# ARBITRATION SUMMARY AND AWARD LOG
## OCB AWARD NUMBER: 1109

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| **OCB GRIEVANT NUMBER:** | 31-02-951103-0013-01-06 |
| **GRIEVANT NAME:** | Class Action |
| **UNION:** | OCSEA |
| **DEPARTMENT:** | Department of Transportation |
| **ARBITRATOR:** | Nels E. Nelson |
| **MANAGEMENT ADVOCATE:** | Michael P. Duco |
| **2ND CHAIR:** | Rachel L. Livengood |
| **UNION ADVOCATE:** | John Gersper |
| **ARBITRATION DATE:** | January 10, 1996 |
| **DECISION DATE:** | January 27, 1996 |
| **DECISION:** | Denied |
| **CONTRACT SECTIONS AND/OR ISSUES:** | Did employer violate Article 13 and Article 11 of the Agreement by instituting two shifts and by the potential use of intermittents under the Vision 2000 Ice and Snow Excellence Plan. |
| **HOLDING:** | Arbitrator Nelson stated that management did not violate any of the before mentioned Article's. Management's use of two shifts was for the removal of ice and snow and was not arbitrary or capricious. Furthermore the use of intermittent workers did not present a threat to health and safety. The unions charge that the use of intermittents was a threat to the integrity of the bargaining unit is not true. Management argued that their purpose was simply to improve ice and snow removal. |
| **ARB COST:** | |

#1109

# ARBITRATION DECISION

January 27, 1996

In the Matter of :

| | | |
|---|---|---|
| State of Ohio, Department of Transportation, District 2 | ) | |
| | ) | Case No. 31-02-(11-03-95)-13-01-06 |
| and | ) | Class Action Grievance |
| | ) | |
| Ohio Civil Service Employees Association, AFSCME Local 11 | ) | |

## APPEARANCES

For the State:

Michael P. Duco, Assistant Legal Counselor, Office of Collective Bargaining, Advocate
Rachel Livengood, Manager, Dispute Resolution, Office of Collective Bargaining, Second Chair
Jim Miller, Director of Labor Relations, Ohio Department of Transportation
Richard S. Martinko, Highway Management Administrator
Frank S. Kubovich, Labor Relations Officer
James L. McCarty, District Deputy Director

For the Union:

John Gersper, Staff Representative, First Chair
Pat Schmitz, Associate General Counsel, Second Chair
Lois Haynes, Staff Representative, Second Chair
Mike Danko, Chief Steward
George Rhoad, Witness
Mark Conley, Witness
Joseph Hendricks Sr., Witness
Mary Beth Reamer, Witness



Arbitrator:

Nels E. Nelson

## BACKGROUND

The instant grievance relates to the Vision 2000 Ice and Snow Excellence Plan of District 2 of the Ohio Department of Transportation. The plan replaced the single shift working from 7:30 A.M. to 4:00 P.M. with two shifts working from 4:30 A.M. to 1:00 P.M. and from 12:30 P.M. to 9:00 P.M.. It also established a list of intermittent employees to be used to meet operational needs when existing manpower is not adequate.

The plan was discussed at three Labor-Management Committee meetings. At the first meeting on September 26, 1995 management presented the plan and explained the rationale for the plan and the union raised a number of questions. On October 6, 1995 the union offered a counter proposal which was rejected by management. At the final meeting of the Labor-Management Committee on October 27, 1995 management indicated that it was going forward with the plan effective December 1, 1995.

On November 1, 1995 the union filed a class action grievance. It charges that the Vision 2000 Plan violates a number of provisions of the collective bargaining agreement. The grievance requests that the plan be rescinded; that deviations from the contract cease and desist; and that employees be made whole for any losses they suffered.

The step two grievance hearing was held on November 22, 1995. At that time the union raised a number issues related to overtime, the use of intermittent workers, and the motivation for the adoption of the plan. Management argued that the plan responds to the needs of the motoring public and denied that it violated any of the terms of the agreement between the parties.

The union then filed an action in Lucas County Court of Common Pleas seeking a temporary restraining order to prevent the implementation of the plan. On December 1, 1995 an agreement was reached between the union and management. In it the union agreed to waive any right to file a court action contesting the Vision 2000 Plan challenged in the grievance filed on November 1, 1995 and management promised to delay the implementation of the plan until December 11, 1995. The parties agreed to meet

December 4-6 and December 8, 1995 to attempt to resolve the outstanding issues. In the event that the parties were unable to resolve the dispute, the parties specified that the grievance would proceed directly to arbitration on January 10, 1996 before this Arbitrator and that the Arbitrator would be requested to render a written decision within 14 days.

