafted by others in a different context and in response to other circumstances and policies. In such a case, there can be no doubt as to the right of an interpreter to modify and mitigate-in effect excise-the unpremeditated, unintended language in order to prevent and absurd result and to give effect to the true intention of the parties."

It is the Patrol's contention in its Level III answer that "[t]he Grievant was reasonably compensated for his Court appearance on January 21, 1991, in accordance with a fair and reasonable interpretation of the

Collective Bargaining Agreement. The employer's obligation to carefully justify expenditures of public funds mandates denial of the Grievant's request for a windfall."

These positions and contentions were refined and elaborated upon at the arbitration hearing. Thus, the Patrol contends that "the language negotiated by the parties, as applied to this unusual situation, is ambiguous. The employer did not intend to produce an absurd result when the language was negotiated." The Patrol contends that there was no intent to produce the results sought by the F.O.P. and the Grievant. It contends that "the evidence demonstrates the circumstances presented are unusual and were not anticipated by either party during negotiations."

The Patrol points out that "[i]t is not common statewide for Courts to schedule cases on holidays. The employer does not control the scheduling of Court cases and, therefore, is at the mercy of the Court in regard to overtime worked on a holiday. The facts of this case were not anticipated when the parties negotiated."

According to the Patrol in its opening statement, "the issue becomes what is reasonable. There are three methods of compensating the Grievant for his Court appearance on a holiday. Two methods ... result in $61.80 for the work performed. The third method, the Union's [presumed] preferred method, results in compensation two and one half times greater, equal to $154.20." These three methods were calculated in the Patrol's Level III answer, as follows:

> "Grievant's regular rate of pay = $16.48. Grievant's overtime rate = $24.72. Hours worked on January 21, 1991 = 1 hour and 29 minutes = 1.5 (above rates do not include shift differential).

1. Holiday Overtime: Grievant would receive (1) hour and (29) minutes of pay at two and one half times the regular rate. $16.48 X 2.5 X 1.5 = $61.80 (Article 44.03).

2. Court Appearance Pay: Grievant would receive minimum Court appearance pay (2 1/2) hours at the overtime rate. $24.72 X 2.5 = $61.80 (Article 51.02 B.).

3. Union's Preferred Method: Grievant would receive two and one half times (2 1/2) hours Court appearance pay at the holiday overtime rate. $24.72 X 2.5 X 2.5 = $154.50."

It is the Patrol's position that "common sense tells us the taxpayers of the State of Ohio would not agree with the Union's request for $154.50 for an hour and one half of work by an employee who regularly earns $16.48. The public trust in our system of individual relations would not be well served were the Union's remedy to be granted."

In the closing argument, the Patrol points out that the F.O.P.'s final formula for the Grievant's compensation, put forth for the first time at the arbitration hearing (and hence yet a fourth possible formula), ignores the parties' practice of paying for Court appearances at time and one half the regular rate. Thus, under the F.O.P. urged formula, argues the Patrol, the F.O.P. would in effect allow the Patrol to change its practices with respect to the rate of pay (time and one half) payable for Court appearances, if the Court appearance occurs on a holiday. But, argues the Patrol, it can't

arbitrarily change its Court appearance pay practices.

In its closing, the Patrol contends that while the F.O.P. asserts that the contract language is unambiguous, the possibility of four (4) compensation formulas demonstrates its ambiguity. The Patrol further contends that since neither side anticipated that Court would be held on a holiday, there was no intent to have compensation calculated as urged by the Union, and this lack of intent additionally establishes the Contract's ambiguity. The Patrol asserts that there were no discussions at negotiations concerning this unusual circumstance, i.e., Court appearances being required on a holiday.

The Patrol urges that Sections 44.03 and 51.02 B. must be looked at separately and not together. In support thereof it asserts that the two provisions were negotiated separately and that reading them together leads to an absurd result.

In sum, the Patrol argues that "[t]he Union ... seeks to set a practice which produces an absurd pecuniary benefit under unusual and isolated conditions. The employer's contract interpretation results in just and reasonable compensation for the Grievant."

So it is that the Patrol urges that the grievance be denied in its entirety.

