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IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF TRANSPORTATION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Thomas Romine – Class Action

Case No. 31-05(022707)0007-01-07

Dates of Hearing: January 9, February 5 and February 6, 2008

Place of Hearing: ODOT - Jacksontown, Ohio

APPEARANCES:

For the Union:
Advocate: Harold Bumgardner, OCSEA Staff Representative
2nd Chair: Mike Schiffer, OCSEA Staff Representative
Witnesses:
John Gersper – OCSEA Staff Representative
Bob Goheen – OCSEA Operations Director
Jerry McQuain – Highway Technician
Mike Adamik – Highway Technician
Kevin Wamsley – Highway Technician
Melody Conrad - Steward

For the Employer:
Advocate: Ed Flynn, Assistant Labor Relations Administrator
2nd Chair: Joe Trejo, OCB
Witnesses:
Coleen Ryan – LRO
Julie Brogan – Highway Management Administrator
Darrell Fawcett – County Manager
Ray Dailey – County Manager
Jim Miller - Administrator
Chuck E. Schultz – Administrator

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: April 25, 2008

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009 between the State of Ohio Department of Transportation ("ODOT") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether Articles 1.05, 7.06, 13.01, 13.02, 13.07, 13.10 and 13.07 (Agency-specific) were violated by the Employer in the scheduling and utilization of bargaining unit members on February 13, 14 and 15, 2007.

This matter was heard on January 9, February 5 and February 6, 2008. Both parties had the opportunity to present evidence through witnesses and exhibits at the hearing. The parties submitted post-hearing briefs on or about March 7, 2008. The matter is properly before the Arbitrator for resolution.

BACKGROUND

On February 13, 14 and 15, 2007, the Employer scheduled Highway Technicians ("HT") in District 5 to work twelve (12) hour shifts due to a snow storm which was predicted to last up to five (5) days. The affected employees were in the maintenance department and were utilized in the effort to remove snow and/or ice from the roads.

The counties in District 5 are Knox, Licking, Muskingum, Fairfield, Perry, Guernsey and Coshocton. The only county remaining on a regular shift was Coshocton because it did not have enough employees to perform twelve hour shifts. On February 12, 2007, the County Managers informed the employees that their eight-hour work schedule was changed beginning the following day. All of the counties "rolled" into the twelve hour shifts beginning at 12:00 a.m. on February 13, 2007.

The snow storm arrived as predicted, beginning around 1:10 a.m. on February 13 and resulting in the Director of Public Safety declaring a weather emergency on

February 14, 2007 in accordance with Article 13.15 of the CBA. During the storm, all HTs worked the twelve hour shifts. Auxiliary and management employees also worked to provide maximum coverage during the storm.

The Union contends that the HTs' normal work schedule was changed without proper notice in violation of Articles 13.01 and 13.02 of the CBA and, specifically, that the Employer went to a non-standard work schedule without providing proper notice to the Union as required under Article 13.02. The change from the eight hour work schedule created a non-standard work schedule, opines the Union. Moreover, when ODOT decided on February 12, 2007 to implement the non-standard schedule the snow storm had not occurred and ". . . [at] that point in time there was no operational need. It was **not snowing** . . . " (Union's Opening Statement, p. 4).

The Union also contends that, by working the 12-hour shifts, the Employer avoided the payment of overtime, and the most efficient utilization of staff and equipment would have been to schedule 16-hour shifts. The total overtime hours were improperly reduced, because the Employer would normally schedule three days of 16-hour shifts before rolling to 12-hour shifts on the fourth day. Also, the 16-hour schedule would have allowed all of the trucks to be on the road as opposed to only half of them doing so, opines the Union.