The parties were unable to resolve the dispute. The arbitration hearing was held on January 10, 1996. The record of the hearing was closed pending the receipt by the Arbitrator of several arbitration decisions cited by the state. The decisions were received on January 20, 1996.

## ISSUES

The parties stipulated that the issues were as follows:

1) Did the Employer violate sections 13.02 and the ODOT specific section 13.07 of the CBA when it established shifts for snow and ice removal in ODOT District 2? If so what shall the remedy be?

2) The Union reserves the right to raise issue about sections 1.05, 7.03, 11.01, 11.03, 17.01 and ODOT specific 1000 hour assignment; however, the Employer reserves the right to object.

3) Then Employer reserves the right to raise any section of the CBA in order to argue its rights as outlined by the Agreement.

In addition, the union submitted the following issue:

Does ODOT District 2's utilization of intermittent employees through its Vision 2000 Ice and Snow Removal Policy violate Sections 1.05, 7.03 and/or Article 11 of the collective bargaining agreement?

## RELEVANT CONTRACT PROVISIONS

The parties cited the following provisions of the March 1, 1994 - February 28, 1997 collective bargaining agreement:

Article 1, Section 1.05; Article 5; Article 7, Section 7.03; Article 11, Sections 11.01 and 11.03; Article 13, Section 13.02; and Article 17, Section 17.04 and Section 13.07 of the Agency specific agreement.

## UNION POSITION

The union argues that the Vision 2000 Plan is a scheme to avoid the payment of overtime. It points out that under the old schedule the hours between 4:30 A.M. and 7:30 A.M. and 4:00 P.M. and 9:00 P.M. were overtime but under the new schedule they are paid at straight time. The union claims that this violates Section 13.07 of the agency-specific agreement which requires overtime to be distributed equitably among those normally performing the work and prohibits management from changing an employee's posted regular schedule to avoid overtime.

The union contends that statements made by management officials indicate that the goal of the plan is to reduce overtime. It observes that Mark Conley, a steward, testified that at the annual inspection at the Fremont garage Richard Martinko, the highway administrator in District 2, stated that management was trying to save money. The union notes that George Rhoad, a steward, reported that Jerry Wray, the director of the department, indicated that management had to reduce overtime.

The union challenges the reasons that management gave for instituting two shifts. It contends that at first management claimed that it had problems getting people out for snow plowing. The union maintains that when management found out that response times were only 15 to 30 minutes, it then asserted that it wanted to have employees working during the morning and afternoon rush hours.

The union contends that the two-shift schedule does not make sense. It points out that it is dark from 4:30 A.M. to 7:30 A.M. and from 4:00 P.M. to 9:00 P.M. so that no highway maintenance can be performed during those hours. The union stresses that since snow removal occupies only 28% of employees' time in the winter, the new schedule results in the waste of time and money.

The union contends that the new schedule is unnecessary. It states that when snow conditions dictate, management switches to 12-hour shifts so that plowing can take

place continuously. The union further notes that during a meeting with management, it proposed that extra night patrols be established to report developing road problems.

The union complains that the new schedule creates hardships for many employees. It points out that Mike Danko, the chief steward, testified that on one weekend he received about 50 calls from employees concerned about the impact of the schedule on them. The union observes that Joseph Hendricks testified that when his schedule was changed, his wife had to quit her job to get their children off to school and that Mary Beth Reamer reported that her new hours did not allow her time to see her son.

The union charges that the use of intermittent employees under the Vision 2000 Plan violates the collective bargaining agreement. It complains that the intermittent employees will endanger the health and safety of bargaining unit employees because the intermittent employees were given only one or two days of training while bargaining unit employees attend a two-week training program in Columbus. The union further asserts that management has eroded the bargaining unit by not filling open positions and using intermittent employees to fill those positions.

The union rejects management's claim that it cannot challenge the use of intermittents. It states that the fact that intermittents have not yet been used does not diminish its claim. The union stresses that if it cannot argue regarding the use of intermittents, it would limit what it could accomplish in arbitration.

The union asks that the grievance be granted. It requests that the two-shift schedule be eliminated; that the use of intermittent employees be discontinued; and that any employee who suffered a loss be made whole. The union further wishes the Arbitrator to retain jurisdiction for thirty days.

