#1368

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety, Division of State Highway Patrol
-AND-
OSTA, Inc.

For Division of State Highway Patrol
Richard G. Corbin, Advocate

For OSTA
Herschel M. Sigall, Esq., Advocate

Case Decided
May 24, 1999

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Eligibility for "Double Back" Pay

I. The Facts

The facts in this case are largely undisputed and essentially revolve around Articles 26.05 and 37.02 in the parties' current Collective-Bargaining Agreement, which covers 1997 through 2000 (the Contract or Collective-Bargaining Agreement). The Ohio State Troopers Association represents the grievants, all of whom are state troopers, and the Ohio Highway Patrol is the Employer. Although this dispute comprises nine grievances and as many Grievants,[1] the parties stipulated that Trooper Phillip Sheaffer (Trooper Sheaffer) filed the lead grievance and, therefore, is the lead Grievant.[2]

A. Historical Sketch

The Fraternal Order of Police (FOP) represented Ohio's State Troopers until 1997, when the Ohio State Troopers Association (OSTA or the Union) assumed that responsibility. From approximately 1987, the established parties' past practice has been to offer premium pay to troopers who work two consecutive shifts where the second shift starts less than 24 hours after the first began (double back). However, premium pay was not available if either of the two shifts was a training shift, unless the training occurred at the Highway Patrol Academy in Columbus, Ohio. The language in the two articles which are relevant to premium pay for double back (Articles 26.05 and 37.02) has remained the same since 1986. During its first contract negotiations with the Employer, in 1997, OSTA proposed to retain the language of Article 26.05 and Article 37.02 and did not question the past practice mentioned above.

The foregoing past practice was reinforced by an opinion and award that Arbitrator Dworkin rendered in 1987 (1987 Opinion) to settle a dispute between the Employer and FOP. That dispute arose because some troopers were doubled back either to training or to regular work schedules, or to both. With respect to the instant dispute, the relevant issue before Arbitrator Dworkin was whether "'double back'" pay

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[1] *See* appendix A for a list of the other grievants and their complaints.

[2] Management's brief at 3.

is applicable to situations concerned with attendance at scheduled training sessions."[3]

In deciding that issue, Arbitrator Dworkin set forth the relationship between Articles 37 and 26. Article 26.05 provides for premium pay for "double backs" Article 37.02 specifically addresses several factors involving training shifts, including compensation for attending such programs. Arbitrator Dworkin held that Article 37.02 exempted training shifts from the provisions for "double back" pay in Article 26.05. He reasoned that because Article 37 was more specific than Article 26.05 regarding training programs, the parties must have intended for Article 37.02 to control Article 26.05 in that respect. Moreover, Arbitrator Dworkin concluded that Article 37.02 exempts scheduled training sessions from the premium pay provisions of Article 26.05.

In 1988, the parties scheduled a second hearing before Arbitrator Dworkin to clarify his 1987 Opinion. There, the issue was whether various "activities" were "covered by the double back language of Article 26.05 or . . . [were the activities] excluded, based on the 'training' exemption granted in Article 37.02."[4] The three "activities" in question were: (1) annual Breath-testing Instrument Certification; (2) Comprehensive physical and Health Prescription, and (3) Orientation Day—Ohio state Fair Detail.[5]

On January 8, 1988, Arbitrator Dworkin issued a second opinion (1988 Opinion) resolving that issue. Excluded from the scope of training were activities that essentially had the purpose of testing or measuring rather than enhancing troopers' skills.[6]

B. Facts Involving the Instant Dispute

The instant dispute arose after Management required the Grievants to work double backs that involved training and regular work shifts. In fact, all, or virtually all, of the Grievants worked double backs

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[3] Arbitrator Dworkin's 1987 Opinion at 2.

[4] Arbitrator Dworkin's 1998 Opinion at 8, citing the employer's brief at 2.

[5] *See* Appendix B for a summary of Arbitrator Dworkin's classifications of these activities.

[6] *See* Appendix B.

in which the second shift began from 8 to 12 hours after the first shift ended. For example, Trooper Sheaffer had eight hours between the end of his shift of civil disturbance (or "riot) training and the beginning of his regular shift.[7] The Grievants were scheduled to work training shifts first and regular shifts second, or vice versa. After Management rejected the Grievants' requests for "double back" pay, they filed separate grievances and, ultimately, selected the undersigned to resolve this dispute. Instead of scheduling an arbitral hearing before the undersigned, the parties elected to submit their briefs and evidence by mail. There are no procedural issues in this dispute, and it is now properly before the Arbitrator.

II. Relevant contract Language

Article 20.08 Arbitration

20.08(4) Decisions of the Umpire

The Umpire's decision shall be final and binding upon the Employer, Union and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the Umpire as set forth in this Article.