Both parties contend that Article 13.07 §2, Roster Administration (Agency-specific), pp. 290-291 applies -- but in opposite ways. The language, in part, states: "This section does not apply to shifts formed in reaction to short-term operational need." The Union contends that this language only applies to the overtime call out rosters and not shifts created due to snow and ice control. The Union contends that Article 13.07 (Agency-specific) p. 291, Snow and Ice Control Policy specifically controls in these circumstances. ODOT, on the other hand, contends that the paragraph taken as

a whole is dispositive on this matter and and that the parties agreed to five days' notice for maintenance schedule changes that exceed ten working days but that no notice was required for shifts formed in reaction to short term operational needs. The Employer considered the snow storm a short term operational need. The Union disagrees.

ODOT states that, in a labor management meeting on February 20, 2007, the Union consented that management had the right to schedule twelve hour shifts and that it has done so in the past. County Managers Ray Dailey ("Dailey") and Darrell Fawcett ("Fawcett") testified that twelve hour shifts have been utilized in Guernsey and Muskingum Counties prior to this storm.

The Employer also presented several past grievances alleging similar contractual violations by the Union that were withdrawn by the Union (Management Exhibit ("MX") K) at either Step 3 or mediation. The Employer submits that rolling into twelve hour shifts has been grieved numerous times in the past by the Union to no avail. The Union disagrees and seeks to hold the Employer accountable for the numerous violations cited above.

As a remedy, the Union demands that ODOT comply with the Agency-specific language in Article 13.07 and pay overtime to members who were denied overtime hours because of the Employer's utilization of non-bargaining unit employees.

The Employer asks that the grievance be denied in its entirety and points out that evidence was only offered from bargaining unit employees from Guernsey County, thereby preventing the fashioning of a remedy appropriate to all of ODOT District 5.

ISSUE

The parties did not stipulate to an issue. The issue is as follows:

Under the CBA between the parties, did any violation occur when the Employer instituted twelve hour shifts on February 13, 14 and 15, 2007 in response to a snow storm?

RELEVANT PROVISIONS OF THE CBA

ARTICLE 1 – RECOGNITION

1.05 – Bargaining Unit Work

Supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees; 2) determine the number of persons required to be employed or laid off; 3: determine the qualifications of employees covered by this Agreement; 4) determine the starting and quitting time and the number of hours to be worked by its employees; 5) make any and all rules and regulations; 6) determine the work assignments of its employees; . . . .

ARTICLE 7 – OTHER THAN PERMANENT POSITIONS

7.06 – Seasonal, Intermittent, Interim, Temporary Overtime

Overtime that is available when seasonal, intermittent, temporary and interim employees are on staff shall first be offered to permanent employees pursuant to Section 13.07.

ARTICLE 13 – WORK WEEK, SCHEDULES AND OVERTIME

13.01 – Standard Work Week

The standard work week for full-time employees covered by this Agreement shall be forty (40) hours, exclusive of the time allotted for meal periods, consisting of five (5) consecutive work days followed by two (2) consecutive days off. . . .

The Employer and the Union may discuss alternate work schedule arrangements as reflected in Section 13.13.

13.02 – Work Schedules

Work schedules for employees who work in five (5) day operations need not be posted. However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such. . . .

The parties recognize that there are certain jobs which require non-standard work schedules. Such work schedules shall be for operational needs. The Employer shall notify the Union prior to the creation of any new non-standard work schedules. The Union may request a meeting with the Employer to discuss the impact of such schedules. Non-standard work schedule assignments shall not be arbitrary or capricious.

13.10 – Payment for Overtime

All employees, except those whose job duties require him or her to maintain a license to practice law shall be compensated for overtime work as follows:

1 Hours in an active pay status more than forty (40) hours in any calendar week shall be compensated at the rate of one and one-half (1-1/2) times the employee's total rate of pay for each hour of such time over forty (40) hours;

2. For purposes of this Article, active pay status is defined as the conditions under which an employee is eligible to receive pay and includes, but is not limited to, vacation leave, and personal leave.

Sick leave and any leave used in lieu of sick leave shall not be considered as active pay status for purposes of this Article.