## MANAGEMENT POSITION

Management argues that the Vision 2000 Ice and Snow Excellence Plan is intended to serve the public better. It indicates that it analyzed data regarding snowfall and traffic patterns and found that the one-shift schedule did not adequately cover the

morning and afternoon rush hours. Management claims that the new two-shift schedule was adopted because it covers 80% of the traffic.

Management asserts that the plan does not violate Section 13.02 of the collective bargaining agreement. It maintains that the two-shift schedule is based on operational needs and that the union was given prior notice of the new schedule and had an opportunity to discuss the plan prior to its implementation. Management states that the union cannot show that the new plan is arbitrary or capricious.

Management contends that the plan does not violate Section 13.07 of the agency specific agreement. It acknowledges that this section prohibits it from changing an employee's schedule to avoid overtime but maintains that it does not apply in the instant case because the new schedule was instituted to better meet the needs of the public. Management asserts that the union cannot meet the burden of proving that the plan was motivated solely by a desire to avoid overtime.

Management observes that overtime will not be eliminated by the new schedule. It points out that if it snows between 9:00 P.M. and 4:30 A.M. or on a weekend or if the snowfall is heavy, overtime will be necessary. Management notes that since the new schedule was adopted on December 11, 1995, 7066.4 hours of overtime have been worked. It stresses that even if overtime is reduced by the two-shift schedule, there is no violation of the agreement as long as there is some operational need for the new schedule.

Management claims that there is no loss of productivity. It states that employees who are scheduled during the hours of darkness and cannot do highway maintenance perform other work during that time. Management indicates that Martinko requires garage managers to send reports to him by email regarding the work performed during the hours of darkness. It contends that the spreadsheet prepared by Martinko indicates that there is no loss of productivity due to the new schedule.

Management claims that the union's charge that the use of intermittents creates safety problems and is intended to eliminate overtime is not ripe for arbitration. It states

that intermittent employees went through an assessment but have not yet been used. Management notes that it stipulated that intermittents will be used only after permanent employees, employees on the auxiliary lists, and 1000 hour transfers or if it goes on 12 hour shifts or to supplement the work force when more manpower is needed than is available.

Management charges that the union did not prove that the use of intermittent employees would create a safety hazard. It points out that in the highway maintenance worker school in Columbus only two days are devoted to snow and ice removal which is the same time as the assessment of the intermittents. Management adds that intermittents will be slip-seated with experienced employees until they are competent to work on their own.

Management asks the Arbitrator to deny the grievance in its entirety.

## ANALYSIS

The instant case raises three issues. First, the union charges that management violated the collective bargaining agreement by instituting two shifts under the Vision 2000 Ice and Snow Excellence Plan. It argued that management's action violated Section 13.02 of the main agreement and Section 13.07 of the agency specific agreement.

The Arbitrator does not believe that there is any violation of Section 13.02. It defines "work schedule," preserves Pick-A-Post agreements, provides for short-term assignments, and sets forth a number of requirements regarding work schedules for employees working in five and seven day operations. None of these points appear relevant in the instant case.

The last paragraph of Section 13.02 would appear to apply in the instant case. It recognizes that certain jobs require non-standard work schedules but states that they must be based on operational needs and requires the employer to notify the union prior to the creation of a new non-standard schedule and permits the union to request a meeting to

discuss the impact of such a schedule. The paragraph further specifies that a non-standard work schedule assignment cannot be arbitrary or capricious.

Management's action complied with these requirements. As will be discussed below, the two-shift schedule was adopted in response to the need to clear roads of ice and snow for the morning and afternoon rush hours. Management made a formal presentation of the Vision 2000 Plan to the union and a series of meetings took place where the program was discussed. The implementation was delayed by management and the union was given an opportunity to make suggestions.

Section 13.07 of the agency specific agreement deals with overtime. It contains more or less standard language relating to the distribution of overtime. The section also states that "an employee's posted regular schedule shall not be changed to avoid the payment of overtime." The union charges that management violated this restriction.

The Arbitrator does not believe a violation of Section 13.07 occurred. First, it is not clear that the sentence at issue applies in the instant case. It appears to be designed to protect employees from having their schedule changed on an occasional or irregular basis to avoid overtime in connection with a specific event or need. This was the case in Ohio Bureau of Employment Services and Ohio Civil Service Employees Association Local 11, AFSCME; Case No. G-36-70; June 24, 1987 where management changed an employee's hours simply to avoid paying her overtime for working at the state fair on Saturday and Sunday. However, in the instant case management established a new "regular schedule" comprised of two shifts rather than the previous schedule of one shift. The issue is not changing an employee's "regular schedule" but the establishment of a new "regular schedule."