20.08(5) Limitations on the Umpire

The umpire shall have no power to add to, subtract from or modify any of the terms of this agreement, nor shall the umpire impose on either party a limitation or obligation *not specifically required* by the language of this agreement.[8]

Article 26—Hours of Work and Work schedules

26.05 Double Backs

At any time 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 ½) times his/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.

Article 37-Educational Incentive and Training

37.02

In addition to the basic training provided at the Academy, advanced, specialized or individual training may be provided as needed. The reasons for training may include, but are not limited to, the overall improvement of skill and efficiency; changes in laws or duties and responsibilities, changes in equipment or technologies; and to qualify for positions of greater responsibilities.

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[7] Grievance # 15.03.970530.058.04.01. Trooper Sheaffer attended civil disturbance training session from 1:30 p.m. to 9:30 p.m. and worked his regular shift from 6:00 a.m. to 2:00 p.m.

[8] (emphasis added).

The work day for all training programs shall be from 8:00 A.M. to 5:00 P.M., unless otherwise specified, with one (1) hour for lunch and time for breaks as the program allows. Employers assigned to attend training programs will adopt the schedule of the program.

Employees required to participate in official duties or classes that extend beyond an eight (8) hour day may be compensated according to the overtime provisions of the contract.

Staying or sleeping overnight at a particular location during training program shall not give rise to the accumulation of overtime.
Travel time to and from training programs shall be considered as on-duty hours and compensated appropriately.

III. Relevant Non-Contractual Provisions

HP-17, VI—Payroll Time (1996)
Column 55 "DBT-Double Back Time- Enter the total time worked when the scheduled starting time is less than 24 hours for Bargaining Unit 1, and 20 hours for Bargaining Unit 15 employees from the preceding scheduled starting time, *with the exception of local emergency situations and all approved/authorized training.* A report back is not considered a double back. . . ."[9]

HP-17, VI—Payroll Time (1986)
Column 55 "DBT-Double Back Time- Enter the total time worked during a shift when the scheduled starting time is less than 24 hours from the . . . [preceding][10] scheduled starting time, *with the exception of local emergency situations and all approved/authorized training.* A report back is not considered a double back."[11]

IV. The Issue

Management submitted no statement of the issue. The Union submitted the following issue: "Were the Grievants wrongfully denied back pay as prescribed by article 26.05 of the Collective-Bargaining Agreement, when the Grievants were required to report back to their regular work shift after attending training, not occurring at the academy."
The Arbitrator adopts the Union's statement of the issue.

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[9] (emphasis added).

[10] Here the actual provision refers to the "*proceeding* scheduled time." "Proceeding" renders the passage unclear. The Arbitrator, therefore, assumed that Management intended to use "preceding" which looks backward to the next previous starting time and which jibes with the language in the 1996 version of HP-17.

[11] (emphasis added).

V. List of Exhibits

A. Management's Exhibits

Employer's Brief[12]

A. Contract language all labor agreements since 1986, Article 25 and 37
B. Arbitration Awards 86-04, Harry Dworkin, (1987)
C. Arbitration Awards 86-04, supplement, Harry Dworkin, (1988)
D. Grievant Sheaffer's Training Record, May 8, 1997 training highlighted
E. Factfinder's report, Jonathan Dworkin, November 5, 1997 (adopted by the parties)
F. Statement, Captain Richard G. Corbin
G. Highway Patrol Policy HP-17, 1987 edition and current policy
H. Ground rules for 1997 negotiations

B. Union's Exhibits

Union's brief[13]

1. Arbitrator Dworkin's 1987 Opinion
2. Appendix B—Administrative-Operations—Subject: Firearms Issue, Training and Qualification
3. Appendix C—Arbitrator Dworkin's 1988 Supplemental Opinion
4. Trooper Sheaffer's grievance trail
5. Trooper Larry Anderson's grievance trail
6. Trooper Charles M. Gannon's grievance trail
7. Trooper Michael Meyers' grievance trail
8. Trooper Michael Roth's grievance trail
9. Trooper Mark D. Groves' grievance trail
10. Trooper Phillip H. Bender's grievance trail
11. Trooper David Ledford's grievance trail

VI. The Parties' Positions

A. Management's Arguments

1. This dispute falls within the scope of the parties thirteen-year past practice of disallowing "double back" pay for training shifts.
   a. Arbitrator Dworkin's 1987 Opinion addressed double backs *to* and *from* training shifts to regular shifts and vice versa.
2. Article 20.08(4) establishes the agreed-upon impact of an arbitrator's award on the parties.
3. Given the two or more hours of classroom instruction, civil disturbance training a "training" session

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[12] Contents of the brief reflect Management's labeling.