APPENDIX Q – AGENCY SPECIFIC AGREEMENTS

ARTICLE 13.07 – OVERTIME

13.07 (2) – Roster Administration

In situations where shifts are utilized, the Employer and Union may agree to alternative call-out procedures to work non-shift hours. Five (5) calendar days' notice will be given for county maintenance shifts which exceed ten (10) working days and will be first filled by canvassing qualified volunteers from that work unit's regular roster for the classification specified. If there are more volunteers than shift positions, then State seniority shall be the determining factor. If the need for volunteers still exists, the remaining shift positions shall be filled by inverse seniority. This Section does not apply to shifts formed in reaction to short term operational needs. . . .

13.07(3) – SNOW AND ICE CONTROL

During snow and ice operations employees are expected to work overtime. Consistent charged refusals to work overtime may be grounds for discipline. . . .

With the effective date of this agreement through November 26, 2006, snow and ice overtime call out procedure shall be offered in the following order: . . . .

Snow and ice overtime call out procedure is an appropriate subject for District Labor/Management Committees. If the parties are unable to resolve this issue at the District level, the issue may be submitted to the Statewide Labor/Management Committee for resolution.

R. Supercession

This agency supplemental agreement supercedes any conflicting contractual language.

ODOT – STANDARD OPERATING PROCEDURE

5. Policy on Maximum Working Hours

1. No employee shall be permitted to work more than sixteen (16) hours in any twenty-four (24) hour period, except as noted below, to complete a scheduled work shift. Employees having worked sixteen (16) hours continuously shall then be given at least eight (8) hours off duty. Employees will not be paid for resting or sleeping at the State facility.

2. If it is necessary for work efforts to continue past seventy-two (72) consecutive hours due to a winter storm, officially-declared emergency, or other situation, the supervisor should then reschedule employees on rotating shifts of twelve (12) hours on duty and twelve (12) hours off duty until conditions permit returning to a normal schedule. . . .

POSITION OF THE PARTIES

UNION'S POSITION

The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry and Muskingum Counties that were consolidated into the single matter before the Arbitrator. The grievances allege that ODOT improperly used managers and auxiliary employees during the 12-hour shifts as opposed to full-time bargaining unit employees. (JX A, pp. 1-7). The Union further alleges a violation of ODOT's agency-specific language and any other article contained in the CBA pertaining to this matter.

The Union contends that Article 7.06 was violated in that auxiliary employees were allowed to work while full time HTs were off duty and available. Jerry McQuain ("McQuain") testified, and exhibits indicated, that temporary employees and managers were performing bargaining unit duties during the storm. Moreover, in the past, bargaining unit employees were scheduled for 16-hour shifts in accordance with ODOT policy (Union Exhibit (UX) C), and the remaining eight hour shifts were staffed with temporary or interim employees. The Union questions ODOT's reason(s) for going to 12-hour shifts when the use of sixteen hour shifts was the consistent accepted practice during winter storms.

Union witnesses McQuain, Mike Adamik ("Adamik") and Melody Farnsworth ("Farnsworth") all credibly testified that the parties agreed in Labor-Management meetings that employees would work three 16-hour shifts and then roll into twelve hour shifts on the fourth day.

The Union contends that, through the Labor-Management meetings, the parties discussed and resolved all issues associated with work schedules and changes. Article 13.02 states that work schedules "are defined as an employee's assigned work shift (i.e., hours of the day) and days of the week and work area . . . . [The] Employer shall notify the Union prior to the creation of any new non-standard work schedules. The Union may request a meeting with the Employer to discuss the impact of such schedules."

Since 2005, the Employer has utilized Labor-Management meetings to inform the Union of work schedule changes. If notice was required, however, or if inadequate notice was provided, the parties would execute mutually agreed upon waivers to change an employee's normal work schedule. In short, the longstanding practice of using the Labor-Management meetings to address schedule changes was violated on February 12, 2007 by the Employer. The Union also presented minutes of Labor-Management meetings from December 2005 until February 2007 indicating that the process for notification of schedule changes remained the same.

