ARBITRATION DECISION NO.:
84

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation
District 5

DATE OF ARBITRATION:
December 11, 1987

DATE OF DECISION:
January 5, 1988

GRIEVANT:
Leist, et. al.

OCB GRIEVANCE NO.:
G-87-0522

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
Linda K. Fiely, Esq.

FOR THE EMPLOYER:
Tim Wagner

KEY WORDS:
Jurisdiction - Extra District
    Effect Of Opinion
Employee Not In Service
Time And Mileage For
    Field Employees

ARTICLES:
Article 13 - Work Week,
Schedules And Overtime
    §13.06-Report-In
Locations
Article 25 - Grievance
Procedure
    §25.01-Process

Article 32 - Travel
§32.02-Personal Vehicle

FACTS:

Grievants were Project Inspectors in ODOT District 5. Their duties involve project inspection (90%) and related duties as assigned (10%). During construction season, they drive from home to the field site and back home. Travel pay is computed for these miles over 20 each way, to and from work. The employee is considered at work for pay purposes when he or she crosses that 20 mile point. If driving a state car, the employee is paid no mileage but is at work at the 20 mile point. During the winter of 1987, the projects were closed due to inclement weather and the inspectors were assigned indoor duty in Newark. The employees attempted to collect pay and mileage under the 20+ system; the employer refused.

UNION'S POSITION:

Project inspectors can have only two assignments: (1) project site, either field or district office or (2) a 1000 hour assignment at the county garage. The project inspectors should be paid under the 20+ system whether going to a site or the District Office. They are either field employees or on 1000 hours assignment.

EMPLOYER'S POSITION:

Project inspectors are paid mileage after 20 only when he or she is on field assignment at an active construction site. During the winter, the employee has two options: (1) work at District Office, which will be the report-in location or (2) 1000-hour assignment and the report-in location is the county garage. The project inspector is no longer a field employee when assigned to the district office or a 1000-hour assignment.

ARBITRATOR'S OPINION:

The arbitrator looked at the actual words of Section 13.06 because they are the words of the contract and both parties agreed that management's last best offer was accepted by the Union and expresses the intention of Section 13.06. Sentence two of Section 13.06 says "The report in location for ODOT field employees shall be the particular project to which they are assigned or 20 miles, whichever is less". The word field describes the employee and describes a location of work. The job description includes field and non-field duties. When not assigned field work, he is not a field employee. A project inspector not on a site or on 1000-hour assignment is no longer a "special case" and is governed by paragraph 4 which states the "report-in location shall be the facility to which they are assigned." Grievance denied.

The arbitrator did not address the issue of an employee no longer in service receiving backpay from an arbitral award because the grievance for all of the grievants was denied.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

IN THE MATTER OF THE
ARBITRATION BETWEEN

OCSEA, Local 11,
AFSCME, AFL-CIO,
Union

and

Ohio Department of Transportation
Employer

Grievance No.:
G-87-0522

(Grievant(s) Leist et. al.)

Hearing Date:
December 11, 1987

For OCSEA:
Linda K. Fiely, Esquire

For ODOT:
Tim Wagner

Present:

In addition to Ms. Fiely, Mr. Wagner, and the Grievant, the following persons were present at the hearing. Russell Murray (Executive Director, OCSEA, Chief Union Contract Negotiator, Witness), Eugene Brundige (Chief Contract Negotiator for the State), Ronald Harding (Project Inspector 3, Union Steward, Witness for the Union), Ms. Price (Personnel ODOT, Witness for Employer), Harold W. Hitchens (Construction Engineer, ODOT Witness).

Preliminary Matters

The parties agreed that the Arbitrator could tape record the hearing for the sole purpose of refreshing her memory. The parties understood that the tapes would be destroyed on the day the opinion was rendered. The parties further agreed that the Arbitrator could offer the opinion for publication.

The parties mutually agreed that the matter was properly before the Arbitrator. The witnesses were not sequestered; all witnesses were sworn.

Procedural Issue(s)

(1) This grievance concerns ODOT Project Inspectors in District 5. At the time the grievance arose 10 persons held that position. Since that time, one of those persons has left state employ. The Union maintains that if an award of back travel pay is made, all 10 persons should receive the pay. The Employer maintains that a person who has left State employ is not entitled to any award

under the Contract.

The Arbitrator declines to answer this question because the award (see below) renders the issue moot.

(2) A second jurisdictional issue involves the effect of this opinion. The Union argues that this award governs all ODOT project inspectors in the State. The Employer argues that this award only governs ODOT project inspectors in District 5.

The Arbitrator is bound by two factors: (1) the contract and (2) the facts presented.

Sections 25.01 A and B states as follows:

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievants). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

Under the contract, the Union can process grievances for an employee, for a group of employees, or itself. How the grievance is brought is determinative of the parties. Joint Exhibit #3 reveals that Ronald P. Leist et. al. (9 other project inspectors from District 5) initiated the grievance. This form of the grievance continued throughout the grievance steps. Looking at the paper trail of the grievance, the Arbitrator finds no evidence that the Union sought to expand the class affected. The Arbitrator also notes that neither side presented evidence from outside ODOT District 5.