[13] Contents of the briefs reflect the Union's labeling.

rather than a qualification or proficiency test.[14]

B. Union's Arguments

1. The parties' past practice is not binding in this dispute because:
   a. This dispute only addresses "double back" pay for reporting *to* a regular shift *from* a training shift, while the past practice covers the reverse and, therefore is irrelevant.[15]
   b. The past practice lacks continuity because Management has granted one trooper "double back" pay for working a training shift.
2. By allowing "double back" pay for training in Columbus, Policy 9-500.20(C)(5) invites the conclusion that "double back" pay applies to training conducted elsewhere.
3. The rationale for "double back" pay under Article 26.05—that troopers must be alert, coherent, and mentally fit should apply across the board to all back-to-back shifts.
4. In his 1987 Opinion, Arbitrator Dworkin exceeded his authority, under Article 20.08, by holding that Article 37 controls Article 26 regarding "double back" pay for working training shifts. Neither Article explicitly states that proposition.[16]
   a. Article 37 does not "specifically address the issue of double backs and, therefore, is subject to further interpretation."[17]
   b. Arbitrator Dworkin's 1987 opinion holding that double backs are inapplicable to training shifts is contrary to the Union's intent.
5. Because firearms qualifications is a proficiency test and is central in civil disturbance training, the entire civil disturbance training program should be deemed a proficiency test and subjected to the "double back" pay provisions of Article 26.05.

VII. Discussion

A. "Double Back" Pay from Training Shifts vs. "Double Back" Pay to Training Shifts

The basic issue here is whether troopers assigned to regular shifts within twenty-four hours after they started training shifts are entitled to "double back" pay. The Union offers two arguments here: (1) this issue has not been previously addressed; and (2) under the foregoing conditions, troopers are entitled to in"double back" pay. In contrast, Management contends that Arbitrator Dworkin's 1987 Opinion—and the ensuing,

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[14] "'Semi-annual pistol and shotgun qualifications.'"
1. "Two hours of classroom type of training sessions."
2. "Training on home weapon security."
3. "Cleaning weapons."
4. "Core values."
5. "Use of force."

[15] Union's brief at 5.

[16] Union's brief at 4.

[17] Union's brief at 5.

twelve-year past practice—fully addressed entitlement to "double back" pay under these conditions. In support of this position, Management argues that the facts surrounding the dispute that led to Arbitrator Dworkin's 1987 Opinion are the same as those in the instant dispute. Specifically, Management points out that, in the 1987 dispute, the Grievant (Trooper Greenwood) filed two grievances for denial of "double back" pay: one claiming that entitlement was based on Trooper Greenwood's having doubled back from a regularly scheduled shift to a training shift; the other grievance claiming that is entitlement to "double back" pay stemmed doubling back from a training shift (orientation day) to a state fair detail.

This argument implicitly assumes that state fair duty is equivalent to a regular work shift, and the record offers no reason to doubt that equivalency. Moreover, two reasons suggest that state fair detail lasts for more than one or two days, which tends to support the position that it is more akin to regular-schedule duty. First, the record reveals that Orientation training is a day-long activity.[18] Yet, the Employer is unlikely to incur the expense of having troopers attend a day-long training session in preparation for state fair duty if that duty lasted for only one or two days. Second, it is reasonable to infer that the length of state fair duty is coextensive with the life span of the state fair itself, at least a week. These considerations persuade the Arbitrator that state fair detail is roughly equivalent to regularly scheduled duty.

Therefore, one can also conclude that the facts, in the 1987, dispute did involve doubling back from training shifts to regularly scheduled shifts, i.e, state fair detail. Accordingly, this Arbitrator holds that Arbitrator Dworkin's 1987 Opinion applied to situations in which troopers doubled back from training shifts to regular scheduled shifts. As a result, one cannot accept the Union's argument that this issue of entitlement to "double back" pay for reporting from a training shift to a regular shift has not been previously addressed.

Furthermore, the issue was resolved. Arbitrator Dworkin's 1987 Opinion denied "double back" pay under those same facts.

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[18] Arbitrator Dworkin's 1988 Opinion at 14, referring to "Orientation Day."

B. Scope of the Twelve-Year Past Practice

The issue here is whether the past practice that implemented Arbitrator Dworkin's 1987 Opinion encompassed double backs from training to regular-scheduled shifts. Evidence in the record does not support the Union's contention that the issue of entitlement to "double back" pay for reporting to regular shifts from training shifts exceeds the scope of the parties' past practice. Since approximately 1987, the parties have followed a past practice that implements Arbitrator Dworkin's 1987 Opinion, which denied "double back" pay for attending training sessions. Moreover, as pointed out above, the facts underlying that Opinion include situations in which troopers report from training duty to regular duty. Thus, nothing in the record establishes the Union's contention that the past practice does not cover double backs from training to regular-scheduled shifts.

C. Continuity of the Twelve-Year Past Practice

The Arbitrator is not persuaded by the Union's contention that this past practice is somehow compromised because the Employer paid Trooper Chris Dickens "double back" pay for doubling back from training in the summer of 1998.[19] First, the Union offered no independent evidence to support this assertion. And, second, assuming the truth of the assertion, a single breach of a twelve-year past practice is hardly sufficient to justify disregarding that practice.