Second, the sentence at issue does not prohibit changes in schedules but changes made "to avoid the payment of overtime." In the instant case it is clear that the motivation of the change to two shifts was to improve ice and snow removal. The one-shift schedule puts trucks on the road after the morning rush hour begins and takes them off the road

before the afternoon rush hour ends. The new schedule allows time to remove ice and snow for both the morning and afternoon rush hours.

Management acknowledges that the result of going to two shifts may be less overtime. That fact, however, does not alter the fact that the motivation for the adoption of the two-shift schedule is to improve operations. Whether the new plan results in less overtime will depend on the number and timing of winter storms. The data supplied by management indicates that considerable overtime was worked since the adoption of the new schedule. Furthermore, there is nothing in the contract that guarantees employees any particular amount of overtime.

The union argues that changing work hours by going to two shifts created hardships for many employees. While the Arbitrator understands that changes in the starting and ending times of shifts may interfere with childcare and the work schedules of spouses, it cannot serve as the basis to order management to return to the previous single shift schedule. The collective bargaining agreement allows management to change schedules in response to operational needs. The fact that employees were able to select the shift on which they wished to work based on seniority may have ameliorated the adverse impact of the schedule change.

The union also charged that the new schedule results in the loss of productivity. While it is true that the two-shift schedule results in employees being at work during hours of darkness prior to 7:30 A.M. and after 4:00 P.M. when highway maintenance may create problems, management claimed that employees are doing work in the garages during those times. Whatever is the case, it is management's responsibility to use manpower and equipment as efficiently as is reasonably possible.

The Arbitrator would note that the parties agreed to the following:

> The Employer and the Union agree that the District Joint Health and Safety Committee will review the work practices established for work performed during hours of darkness and make recommendations to the Deputy Director of District 2. The first meeting shall be held no later than 10 working days

from the date this Agreement is entered into by the parties. The agenda for the first meeting shall include the discussion and review of the following incidents: 1) Northwood - cutting brush and 2) Sandusky - mailbox replacement. The Employer has a pre-existing duty to abide by Article 11 of the CBA and HB 308.

The conclusion that management had the right to change the schedule is very strongly supported by four prior arbitration decisions submitted by management. In OCSEA/AFSCME Local 11 and State of Ohio, Department of Transportation; Case No. G87-1922; March 13, 1991 the union grieved when management established a second shift at the Xenia garage to use a bumpgrinder charging that the change was designed to avoid overtime and created a hardship for employees. Arbitrator Harry Graham ruled that the establishment of the second shift was not motivated by a desire to avoid overtime but to maximize the utilization of the bumpgrinder and to minimize the inconvenience to the traveling public. Arbitrator Graham in OCSEA/AFSCME, Local 11 and State of Ohio, Department of Natural Resources; Case No. 25-12-(5-23-90)-75-01-06; November 5, 1990 found that a change in the summer hours of a golf course employee was made for operational reasons and not to avoid overtime, as alleged by the union, and, therefore, did not violate the contract. In State of Ohio, Department of Transportation and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO; Case no. G-87-0715; December 16, 1988 management established a night patrol in the five Geauga County garages and the union charged that management was seeking to avoid overtime and that it was expensive to run five trucks regardless of the weather. Arbitrator Linda Dileone Klein held that management's objective was to better serve the traveling public and any reduction in overtime was incidental. Management staggered the starting time of project engineers in State of Ohio, Ohio Department of Transportation, District 5 and Ohio Civil Service Employees Association, Local 11, AFSCME , AFL-CIO; Case No. G-86-0791, October 10, 1988 and the union charged that the goal was to avoid overtime. Arbitrator David M. Pincus stated that management had the right to schedule work in order to

optimize efficiency. The union was unable to distinguish these prior cases from the instant case.

The second issue is whether the issue of the use of intermittent employees under the Vision 2000 Plan is arbitrable. Management argued that the issue is not ripe for adjudication because no intermittents had been used up to the time of the hearing. The union claimed that the fact that intermittents had not yet been used did not diminish its contention that their use under the Vision 2000 Plan would violate the collective bargaining agreement.