Discussion and Opinion:

As a logical starting point, it is noted that the Arbitrator is a captive of the Contract, which in turn is merely a compilation of language and concepts. Presumably, the language chosen expressly states the Parties' intent. As a captive of the Contract, the Arbitrator must follow where the plain meaning of the language utilized leads. In the search for intent, the

language utilized must be the primary source. Moreover, as the Elkouris[2] point out:

> "[i]t is said that 'the primary role in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the Parties and to interpret the meaning of a questioned word or part with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions.'
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> Similarly, 'Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document .... The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole.' This standard requiring the agreement to be construed as a whole is applied very frequently."

If one's faithful to this maximum, as I am, it seems to me one is compelled to accept the Union's proposition that Section 44.03, which expressly deals with the computation of holiday overtime, and is unquestionably involved here, and Section 51.02 B., which expressly deals with guaranteed Court appearance pay minimums, and is unquestionably also involved here, must be read together and in conjunction with each other. Faithful to

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[2] How Arbitration Works, 4th Edition, 1985, BNA Books, Inc., Washington, D.C., Pages 352-353 (footnotes omitted).

the maxim, it's not possible to justify "isolating" Section 44.03 from Section 51.02 B., as urged by the Patrol.

But what of the other express contentions of the Patrol. Taking them up seriatim, primary among them is the contention that the result the F.O.P. urges here could not have been intended because there simply was no explicit discussion concerning the manner of compensation for a Court appearance on a holiday. An additional primary contention is that, given the fairness and reasonableness of the compensation in fact paid to the Grievant by the Patrol, in light of the relative brevity of the Grievant's Court appearance, the substantially greater amount of monies sought by the Grievant and the F.O.P. must be characterized as unreasonable and unfair, indeed as absurd, and hence such an amount could not possibly have been intended. Taking up the latter first, I'm unable to concur that the quantum of either the difference in monies between what the F.O.P. seeks and what the Patrol in fact paid, or between the actual hours worked and the amount of pay sought, is so disparate as to warrant the characterization of "absurd." Thus, to be kept in mind is the reality that under discussion here are circumstances which historically in the collective bargaining context, such as here, trigger premium pay. To be kept in mind is the fact that such premium has a purpose, namely, to compensate the employee called to work and inconvenienced while his peers, indeed the work force at large, is enjoying the holiday. Suffice it to say that the "premium" the F.O.P. argues exists here is simply not so out of whack as to be characterized as "absurd." Still further erosion of the validity of an "absurd" characterization lies in the reality of the rarity of occasions upon which the argued for premium would have to be paid. As the Patrol points out, seldom do the Courts convene Court on a holiday, this case being the

first instance of such in five years. Thus, even conceding a meaningful disparity between the relatively small amount of time actually worked and the argued for compensation for same, being a very rare occurrence it is difficult to characterize the premium as an "absurd" undertaking on the part of the Patrol. This being so, it is found that the Patrol-urged principle of interpretation of the avoidance-of-absurd-results, and its Evening News Association corollary of arbitral surgery, are inapplicable here.

In any event, neither of these primary contentions of the Patrol are persuasive. Thus, these types of contentions were dealt with extensively by former National Academy of Arbitrator's President Byron R. Abernethy in Magma Copper Company, 51 LA 9, 12-13 (1968). What follows is Arbitrator Abernethy's persuasive rationale for finding no merit to these contentions.

> "... But the Company argues that it was never intended by those who negotiated and agreed upon this Contract language that Section 10-6, B.[3] would become applicable in the case of a change from solar to daylight saving time, that such an application was never discussed during negotiations. It seems that this is true. At the time this contract provision was agreed upon, neither party apparently envisioned Arizona or the United States adopting daylight saving time legislation which would create this

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[3] Section 10-6, B. provided in relevant part that "... any employee starting a shift and released before completing one half shift, shall receive one half day's pay for such period and if required to continue on the second period of the shift, he shall be paid for a full day." During the term of the Contract the State inaugurated Daylight Savings Time, and employees were sent home one hour early and paid for but 7 hours on the time change-over day.

situation.