This issue goes to the question of fairness and to the question of scope of arbitral jurisdiction. Fairness requires notice. No notice was given below that the Union sought to arbitrate the rights of project inspectors throughout the state. Secondly, the Arbitrator is limited by the contract to decide only the issues before her.

For these reasons, the Arbitrator finds that this award applies only to Project Inspectors in ODOT District 5.

Issue

Did ODOT District 5 violate Articles 13.06 and 32.02 of the Contract by refusing to pay mileage and time to the Grievant Project Inspectors (who were assigned to the District Office) for that period of time and distance after the Grievants had driven 20 miles from their home enroute to the District office?

Facts

All the Grievants are Project Inspectors 1, 2, or 3. The basic job of project inspectors regardless of level is to inspect construction sites and ensure that the contractors are abiding by

state specifications. Project Inspector 1's work under supervisors, Project Inspector 2's do much the same work as #1's but not under close supervision. Project Inspector 3's involve more complex inspection and administration of project inspection. All three positions specify that 90% of their work involves project inspection and 10% of their work is "related duties assigned by supervisor".

During construction season, project inspectors work in the field, that is, they are assigned to various construction sites. They drive directly to the site and carry out their inspection work. Any paper work may be done in a trailer on site assigned to the State. At the completion of their work, they drive home. As to travel time pay and mileage during the construction season, the Union and the Employer are agreed. If a project inspector is using his own car, he gets mileage beginning 20 miles from his home to the construction site and he is deemed at work (i.e., paid) when he crosses the 20 mile point. If a project inspector is driving a state car, he receives no mileage but is deemed at work as soon as he crosses the 20 mile limit.

When construction season is over, construction sites are closed down due to weather.

In 1987 when the construction season was over, the project inspectors in question were assigned "to the County of Employment, Licking County, K & G Building Newark Ohio." (ODOT Exhibit #1) At that location, the project inspectors performed various indoors duties relating to past and future projects. Some testimony at the hearing raised the issue of the appropriateness of these duties; however, the grievance does not address those issues and the Union representative so stated at the hearing.

While assigned to the Newark location, the project directors attempted to collect mileage and time for the distance 20 miles from their homes to the Newark office. The Employer refused to pay the mileage or grant the time. Subsequently, some but not all of the project inspectors were chosen to work out of their classification for the rest of the non-construction season. These persons were given "1,000 hour assignments" and were assigned to work out of their county garages.

The Contract section which both parties agree governs the situation is §13.06:

§13.06 - Report-In Locations

All employees covered under the terms of this Agreement shall be at their report-in locations ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the Employer in dispensing discipline.

Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel time counted as hours worked.

Employees who work from their homes, shall have their homes as a report-in location. The report-in locations for ODOT field employees shall be the particular project to which they are assigned or 20 miles, whichever is less. In the winter season when an employee is on 1,000 hours assignment, the report-in location will be the county garage in the county in which the employee resides.

For all other employees, the report-in location shall be the facility to which they are assigned.

Both Chief Negotiators, Union and Employer, testified with regard to the formation of §13.06. Both persons agreed that management's last best offer on _§13.06 was the version accepted on May 10, 1986 for the Contract. The last best offer read:

All employees covered under the terms of this agreement shall be at their report-in locations

ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the employer in dispensing discipline.

Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel time counted as hours worked. Due to the nature of their work, employees may have their home designated as a report-in location. The report-in location(s) for ODOT field employees shall be the particular project to which they are assigned or 20 miles, whichever is less, during the construction season. In the winter season when an employee is on 1,000 hour assignment the report-in location will be the county garage in the county in which the employee resides.

Current practices regarding authorization for overnight stays shall continue. An employee required to spend two or more consecutive days at a place other than their normal report-in location shall be granted travel time for one round trip.

Both parties agreed that the changes made between the accepted version and the contract version were editorial changes which did not change the meaning of the section. The words "during the construction season" were omitted (See words in bold in "last best offer" above) and the last sentence "For all other employees the report-in location shall be the facility to which they are assigned" was added (see sentence in bold in §13.06 above).

Both parties agree that paragraph 3 was the paragraph designed to cover special types of State workers whose work required unusual report-in locations, and both parties agree that the special circumstances of ODOT project inspectors were addressed in paragraph 3.

The Union argues[1] that a project inspector can have only two (2) assignments 1) a project site be it an actual construction site or the district office (in the winter) or 2) 1,000 hour assignment where the report-in location is the county garage. Under the Union's scheme, a project inspector is paid mileage whenever he gets 20 miles from home whether he is going to a construction site or going to the District Office in Newark to work on project paperwork. At all other times, according to the Union, the project inspectors are assigned to County garages on 1,000 hour assignment, and the mileage issue is moot.