D. Academy Training, Decentralization, and the Purpose of "Double Back" Pay

Here, the Union makes three arguments for extending "double back" pay to training that occurs outside of the academy. First, the Union points out that the Employer exempts training at the Columbus Academy from the general prohibition against granting "double back" pay for training. Second, the Union argues that, over time, training has been decentralized, occurring predominantly at regional training sites.

According to the Union, the Employer should compensate for training at regional district training

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[19] Union's brief at 8.

sites as it compensates for Academy training. In support of this argument, the Union seems to offers three points. First, under any circumstances, the exemption for Academy training undermines the past practice. Second, the decentralized nature of training should effectively "swallow" the general rule and permit "double back" pay for all training, wherever it occurs. Third, the Union maintains that the purpose of granting "double back" pay in the first instance illustrates its applicability to training. Here, the Union specifically points out that the rationale for granting "double back" pay for double backs between two regular shifts is to discourage the Employer from scheduling troopers in that manner. And, according to the Union, requiring troopers to work two shifts within 24 hours of each other allows insufficient time for troopers to recover between shifts. Such assignments are alleged to ignore that the nature of troopers' duties requires them to be alert and rested. Also implicit in the Union's argument is that duty on training shifts can be as enervating as duty on regular shifts. Therefore, troopers who double back from training shifts to regular-scheduled shifts in less than 24 hours are likely to be as fatigued and listless as troopers who double back between regular shifts within the twenty-four-hour window. Thus, the same types of danger and problems confront both groups of troopers.

Although it lacks independent, corroborative evidence, the Union's contentions are commonsensical and, thus, are not bereft of credibility. Nevertheless, the Arbitrator is not inclined to discard or even substantially amend a twelve-year past practice, though, on the surface, it seems to contradict the articulated purpose of Article 26.05.[20] This source of this reluctance is that both the purpose of Article 26.05 and the past practice have coexisted for those twelve years without clear evidence of mutual abrasion. Problems like those which the Union raises present an obvious danger to the public and should have surfaced and been

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[20] To some extent, the Employer validates the Union's points. In his 1987 Opinion, Arbitrator Dworkin pointed out that the Employer addressed the purpose of the double-back provisions of Article 26.05. He wrote: In the judgment of the Employer the 'double back' language of the agreement was designed to serve as a penalty clause so as to discourage scheduling employees subject to the permanent shift system in a way that sets those regular shifts too close together. . . ." Arbitrator Dworkin's 1987 Opinion at 16. The questions are: (1) Why the concern for setting regular shifts too close together; (2) Are the problems that the Union points out also a basis for concern about double backs; and (3) does the inclusion of training shifts in double backs justifiably alleviate those concerns?

addressed within twelve years. Yet, there is no evidence that the Union's concerns have surfaced as material and substantive problems. Under these circumstances, the Arbitrator must decline the invitation to overrule such a long-lived past practice on the basis of a plausible but inchoate problem.

E. Propriety of Arbitrator Dworkin's 1987 Opinion

The Union launches several attacks on the propriety of Arbitrator Dworkin's 1987 Opinion, ultimately claiming that it exceeded the Arbitrator's authority under Article 20.08. Specifically, Arbitrator Dworkin is alleged to have transgressed the boundaries of Article 20.08 by holding that Article 37 controlled Article 26. The Union rejects Arbitrator Dworkin's holding because nothing in either Article 37 or 26 explicitly supports it.

Apparently, the Union premises its argument on a literal reading of Article 20.08(5), which states: "The umpire shall have no power to *add to, subtract from or modify* any of the terms of this agreement, nor shall the umpire impose on either party a limitation or obligation *not specifically required* by the language of this agreement."[21] In essence, the Union is asking this Arbitrator to overrule Arbitrator Dworkin's 1987 Opinion regarding the hierarchal relationship between Articles 26.05 and 37.02.

Several reasons counsel against that step, however. First, this Arbitrator reads 20.08(5) as a typical attempt to address a fundamental concern that the United States Supreme Court also discussed in *United Steelworkers of America v. Enterprise Wheel and Car Corp*:[22]

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to *dispense his own brand of industrial justice*. He may of course look for *guidance from many sources*, yet his award is legitimate only so long as it *draws its essence* from the collective bargaining agreement. When the arbitrator's words manifest an *infidelity* to this obligation, courts have no choice but to refuse enforcement of the award.[23]

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21 (emphasis added).

22 363 U.S. 593 (1960).

23 *Id.* at 596.