The Union contends that on February 13, 14 and 15, the employees' standard work schedule from 7:30 a.m. to 4:30 p.m. was changed in violation of Article 13.02. The Union, through witness John Gersper ("Gersper"), testified that Article 13.02's language is very "specific" and supersedes any general language elsewhere in the CBA on this issue. The 12-hour schedule worked on February 13, 14 and 15 was a non-standard schedule which required notice to the Union. ODOT's failure to provide timely notification prevented the Union from requesting a meeting to discuss the impact upon the employees.

The Union also refutes the Employer's position that the contract language contained in Article 13.07, Agency-specific, pp. 290-291 governs in this matter. The

Union specifically asserts that the snow storm was not a short term operational need obviating the notice requirement under Article 13.02.

The language of Article 13.07, Agency-specific, is under the section titled **Roster Administration**, and its general language cannot be given more weight than the specific language in Article 13.02 (main body). Secondly, the language was only intended to apply to this particular section, i.e., Roster Administration. The Union argues that this language does not apply to circumstances involving snow and ice, and the language's only meaning and correct understanding ". . . [is] that the intent of this language did not pertain to 'snow and ice' . . . ." (Union's Post Hearing Statement, p. 10). The Union, through Kevin Wamsley ("Wamsley"), who was a member of the negotiating team, testified that shifts formed for short term operational needs covered events such as tornadoes, mud slides, highway accidents, and/or hurricanes that did not allow the Employer sufficient time to follow the call out procedures due to the urgent necessity for immediate action. Wamsley further added that the Snow and Ice Control Policy contains a defined call out procedure and that snow/ice is not a short term operational need because the Employer has sufficient opportunity to anticipate the alleged emergency.

On February 13th, 14th and 15th, the Employer followed the Snow and Ice Control Requirement in Article 13.07, §3, Agency-specific, reinforcing the Union's position that the snow storm was not an unforeseen event triggering the "short term operational needs" provision relied upon by the Employer. Gersper's testimony supported the Union's position when he indicated that a snow storm was not necessarily a short term operational need. Therefore, if the snow storm was not a short term need, then the schedule change was in violation of Article 13.02.

Finally, Article 13.02 governs non-standard work schedule assignments in that they " . . . shall not be arbitrary and capricious." The decision not to utilize 16-hour shifts resulted in inefficiency because all of the trucks were not on the roadway during the storm. UXs U-K, Chart C clearly established that 16-hour schedules were the most efficient way for ODOT to keep the roads safe. The four (4) hour difference was not shown to be a safety factor and other state employees routinely worked sixteen hour shifts with no dire consequences. The Union further contends that ODOT's use of the 12-hour shifts in this instance allowed the Employer to reduce its overtime liability, contending that is the real reason ODOT rolled to 12-hour shifts. The action of the Employer was, therefore, arbitrary and capricious.

The Union seeks a remedy that requires the Employer to: comply with proper notice in Article 13.02; abide by the overtime and call-out procedures contained in the Agency specific language; cease from performing bargaining unit work; pay overtime compensation for employees who were impacted; and follow the Snow and Ice Control Policy in the Agreement.

EMPLOYER'S POSITION

The Union's issues on the alleged contractual violations before the Arbitrator have changed over time and have created a state of confusion regarding this matter. Initially, the grievances contested the Employer's authority to roll into twelve hour shifts as opposed to 16-hour shifts. This issue was discussed on February 20, 2007 at a Labor-Management meeting, and although not pleased with the decision, the Union acknowledged the Employer's right to schedule twelve hour shifts. (MX D, pp. 57-58).

On February 21 and February 22, 2007 all of the grievances were filed contending in essence that temporary, auxiliary and management employees performed bargaining unit work and Article 13.07 (overtime) and Article 13.07(2), Agency-specific, were

violated. The Union's position during Steps 2 and 3 of the grievance procedure was centered only on the above alleged violations.