But if this is so, as the evidence indicates it is, and there was simply no discussion by either side, one way or the other as to whether Section 10-6, B was to be applicable when converting to daylight saving time, then there was no specific understanding, mutual agreement or commitment by either party, either that Section 10-6, B would permit the Company to release employees after seven hours with only seven hours' pay, or that it would require a full day's pay, under circumstances such as those prevailing here, and there was no mutual understanding, agreement, commitment or intent that Section 10-6, B either would or would not be applicable in the case of transition from solar to daylight saving time. What happened during negotiations then just cannot be of assistance in this case. No "intent" regarding this issue was considered or expressed by either party during negotiations, and the Arbitrator has only the language of the Contract to guide him.

Neither does it follow that this provision cannot be held to apply here because the parties did not, during negotiations, envision this situation, or discuss or consider the application of this provision to daylight saving time situations. Parties negotiating a provision of a collective bargaining agreement frequently fail to envision, discuss and consider all the situations which may subsequently arise to which that provision may apply. That fact does not make the provision inapplicable when the unforeseen situation does arise, and when by its language

the provision is clearly applicable.

Finally, where the language of the Agreement is clear and unambiguous, as the language of Section 10-6, B appears to this Arbitrator to be, that is the end of the Arbitrator's inquiry. One does not resort to parol evidence concerning what was or was not discussed during negotiations or as to what was intended by the parties, to ascertain the intent of clear and unambiguous contract language. Such contract language speaks for itself of the intent of the contracting parties, and the intent indicated by the unambiguous contract language must be enforced.

* * *

The "Understanding"[4] of March, 1968, providing that in 1968, under similar circumstances, employees scheduled to work a seven hour shift will be compensated for the actual time worked - 7 hours if the full shift is worked, appears to this Arbitrator to be a reasonable, fair and equitable solution for the parties to have negotiated. But the important thing here is that this was an agreement negotiated and bargained by the parties. It is not the function of the Arbitrator to add to or modify an existing Contract to achieve a fair and equitable solution to a problem which arises under that Contract. It is the Arbitrator's function to enforce the applicable Agreement written by the parties as the parties wrote it, regardless of his opinion of the fairness and

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[4] The Understanding was entered into by the parties subsequent to the events which gave rise to the grievance.

equity of that Agreement. As Arbitrator Killingsworth stated in another case involving daylight saving time (Bethlehem Steel Co., 13 LA 556, 559).

> In the absence of ambiguity, it is the duty of the Umpire to uphold the insistence of one party that a valid agreement be applied exactly as the parties themselves wrote it, even if such strict application results in inconvenience, embarrassment, or even unfairness to the other party to the Agreement. An arbitrator should never substitute his own judgment of what is proper and just for what the parties themselves have clearly agreed upon. "

Concerning the Patrol's contention that it was "at the mercy of the Court" and not in control of the underlying circumstances here, suffice it to say that virtually any overtime situation and/or holiday work situation embodies a situation where the employer does not have control and is subject to the vagaries of outside forces; the point being that if employers had their druthers they would never be confronted with circumstances which required the performance of work on time frames calling for a premium payment. Accordingly, this argument is not a persuasive one.

With respect to the Patrol's contentions that the four possible formulas for compensation here demonstrate the "ambiguity" of the parties' contractual provisions, suffice it to say that this contention is essentially boot strapping in that it is dependent upon finding merit in the first instance to the Patrol-urged formulas, which is not the finding here.

There remains for consideration the point made by the Patrol that the F.O.P.'s argued-for formula ignores the parties' past practice of paying time and one half for Court appearances. In my judgment, this factor has no impact here. Thus, while the "practice" is apparently longstanding, inaugurated at least from the inception of the Parties' collective bargaining relationship,

and therefore co-exists with both the Parties' current, and predecessor Contract, the parties have not seen fit to conform the language of Section 51.02 B. to this reality. Thus, in adhering to the literal language of Section 51.02 B., the F.O.P. is being consistent with its underlying theorem, namely, that the Arbitrator must go where the parties' language leads. One comes then full circle on this point: as previously pointed out, the language the parties use is the primary source for the ascertainment of their intent, and the language utilized here manifests an intent to apply the formula the F.O.P. urges.

Award:

For the reasons more fully set forth above, the grievance is sustained. The Grievant is to be paid the difference between what he in fact was paid for his Court appearance on January 21, 1991, and $103.00.

Dated: September 18, 1991

Frank A. Keenan
Arbitrator