The foregoing passage implicitly recognizes at least four principles that are crucial to assessing the legitimacy of Arbitrator Dworkin's 1987 Opinion. First, the passage suggests that it strains reason to expect even the finest draftsman to articulate the agreements that lurk beneath the numerous provisions in any Collective-Bargaining Agreement, without falling prey to latent (and perhaps patent) ambiguities.[24] This observation is strengthened when one considers the virtually infinite number of circumstances that could arise during the life of a Collective-Bargaining Agreement. In light of these considerations, adopting the Union's position that the legitimacy of Arbitrator Dworkin's Opinion depends on the presence of explicit, on-point, supportive language would saddle draftsmen with an impossible task.

Second, if the explicit language to which the Union refers had existed, then the relationship between Articles 26.05 and 37.02 would not have been shrouded in ambiguity in the first instance. The absence of such explicit language essentially created the ambiguity. Furthermore, acknowledging or even lamenting the absence of explicit language does nothing to address the existence or persistence of the issue or the need to resolve it.

Third, although arbitrators may not dispense their "own brand of industrial justice," in attempting to extract the parties' intent from ambiguous contractual language, arbitrators may (and often must) "look for guidance from many sources." In his 1987 opinion, Arbitrator Dworkin addressed the ambiguity surrounding the relationship between Articles 26.05 and 37.02.[25] In doing so, he accepted the Employer's

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[24] Latent ambiguities arise in the wake of unforeseen and/or unforeseeable future circumstances. Patent ambiguities result from imprecise contractual language. An example of a patent ambiguity here is that Article 26.05 does not specifically include or exclude training, and Article 37.02 does not explicitly include or exclude "double back" pay.

[25] For example, Article 26.05 discusses "double back" pay for shifts that start less than 24 hours apart and explicitly excludes "report backs" within 24 hours as bases for awarding "double back" pay. On the other hand, Article 26.05 no where excludes training shifts for purposes of "double back" pay. Therefore, one could read Article 26.05 to implicitly include training shifts, since it does not explicitly exclude them as it did "report backs." In short, on its face, Article 26.05 is subject to at least two reasonable interpretations, which renders it ambiguous by definition.

Similarly, Article 37.02 addresses training shifts, compensation therefor, and other specifics about training. However, Article 37.02 never specifically mentions whether "double back" pay applies when the starting times for training shifts and regular shifts are less than 24 hours apart. Consequently, one could reasonably interpret Article 37.02

invitation to apply the traditional and widely accepted canon of *Ejusdem Generis*—where specific and general language conflict, specific language controls.[26] This canon is one of the "many sources" available for interpreting ambiguous language. Applying well-known interpretative canons is one of several traditional approaches to resolving ambiguities in Collective-Bargaining Agreements without resorting to parole evidence. Endorsing the Union's "explicit language requirement" would seriously threaten (if not nullify) the utility of traditional canons of interpretation like *Ejusdem Generis.*

Fourth, Arbitrator Dworkin drew upon the "essence" of the Collective-Bargaining Agreement in deciding that Article 37.02 controls Article 26.05. For example, he carefully explained why he found Article 37.02 to be more specific than Article 26.05. He stated why he thought that specificity reflected the parties' intent that Article 37.02 determine whether the double-back-pay provisions of Article 26.05 applied to training shifts.

In light of these considerations, this Arbitrator is not prepared to define "specifically required," in Article 20.08(5), to mean explicitly stated, especially where, as here, the contractual provisions in issue suffer from both latent and patent ambiguities.[27] The imperfection of draftsmanship and the impossibility of accurately predicting which circumstances will arise in the future to confound even the most carefully

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as manifesting an intent to exclude training shifts from "double back" pay, since it explicitly discusses compensation for overtime and for travel time. On the other hand, one could interpret Article 37.02 as including "double back" pay because it defines what does and does not constitute adequate grounds for receiving overtime, but makes no mention of whether training ever qualifies for "double back" pay. Failure to exclude "double back" pay while specifically excluding sleeping overnight as a basis for overtime reasonably suggests that the drafter did not intend to exclude "double back" pay for training shifts. Thus, Article 37.02 is subject to at least two reasonable

[26] *See, e.g.*, ELKOURI AND ELKOURI, HOW ARBITRATION WORKS 355 (4th ed. 1985); FAIRWEATHER'S, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 176 (J. Schoonhoven, Ed. in chief, 3rd ed. 1991).

On its face, Article 37 is more detailed than Article 26.05 regarding pay for training shifts. In applying *Ejusdem Generis*, one might reasonably conclude that the parties invested more thought in Article 37 than in Article 26.05 and, therefore, likely considered whether "double back" pay should apply where, within 24 hours, training either precedes or follows regular work shifts. Nevertheless, the parties elected not to address "double back" pay under Article 37. In other words, there is a reasonable basis for Arbitrator Dworkin's holding regarding the relationship between Articles 26.05 and 37.02.

[27] *See supra* note 24.

articulated agreements essentially foreclose a literal definition of "specifically required."