At Step 3, in an effort to resolve this matter, the Union was advised of prior grievances where identical issues similar to this matter were previously resolved. Prior grievances dealt with the following issues: whether employees were entitled to sixteen hour shifts as opposed to twelve hour shifts in snow/ice situations (MX K); and whether part-time or auxiliary employees were allowed to work four overtime hours prior to offering such opportunity to the regularly scheduled employees during snow/ice declarations. The Employer presented nine (9) grievances which were filed between December 2003 and January 22, 2007. (MX K, pp. 1-60). All of the grievances were either withdrawn or not appealed by the Union beyond mediation. (Employer's Opening Statement, p. 4). Moreover, only one (1) grievance was heard as a Non-Traditional Arbitration where it was denied by Arbitrator David Pincus. (MX D, p. 57). The Union was put on notice that the Employer's action in rolling to twelve hour shifts and utilizing auxiliary temporary employees was not in violation of the CBA.

The Union exacerbated the situation after scheduling the matter for arbitration by claiming additional issues existed, according to Colleen Ryan ("Ryan"), Labor Relations Officer. Ryan testified that the Union articulated the following new arguments at that time: ODOT sent employees home during their regular shift prior to going to 12-hour shifts; going to 12-hour shifts was to avoid payment of overtime; work schedules were changed without 5 days' notice or discussions with the Union, and employees were to work three (3) sixteen (16) hour shifts before going to 12-hour shifts. The Union's invocation of new issues made it virtually impossible to understand the Union's position prior to Arbitration. Additionally, during Arbitration, the Union advanced new arguments regarding whether a snow storm qualifies as a short term

operational need and whether the Agency-specific language takes precedence only over the identical section contained in the main body of the CBA.

The Employer presented evidence to refute all of the arguments of the Union, but contends that **". . . ODOT's agency specific language is clear and unambiguous. Specifically, the last paragraph on page 290 and going onto page 291 is controlling. ODOT negotiated language giving employees 5 days' notice for MAINTENANCE schedule changes that exceed 10 days. It was made clear that this notice was not required for shifts formed in reaction to short term operational needs. "** (Employer's Post Hearing Statement, p.2). The Employer contends that the contractual language in the Agency-specific section governs; however, in the alternative and absent that language, its conduct was within the confines of the CBA, and this matter should be denied.

Regarding the impact of the Agency specific language upon the main body provision, Section R, p. 300 of the CBA resolves all potential differences by indicating that the agency specific agreement "supersedes" any conflicting contractual language. Moreover, the superseding language impact is not limited to sections which are matched by identical headings or titles. The Employer points out that Article 13.07, Agency-specific, entitled Overtime, is identical to the heading in the main body but contains language applicable to main body sections 13.02 and 13.09. Other examples include agency-specific Section 13.08, which supersedes Section 17.07-17.10, 25.02, 33.02 and 33.01 of the main body. As testified to by Jim Miller ("Miller"), the parties did not intend that each section would mirror its counterpart in the main body, and, in the most recent contract negotiations, the parties grouped topics together and put provisions under headings in an effort to make the Agency-specific section flow better. To that extent, several provisions in prior agreements labeled as miscellaneous in the Agency-

specific sections were moved to Section 13.07, Agency-specific. Miller further testified that the language at issue on pp. 290-291 was previously under the Miscellaneous section, but was moved to Article 13.07, Agency-specific. In addition, Section 13.08, Agency-specific, has superseding language regarding various main body sections, so the Union' argument that each section in the specific agency only applies to that identical section in the main body is not factual.

Therefore, the Employer was only required to provide 5 days' notice in the event the snow storm would exceed 10 working days under Section 13.07, Agency-specific, or under Section 13.02 (main body)[1] to notify the Union of the creation of any new non-standard work schedules. The Employer contends that Section 13.02 (main body) is not applicable, but, if it applies, the Employer submits that it complied on December 13, 2005 (MX D, p. 43) and November 13, 2006 (MX 1, p. 54) when the Union was informed that 12-hour shifts could be utilized during a snow storm. Both notifications occurred at Labor-Management meetings, where the Union failed to request any follow-up meetings.