The Employer maintains that the project inspector is paid mileage after 20 miles and/or time from his home only when he or she is on field assignment, i.e., assigned to an active construction site. In the winter when construction sites are closed, the project inspector has two possible options: 1) assignment to the District Office where paragraph 4 covers his or his report-in location or 2) a 1,000 hour assignment where the report-in location is the county garage. According to the Employer's position, a project inspector is entitled to mileage after 20 miles under sentence 2 of paragraph 3 of §13.06. According to the Employer, a project inspector is not entitled to mileage after 20 miles when he is assigned to the district office during non-construction season. At this point, according to the employer, the project inspector is no longer a field employee and is "commuting" to his or her report-in location. If a project inspector receives a 1,000 hour assignment, he or she is assigned to the county garage as a report-in location and he or she commutes to that location.

Discussion

This grievance requires that the Arbitrator interpret §13.06 of the Contract. As the Contract provides at §25.03 "The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not

specifically required by the expressed language of this Agreement." (emphasis added)

A general principle of contract interpretation expressed by judges and arbitrators alike, is that when the words are clear unambiguous the interpretator need not look at other documents or the context in order to determine meaning. Some judges and arbitrators interpret this position to mean if the words within the 4 corners of the document are clear, the interpreter's task is done; he or she need look no further, just apply the contract. This position is disingenuous. Almost all documents are clear and unambiguous until someone attempts to apply them to real world situations. Words which on their face seem clear may be terms of art in certain situations. For example, in paragraph 3 of §13.06 the word "winter" does not, I suspect, mean literally December 21st to March 20th, the calendar definition of Winter. Rather "in the winter" means the "non-construction" season. Thus, the test is not whether the words are clear and unambiguous on their face but whether, when applied, can the words lend themselves to two reasonable but differing conclusions. If two reasonable interpretations are possible, then and only then, must the arbitrator look behind the words to figure out the parties' intentions. Basically, the American jurisprudence of contract interpretation looks to the objective manifestation of intent. The actual subjective intention of the parties gives way to the expressed will of the parties as manifested in the contractual words to which they agreed.

In this grievance, the Arbitrator shall focus on the actual words of §13.06 for two reasons: 1) they are the Contract words; 2) both parties agreed that the "last best offer" of management which was accepted by the Union contains exactly the same "intention" as §13.06 and that §13.06 is only an "edited" version.

The focus is on paragraph 3 which both parties agree contains language directed specifically at ODOT field employees, including project inspectors. Paragraph 3 covers special cases not covered in paragraphs 1 and 2. We know paragraph 3 is a "special case" paragraph because of sentence 1 i.e., "Employees who work from their homes . . ." This sentence does not apply to ODOT project inspectors (see footnote 1) but to other state employees in special situations. Sentence 2 speaks directly to the situation at hand. "The report-in location(s) for ODOT field employees shall be the particular project to which they are assigned or 20 miles whichever is less." The Union argues that project inspectors are "field employees" year round unless on 1,000 hour assignment. For two reasons, that position is rejected. 1) Testimony showed that some project inspectors never leave the office, i.e., never go in the field; and 2) the word field is an adjective which describes employee. The word field describes a location of work. A project inspector has both field duties and non-field duties (see job description exhibit). When the project inspector is not assigned field work, he or she is not a field employee. Paragraph 3, Sentence 3 pertains to project inspectors who are given a 1,000 hour assignment. The sentence does not apply to project inspectors who are not "in the field" or who do not receive 1,000 hour assignments. Sentence 3, like sentences 1 and 2, is designed for special cases. The facts show that not all project inspectors are given 1,000 hour assignments. A project inspector who is <u>not</u> in the field <u>nor</u> on 1,000 hour assignment is no longer a special case and is no longer covered by paragraph 3. At that point in time, such project inspectors are treated like all other employees and covered by paragraph 4, i.e., their "report-in location shall be the facility to which they are assigned." In this case, the project inspector is assigned to the county office indicated on their position description.

The Arbitrator's decision embraces the Employer's interpretation. The Union has not presented a second differing position which is equally reasonable. Look at paragraph 3. If sentence one (1) applied to project inspectors, sentence two (2) would not be needed. If sentence two (2) covered project inspectors year round, then sentence three (3) would not be needed. If sentence three (3) covered all project inspectors during the winter, i.e., if all project inspectors were

given 1,000 hour assignments, then a comma should follow season because the phrase "when an employee is on 1,000 hour assignment" would be nonrestrictive i.e., not needed. The placement of the comma indicates that sentence three (3) covers only project inspectors who are only on 1,000 hour assignments and does not cover those who are not. Since all project inspectors are not field employee year round and all project inspectors are not given 1,000 hour assignments, paragraph 3 does not cover exhaustively report-in-locations. Therefore, paragraph 4 fills the gap and covers project inspectors who are not in the field and not on 1,000 hour assignments.

Decision

Grievance denied.

January 5, 1988
Date

Rhonda R. Rivera
Arbitrator

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[1] 1. At one point the Union witness stated that the first sentence in paragraph 3 applied to project inspectors i.e., their report-in location was their home. However, this position is inconsistent with the major position outlined by the Union's opening statement and the position of the Grievants. If the report-in location was their home, would they not argue for mileage from their home to the Newark office rather than from 20 miles out to the Newark Office? The Arbitrator will respond to the more cogent argument.