The foregoing considerations preclude the acceptance of the Union's argument here. Although Arbitrator Dworkin's interpretation is by no means the only rational interpretation of the relationship between Articles 37 and 26.05, his interpretation falls well within the realm of reason and, thus, should not be disturbed.[28]

F. Impact of the 1997 Contract Negotiations

Evidence regarding the 1997 contract negotiations also supports the decision to follow Arbitrator Dworkin's interpretation of the relationship between Articles 26.05 and 37. First, at least three pieces of evidence, in the instant case, establish that during the 1997 negotiations the Union was aware of this past practice. For example, Hp-17 was in place in 1987 and explicitly excluded "all approved/authorized *training*" from the double-back-pay provisions of Article 26.05.[29] Trooper Sheaffer filed his grievance, objecting to the past practice, on May 30, 1997. OSTA and the Employer initiated contract negotiations in early 1997 and those negotiations led to the submission of Fact-finder Jonathan Dworkin's report on November 4, 1997. The existence of HP-17 in 1997 and of Trooper Sheaffer's grievance on May 30, 1997 strongly suggests that, during the 1997 negotiations, the Union was or should have been aware of the past practice of denying "double back" pay for training. Third, despite this knowledge, the Union challenged neither the language of Articles 37 and 26.05 nor the established practice based on Arbitrator Dworkin's 1987 interpretation of the relationship between those articles. Manifestly, the 1997 negotiations were the proper time to challenge Arbitrator Dworkin's 1987 Opinion as well as the ensuing past practice.

G. Role and Status of Arbitral Precedent

Although the Union correctly asserts that neither Arbitrator Dworkin's opinions or awards is binding

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[28] As pointed out earlier, the parties' twelve-year past practice also speaks against disturbing Arbitrator Dworkin's 1987 Opinion, which virtually founded the past practice.

[29] See tab G in the Employer's packet. (emphasis added).

on this Arbitrator, they may serve as persuasive authority. Arbitrators customarily accord some degree of precedential value to arbitral opinions, especially those that construe the same provision(s) of a Collective-Bargaining Agreement under the same or similar facts.[30]

The Union's observation about the legitimacy of Arbitrator Dworkin's 1987 Opinion implicitly questions the proper role of arbitral opinions and awards and pits the need for arbitral finality against the protective language of Article 20.08. Finality of arbitral decisions has been and continues to be the touchstone of the federal labor policy regarding grievance arbitration, as articulated by the United States Supreme court.[31] In addition, finality permeates the very fabric of daily contract administration and furthers the parties' fundamental interests in organizational and procedural efficiency and effectiveness.[32] Article 20.08(4) is also a typical manifestation of the parties' need for finality: "The Umpire's decision shall be *final and binding* upon the Employer, Union and the employee(s) involved, *provided* such decisions conform with the *Law of Ohio* and do not exceed the jurisdiction or authority of the umpire as set forth in *this Article*."[33]

Thus, the Union's desire to overrule Arbitrator Dworkin's 1987 Opinion under 20.08(5) must be balanced against the need for and the benefits of finality as expressed in 20.08(4). Undoubtedly, an arbitrator's opinion and award are vulnerable if they offend Article 20.08. Yet, how does one determine whether such an offense exists? When does an arbitrator's opinion and award "add to, subtract from or

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[30] Although this proposition is stronger where the same Union and Employer are parties in both the precedential and the subsequent disputes, it is also true where, as in the instant case, the identity of one party has changed. *See, e.g.*, "An Arbitrator's Use of Precedence," 94 Dick. L. Rev. 665 (1990).

[31] *See* DelCostello v. Flowers, 462 U.S. 151, 168 (1983) (referring to "the relatively rapid *final* resolution of labor disputes *favored* by *federal law*") (emphasis added).

[32] *See, e.g.*, Shulman, "Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1020 (1955) stating:

> Even in the absence of arbitration, parties themselves seek to establish a form of stare decisis or precedent for their own guidance--by statements of policy, instructions, manuals of procedure, and the like. This is but a means of avoiding the pain of rethinking every recurring case from scratch, of securing uniformity of action among the many people of (citations omitted).-ordinate authority upon whom each of the parties must rely, of assuring adherence in their actions to the policies established by their superiors, and of reducing or containing the possibilities of arbitrary or personal discretion.

[33] (emphasis added).

modify" contractual language, or impose "a limitation or obligation not specifically required by the language of the contract?" When called upon to distill the parties' intent from ambiguous contractual language, an arbitrator may encounter situations where the parties intent is buried between semantic gaps or beneath layers of institutional or political concerns. Even worse, the intent may have been nonexistent when the collective-bargaining agreement was drafted.