Regarding the Union's position that 16-hour shifts were more efficient, the Employer cites several factors to refute this assertion: (1) reserving manpower for an extended storm; (2) duration of the storm; (3) equipment break downs; (4) employees get tired/cannot come to work; and (5) road conditions that might require immediate attention. The Employer analyzed many factors in deciding the most effective operational model to employ.

[1] Employer argues that Section 13.02 (main body) does not apply since it is a 5 day operation and ODOT dictated the change, not a third party. The Employer points to the Kinney arbitration decision, G-86-0791 (Arbitrator David M. Pincus) that ORC §4117.08 and Article 5 of the CBA, which reserves the right to Management to alter work schedules to improve efficiencies based on operational needs. Furthermore, rolling to 12-hour shifts does not create a non-standard work week. A permanent change is contemplated for that; otherwise any, schedule change would satisfy the Union's definition of a non-standard work week.

Overtime is also a planning consideration for the days in question, but it is not the determining factor. During the storm, 555 overtime hours were used as opposed to 768[2] overtime hours had the 16-hour shifts been employed. (MX H). The use of overtime is simply one consideration of many factors, and the facts do not indicate that 12-hour shifts were scheduled to avoid the payment of overtime. The Union also failed to show a contractual violation of Article 1.05 in that Management employees who worked the snow storm, did not erode bargaining unit work. Also, Daily testified that employees begin to drop off after the first 16-hour shift for a variety of reasons is another factor ODOT considered in rolling into 12-hour shifts.

The Employer submits that the Snow and Ice Manual relied upon by the Union (UX L, pp. 9-11) that indicates that 100% of the available fleet should be deployed would be ideal, but this manual is a guideline replete with discretionary judgment calls made by the County Manager regarding how to manage the storm. Dailey, Brogan and Fawcett all testified that the Employer was preparing for a five (5) day storm and that also required managing snow drifts due to the high wind factor after the snowfall had ended.

Finally, ODOT's 16-hour policy is a maximum working hour policy, not a minimum. The policy did not establish an entitlement for the employees.

For all the reasons cited above, the grievance should be denied.

DISCUSSION AND CONCLUSION

Based upon the sworn testimony at the hearing, exhibits and post hearing statements, the grievance is denied. My reasons are as follows:

[2] The assumption being that all of the 32 personnel in the Guernsey County as an example, would have work each 16-hour shift barring any equipment breakdowns, etc. (MX H).

The Union's grievances raise four issues: (1) the Employer went to a non-standard schedule without notification to the Union under Article 13.02 (main body); (2) the rolling into a 12-hour schedule was to avoid the payment of overtime in violation of Article 13.07 (main body); (3) the 16-hour schedule was more efficient and therefore was required to be deployed during the storm; and (4) Article 13.07 Agency-specific language is inapplicable due to the section heading, and, if applicable, "snow storms" are not short term operational needs as negotiated by the parties.

First, consistent with the language of Article 5, Management Rights, and ORC §4117.08(c), the Employer, among other incorporated rights, retains the inherent right to set the work schedules of employees and the efficiency needs of its operations. See, ODOT and OCSEA, AFSCME Local 11, Case No. 31-02-(11-03-95)-13-01-06; January 27, 1996, (Arbitrator Nels E. Nelson concluded that Management had the right to schedule work to optimize efficiency). Absent evidence that the change was motivated by a desire to avoid overtime, a violation of the contract did not occur. Despite a voluminous record of over 500 pages and numerous witnesses, no evidence exists to infer that the Employer's motivation was to avoid overtime pay when instituting the schedule change in violation of Article 13.07 (main body). Moreover, implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the proviso that the work schedule change was not solely to avoid the payment of overtime under Article 13.07 (main body).