The Arbitrator believes that the issue of the use of intermittent employees under the Vision 2000 Plan is arbitrable. Although intermittents may not have been used up to the time of the hearing, they had been processed by the Department of Administrative Services and had received two days of assessment and/or training. The Vision 2000 Plan clearly indicates how they will be used should management feel that the circumstances dictate their use. The per se existence of intermittents under the Vision Plan 2000 Plan is a proper subject for arbitration.

The final issue is the union's charge that the provision for intermittent employees under the Vision 2000 Plan violates the collective bargaining agreement. The union raises two issues. First, it claims that the intermittents constitute a threat to the health and safety of employees in violation of Article 11 of the contract. While the union did not point to any specific language in Article 11 that was violated, it generally charged that intermittents were a threat to health and safety because they were inadequately trained.

The Arbitrator must reject this argument. While it is true that newly hired highway maintenance workers attend a two-week training session in Columbus, management established that only a small portion of the session is related to ice and snow removal. In addition, management stated that intermittent employees, just like regular employees, would be assigned to work with experienced employees until they are qualified to work on

their own. The union was unable to establish that intermittent workers presented any threat to health and safety.

The union's second allegation is that intermittents are a threat to the integrity of the bargaining unit and claimed their use violates Sections 1.05, 7.03, and 17.04 of the contract. The Arbitrator finds no violation of any of these provisions. Section 1.05 prohibits supervisors from performing bargaining work and further states that "the employer ... will not take action for the purpose of eroding the bargaining units." The union, however, did not show that the "purpose" of intermittents under the Vision 2000 Plan was to undermine the bargaining unit. Management argued persuasively that its purpose was simply to improve ice and snow removal.

This interpretation of Section 1.05 is consistent with the decision in OCSEA, Local 11, AFSCME, AFL-CIO and Ohio High Speed Rail Authority; Case No. 56-00-(91-09-19)-02-01-14; November 20, 1992 which was submitted by management. In that case the union grieved when certain work was subcontracted. The union charged that the subcontracting violated the provision against any action taken "for the purpose of eroding bargaining units." Arbitrator Rhonda Rivera held that the use of the word "purpose" required the union to prove that management's intention in subcontracting the work was to erode the bargaining unit and that subcontracting per se is not barred because the contract permits subcontracting. In the instant case the contract permits the use of intermittents and the union was unable to show that the "purpose" of the intermittents was to erode the bargaining unit.

The Arbitrator cannot find any violation of Section 7.03. While this section prohibits the "use of intermittent positions to avoid filling permanent full-time positions," the union did not establish that management intended to use interittents to escape filling vacancies. If the existence of vacancies prohibited the use of intermittents, Section 7.03 would have little effect. Furthermore, should the Arbitrator rule that management cannot

use intermittents when vacancies exist, he would be adding to the collective bargaining agreement in violation of Article 25, Section 25.03.

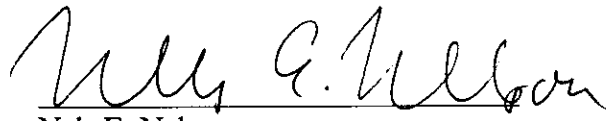
The union also contended that the use of intermittents violated Section 17.04. This section requires the posting of bargaining unit vacancies. The fact that there are vacancies in the district that have not been posted would seem to be beyond the scope of the instance grievance which protests the adoption of the Vision 2000 Plan. Furthermore, Section 17.04 requires to the posting of vacancies which "the Agency intends to fill" rather than requiring management to post positions that become vacant.

The fact that the Arbitrator has found that the intended use of intermittent employees under the Vision 2000 Plan does not constitute a threat to the health and safety of employees and is not intended to erode the bargaining unit, does not mean that the implementation and use of intermittents in the future cannot result in a contract violation. If the union feels at some time in the future that the actual use of intermittents endangers the health or safety of employees or becomes a device to erode the bargaining unit, it is free to grieve at that time.

Based upon the above analysis, the Arbitrator must deny the grievance in its entirety. First, the two-shift schedule was adopted in response to operational needs rather than to avoid the payment of overtime. Although it may result in some reduction in overtime and a hardship to some employees, prior arbitration decisions clearly support management's right to institute two shifts. Second, the use of intermittents as set forth in the Vision 2000 Plan does not constitute a threat to the health and safety of employees and is not an attempt to erode the bargaining unit.

## AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

January 27, 1996
Russell Township
Geauga County, Ohio