Consequently, one can scarcely take a strictly literal approach to language such as that in Article 20.08. Instead, a standard of reasonableness or rationality is indicated. That is, an arbitral opinion and award should remain undisturbed so long as the arbitrator's interpretation of the contractual language in question is based on that contractual language and is *demonstrably* rational or reasonable—reasonable minds might differ regarding the specific analysis or conclusions set forth in an arbitral decision. Thus, even though another arbitrator might have discerned a different relationship (or no relationship at all) between Articles 37 and 26.05, under this "rationality standard," Arbitrator Dworkin's opinion should stand, so long as it satisfies the "rationality test." Arbitral opinions and awards that satisfy this standard also satisfy Article 20.08 and the "essence" test announced in *Enterprise Wheel*.

For the reasons discussed above, this Arbitrator holds that: (1) Arbitrator Dworkin's 1987 Opinion draws its essence from Articles 26.05 and 37.02; (2) is demonstrably rational and, hence, does not violate Article 20.08.

H. Nature of Various Assignments

The crux of the instant dispute is whether the following assignments or activities constitute training or tests: (1) civil disturbance training; (2) people skills training; and (3) forward looking infrared training (FLIR). Although the parties' briefs emphasized the civil disturbance training that Trooper Sheaffer and some other grievants attended, one Grievant attended people skills training and forward looking infrared training respectively. Therefore, the nature of all three types of training is at issue and will be assessed.

Before turning to that assessment, however, a brief discussion about the appropriate standards is indicated. In his 1987 Opinion, Arbitrator Dworkin distinguished "training" from "tests," concluding that

sessions which "train" essentially increase troopers' knowledge or skill, while sessions that "test" basically verify troopers' proficiency or levels of pre-existing knowledge or skills.[34] The gist of that distinction is that training operations or sessions provide "knowledge and information that . . . elevate . . . skill, and proficiency. . . ." [in contrast,] [a] training operation is "an educational process . . . which . . . [instructs individuals] to make them "proficient or qualified regarding a certain task, profession, or undertaking."[35]

Furthermore, Arbitrator Dworkin concluded that a test involves: "an examination or trial . . . to prove the value or ascertain the nature of something. . . . a standard or criterion by which the qualities of a thing are tried. . . . a design "to determine, or prove an officer's qualities, knowledge, ability, aptitude, or qualifications."

Reduced to is essence, Arbitrator Dworkin's definition of training contemplates providing information to increase knowledge and proficiency in a particular area of endeavor. Conversely, testing essentially contemplates an examination to determine the level of knowledge, ability, aptitude, or qualifications in a particular area of endeavor. Finally, to assess the nature of an activity, Arbitrator Dworkin looked to the essential purpose of the activity or session ("essential purpose" test) to determine its basic nature.

This Arbitrator finds that both the "essential purpose" test and Arbitrator Dworkin's definitions of "training" and "testing" activities are sensible, fair, reasonable, and effective. These standards will, therefore, be used to assess the programs enumerated above.

1. Civil Disturbance Training

Civil disturbance training is a hybrid activity which contains some sessions that are "tests" and others that appear, on the surface, to constitute "training." Both Management and the Union apparently accept this fact. For example, Management points to the classroom sessions, in civil disturbance training, as a reason

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[34] Neither party, in the instant case, challenges Arbitrator Dworkin's definitions of either training or tests.

[35] Arbitrator Dworkin's 1988 Opinion at 12.

to classify that program merely "training." In contrast, the Union stresses the central role of firearms qualifications in civil disturbance training as well as the proficiency-testing nature of that those qualifications.

Although civil disturbance training is a hybrid activity, the task today is the same as that which confronted Arbitrator Dworkin in 1987—to determine the essential nature of civil disturbance training. The hybrid nature of civil disturbance training complicates the assessment somewhat,[36] but section D of the Employer's evidentiary packet facilitates the assessment. On the surface, many of the sessions or activities listed in section D, under civil disturbance training, seem to measure proficiency. Examples of these activities include: (1) firearms qualifications; (2) "weapons cleaning"; (3) "handcuff technique"; (4) "range safety"; (5) "roadblocks"; and (6) "pursuits." The central reason for this conclusion is that, in this Arbitrator's view, the skills taught in these sessions are those which troopers probably already possess.[37] Another factor that nudges civil disturbance training toward the "test" end of the spectrum is that firearms qualifications is a central or essential component of civil disturbance training. And even though Trooper Sheaffer received at least two hours of classroom instruction during his civil disturbance training, that is a small amount of time, when one considers that civil disturbance training is at least an all-day exercise.[38] Together, these considerations convince this Arbitrator that, even though civil disturbance training has educational components, its primary purpose is to test or assess troopers' proficiency and skill in handling various aspects of civil disturbances or riots.

2. People Skills Training

People skills training is "training" in the strict sense—intended to increase Troopers' knowledge in this area. Several reasons support this conclusion. First, most of the sessions involved in people skills training seem

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[36] Note that Arbitrator Dworkin did not assess this type of activity in his 1987 award.