The distinction between standard and non-standard work schedules under Article 13.02 is immaterial in this matter for the following reason. The provision in question states, in part, " . . . The parties recognize that there **are certain jobs** which require non-standard work schedules." (Emphasis added). The jobs at issue in this matter involve maintenance workers who, during the winter months, perform a variety

of tasks including snow and ice removal. The record is void of any evidence that these maintenance jobs require non-standard work schedules. The Union's position that any change of a work schedule makes the new schedule a non-standard work schedule is not supported by the language in Article 13.2 or the facts. Article 13.02 is void of language that states any changes of a prior schedule makes the new schedule a non-standard work week. To the contrary, these maintenance jobs are normally eight hour shifts 40 hour work weeks unless operational needs dictate otherwise. Moreover, if notice was required under Article 13.02, on December 13, 2005 and December 13, 2006, Brogan did inform the Union that the Employer may roll into 12-hour shifts during Labor-Management meetings (MX D, pp. 43, 54).

The contract is unambiguous that the schedule change shall be for operational needs (Article 13.07 – Agency specific) and not to avoid the payment of overtime (Article 13.07 – main body). Based upon the weather forecast known to the Employer, on February 12, 2007, justifiable reasons existed to roll into 12 hour shifts. The requirement to keep the roadways free of snow/ice during a storm goes without saying. The scheduling of manpower into two 12-hour shifts by the Employer satisfied the operational needs test. The issue of whether the work schedule was changed to avoid the payment of overtime must also be answered negatively. As a result, notification under Article 13.02 was not required, and Article 13.07 (main body) was not violated.

The Union presented evidence that 16-hour shifts would have provided employees the maximum hours allowed by the Employer's policy and would have prevented auxiliary employees from working overtime when other full time employees were available. A review of the Maximum Working Hours policy provides that employees shall not be permitted to work over 16 hours in a day. The parties' Statewide Health & Safety Committee has reviewed this policy and expressed safety concerns

throughout the year over various aspects. (MX E, p. 1-24). However, the Statewide Committee allows each ODOT district and the counties therein to implement the appropriate hours on each shift based upon staffing levels, roads to cover, equipment, etc. However, no evidence exists to find that employees were entitled to three shifts before rolling into storm emergency. The testimony of Daily, Fawcett, McQuain and Adamik indicated that ODOT has rolled into 16-hour, as well as 12-hour shifts in District 5 in the past. Simply, no entitlement exists that the employees were guaranteed 16-hour shifts under a snow/ice declaration.

Regarding overtime, a review of the actual hours worked in Guernsey County indicates that a total of 502 hours were earned by bargaining unit employees, and 53 hours were earned by auxiliary employees. (MX H, pp. 3-4). However, on February 13th and 14th, six full time employees worked 16-hour shifts and five employees worked greater than 12-hours. Of the approximate thirty employees eligible to work, all twenty worked at least four overtime hours and ten worked greater than four overtime hours. Therefore, all Union employees worked some overtime hours, and some worked 16-hour shifts. The cumulative overtime hours worked by the auxiliary employees did not violate the contract. Moreover, the Union, through witness McQuain, agreed that the Employer complied with the call out procedures during the storm. The Union's argument that in the past, employees worked three 16-hour shifts before rolling to 12-hours fails to consider the Employer's objective to become more efficient, which takes into account factors other than overtime. No evidence exists to conclude that the change in the work schedules were motivated to avoid the payment of overtime. In ODOT and OCSEA Local 11, AFSCME, CASE No. G-87-0715 December 16, 1986, Arbitrator Linda Dileone concluded that when Management established a night patrol to better serve the public, and any reduction in overtime was incidental. In the present matter, the Union was

unable to prove that the overtime worked by the auxiliary employees or managers failed to meet ODOT's objective to better serve the public during the snow storm. Accordingly, ODOT was not required to utilize a 16-hour schedule and the use of management or auxiliary employees was not in violation of the contract.