[37] Observe, however, that the Arbitrator draws this conclusion from the record before him and without the benefit of having held a full hearing on this matter.

[38] Throughout section D of Management exhibit D, reference is made to the "1st-day" of civil disturbance training.

to involve classroom instruction. Second, it is not at all clear that people skills is a type of skill that Troopers or any other group would already possess. And, third, the Union never contended that people skills training was anything but "training." For these reasons, the Arbitrator concludes that people skills training is intended to increase the knowledge or skill of Troopers in this area.

3. Forward Looking Infrared Training

FLIR training is also held to be "training." Again, several reasons support this conclusion. First, the reasons offered to support the conclusion that people skills training is "training" support the same conclusion about FLIR training. Second, Management offers uncontested evidence that the Ohio state Highway Patrol is (or was) deficient in FLIR and was attempting to recruit an expert to increase the knowledge of Troopers in this area. Consequently, the Arbitrator holds that FLIR training is designed to increase the knowledge and skills of troopers in the Ohio Highway Patrol.

VIII. The Award

For all of the foregoing reasons, the Arbitrator:

1. **SUSTAINS** the grievances of Trooper Sheaffer and the other grievants, in this dispute, who attended civil disturbance training, which is basically intended to ascertain the proficiency levels of Troopers. Consequently, the Employer shall pay Trooper Sheaffer "double back" pay for his regular shift on May 5, 1997, to which he reported less than 24 hours after reporting for civil-disturbance-training shift, on May 8, 1997.
2. **DENIES** the grievances of Troopers who attended sessions of either people skills training or FLIR training, both of which are basically intended to increase the knowledge and skills of Troopers.

Appendix A

Other Grievants		
Troopers	**Reasons for Rescheduling**	**Double Backs**
Larry C. Anderson	Work Schedule changed so that he could attend "Riot training."[39]	Training: 12:00 p.m. to 8:00 p.m Reported for normal shift: 8:00 a.m.
Phillip H. Bender, et al	Work Schedule changed so that he could attend "FLIR training."[40]	Reported to regular shift within 24 hours after training session.
Bruce Cornett	Work Schedule changed so that he could attend "CD training."[41]	Training: 3:00 p.m. to 11:00 p.m Reported for normal shift: 8:00 a.m.
Charles M. Gannon	Work Schedule changed so that he could attend "a basic people skills class."[42]	Training: 6:30 a.m. to 2:30 p.m Reported for normal shift: 12:00 a.m.
David A. Ledford[43]	Work Schedule changed so that he could attend "CD Training."[44]	Training: 1:30 p.m. to 9:30 p.m. Reported for normal shift: 6:00 a.m.
Michael D. Meyers	Work Schedule changed so that he could attend "CD training."[45]	Training: 3:00 p.m. to 11:00 p.m Reported for normal shift: 8:00 a.m.
Michael G. Roth	Work Schedule changed so that he could attend "a Commercial Motor vehicle class.[46]	Training: 3:00 p.m. to 11:00 p.m. Reported to normal shift: 700 a.m.

39 15.00.980520.0076.04.01.

40 Union's brief at 2, no grievance number given.

41 Union's brief at 2, no Grievance number given.

42 Grievance 15.00.980815.0122.04.01

43 Grievance # 15-00-981008-0146-04-01.

44 No grievance number given.

45 No grievance number given.

46 Grievance # 15-03-971007-0109-04-01.

Appendix B

Arbitrator Dworkin's Classifications of Activities		
Activity	**Classification**	**Rationale**
Annual Breath-testing Instrument Certification	Not a training program	"Testing . . . is . . . 'an integrated portion of the training program,'" but "no training takes place designed to improve the knowledge, ability, or qualifications of the operator." at 12. Purpose . . . is to determine the operator's ability to operate the breath test instrument. . . . whether he has retained adequate knowledge, and proficiency to continue operating the breath testing equipment." at 13.
Comprehensive Physical & Health Prescription	Not a training program.	The purpose . . . is primarily to allow the examiner to evaluate the officer's physical conduct. . . . Guidelines [are] submitted on an individualized basis . . . to enable the officer to improve as regard certain demonstrated abnormalities. During the physical testing, and examination, the trooper receives no training. Rather some one month after the examination he receives and evaluation." "The physical examination, and subsequent evaluation, do not . . . involve teaching the officer how to improve on his well being."
Orientation day—Ohio State Fair	A training program	Designed to prepare an officer for special and perhaps unfamiliar assignment and to qualify him to perform a specific type of police work at the state fair." at 14-15. "[P]rovides essential information to enable the officer to properly perform his duties while assigned to the state fair. . . ." at 15.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 4th day of June, 1999

Signature of Notary Public: Dana Condra

Printed Name of Notary Public: Dana Condra

My commission expires: 12-03-01

County of Residency: Hamilton

Robert Brookins

Robert Brookins, Labor Arbitrator