A considerable amount of the presentation involved whether Section 13.07 Agency-specific language is dispositive according to the Employer, or inapplicable, according to the Union. The language on pp. 290-291 was moved from the "Miscellaneous" area in the previous CBA to Section 13.07(2) under the section titled **Roster Administration**. Miller testified that the parties attempted to put the miscellaneous provisions under proper headings to clean up the contract. Union witness Gersper agreed to that point. The difference between the parties is whether the language applies exclusively to Roster Administration or to other main body language. The answer is found in Agency specific Article 13.07 R, p. 300, which provides:

> **"R. Supercession**
>
> This agency supplemental agreement supersedes any conflicting contractual language."

Given the simplicity of this language, its clear that the parties intended that the placement of particular provisions under Agency specific headings are ancillary to the existence of any conflicting language in the main body of the CBA. If conflicting language exists in the main body, the Agency specific provision governs regardless of the heading in the main body. As pointed out by the Employer, numerous examples exist under Agency specific headings that fail to correspond with the same heading in the main body. Simply put, the language, and not the headings, control. The Employer's conduct did not violate Section 13.07(2)'s Agency specific language:

> . . . Five (5) calendar days notice will be given for county maintenance shifts which exceed ten (10) working days and will be first filled . . . . This

section shall not apply to shifts formed in reaction to short term operational needs.

In other words, if the storm or another event exceeded ten days, the notice requirement under this provision would control. Considering the specificity of this language, Article 13.02 (main body) language would also have been superseded in this matter.

The sole remaining issue is whether the storm was a short-term operational need obviating the Employer's contractual obligations within this provision. The parties also differ over whether the snow storm qualified as a short term operational need. The Union contends that unplanned for emergencies, such as accidents, floods, hurricanes, and tornadoes, qualify as short-term operational needs, but snow and ice do not. Wamsley and Gersper contend that the Snow & Ice Control Policy in Section 13.07(d) Agency specifically governs, and the requisite manifest urgency is absent regarding snow/ice which enables the Employer sufficient time to comply with the call-out procedures in deploying personnel.

This Arbitrator finds if the parties intended for short term operational needs to apply to conditions that are "immediate" and nothing else, such language would be included therein. The current language provides that maintenance schedules that would extend ten (10) days require 5 days' notice to the Union. The inference being that any schedule change less than ten (10) days based upon operational needs, qualifies as a short term need.

Therefore, any condition which requires either immediate shift alterations or shift schedule changes for less than ten (10) days due to conditions such as snow/ice, floods, tornadoes, hurricanes, catastrophic accidents, environmental spills, etc. qualifies as a short-term operational need under Article 13.07(2), Agency specific. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The ultimate effect of both is unknown, but both require as

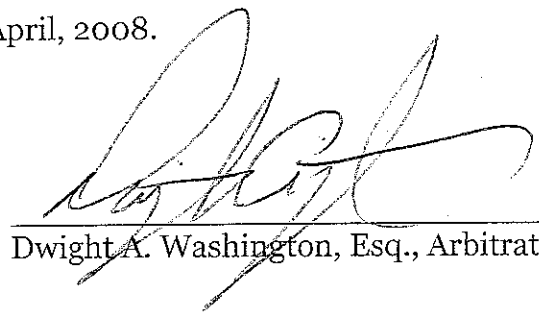
much pre-planning as technology provides to anticipate the impact. Finally, the notion that since the snow and ice had not begun, and that the Employer acted precipitously because it was unable to inform the employees how long they would work the altered schedule violated the contract, fails to render the Employer's actions arbitrary or capricious. It is unrefuted that this was a serious storm which resulted in the Director of Public Safety declaring a weather emergency in all 88 counties on February 14, 2007.

The record consisted of over 500 pages of exhibits and three days of hearing. Given all of the evidence on each issue, the record fails to indicate that the Employer violated the parties' agreement. An analysis of all the evidence indicates that the Employer did not violate the contract when the work schedules were changed on February 13, 14 and 15, 2007. The grievance is denied.

CONCLUSION

For the reasons cited above, the grievance is denied.

Respectfully submitted this 25th day of April, 2008.



Dwight A. Washington, Esq., Arbitrator