

ARBITRATION DECISION NO.:

337

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation
Ashtabula County ODOT Garage

DATE OF ARBITRATION:

March 15, 1991

DATE OF DECISION:

April 24, 1991

GRIEVANT:

D. Park, et. al.

OCB GRIEVANCE NO.:

31-04-(90-07-21)-0029-01-06

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Dennis A. Falcione
John Porter, Esq.

FOR THE EMPLOYER:

Rachel Livengood
Michael Duco

KEY WORDS:

Emergency Pay
Flood
Estoppel

ARTICLES:

Article 13 - Work Week, Schedules and Overtime
§ 13.15 - Emergency Leave

FACTS:

Several members of the Ohio Department of Transportation (ODOT) were called on the night of June 17, 1990 and asked if they wanted to work overtime. The village of Shadyside was hit by a flash flood on June 14, 1990 and the roads had to be cleared of the mud and debris the flood had left. One employee, a Highway Maintenance Worker IV testified that the supervisor who called referred to the situation as an emergency. The employee asked his wife "if it was okay" to go and then agreed to work the overtime. A second employee, an Auto Mechanic III, was called later that night by the Dispatcher. The employee asked whether the man ahead of him on the list had been called. The Dispatcher said yes and that he had refused. After asking a friend if it was okay, the employee agreed to work the overtime.

Other employees testified that the supervisors at the work scene again identified the Shadyside clean up as an emergency. The supervisor denied that he had ever referred to the incident at Shadyside as an emergency. There is various conflicting testimony about whether the Shadyside clean up was characterized as an emergency under Article 13.15 of the Agreement.

UNION'S POSITION:

The Union argued the flash flood was a devastating event that prompted then Governor Richard Celeste to declare an emergency in and around the Shadyside area. On the evening of June 17, 1990 between the hours of 9:00 p.m. and 11:30 p.m. Several Ashtabula ODOT employees were contacted by the County Superintendent and the County Radio Dispatcher for Ashtabula. The employees were told they were needed for an emergency clean up due to the flood. Besides the initial phone call the employer continued to refer to the incident as an emergency. The union grieves that the employees who worked during this emergency situation should be paid emergency pay and asks the arbitrator to award,

as a remedy, the difference between the overtime pay and the emergency pay.

EMPLOYER'S POSITION:

On June 14, 1990, the village of Shadyside was hit by a flash flood and ODOT employees assigned to the Ashtabula County maintenance facility, District 4, were dispatched to assist in the clean up. The employees were deployed in large numbers to clear and restore the roads.

Employees were solicited for an overtime opportunity. The employer followed all the proper procedures for the overtime call out and employees were given the chance to elect to participate in an assignment that would result in overtime. Some employees decided not to take this opportunity and were not disciplined for choosing that option. At no time was the incident characterized as an emergency as defined under Article 13.15. The incident was never declared an emergency and the clean up at Shadyside is a normal, foreseeable ODOT job.

ARBITRATOR'S OPINION:

This arbitration is basically an interpretation of Article 13.15 of the Agreement. In the Cowell decision, a previous case decided by the same arbitrator concerning Article 13.15, there is a two part test. The first question is whether the event is "normal or reasonably foreseeable to the place of employment and/or position description of the employee." The flood was not a normal event but cleaning up after the flood i.e. removing the mud that accumulates on a road, is reasonably foreseeable job for an ODOT worker. It also falls within their position description.

The second prong of the test is whether the employer, by declaring the emergency, can be estopped from arguing there was no emergency. The critical factor in this test is whether the employer gave statements that the employee relied upon. The facts of this grievance do not support this theory. One person who allegedly used the word emergency was the Dispatcher, a fellow bargaining unit employee. The Dispatcher should not be credited with speaking for the employer. The other person who allegedly used the word emergency denies it and the reaction of the two people who claimed he used this word is inconsistent with their testimony. Both employees asked others, their wife or friend, if it was okay if they worked during the emergency. This is not consistent with a mandatory overtime emergency situation. Both employee also stated that they were "asked" if they wanted to work this overtime. The employer also followed the proper procedures for voluntary overtime. The interoffice communications that the Union introduced which referred to the Shadyside incident as an emergency are not sufficient to establish estoppel. The IOC's were not declarations of an emergency and were written after the call up so that the employees could not have relied on them during the call up.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Transportation

Employer

Grievance No. 31-04-(07-21-90)-0029-01-06
Grievant D. Park, et. al.

Hearing Date: March 15, 1991
Award Date: April 24, 1991

Arbitrator: R. Rivera
For the Union:
Dennis A. Falcione
John Porter, Esq.

For the Employer:
Rachel Livengood

Michael Duco

In addition to the Grievant and the Advocates listed above, the following persons were present at the Arbitration Hearing: John Avery, Operations Engineer (witness), Robert Paradise, Maintenance Engineer (witness), Donald A. Campbell, Highway Maintenance Supervisor II (witness), Don St. John, Highway Maintenance Worker Supervisor (witness), Joseph E. Jacobs, Labor Relations Officer, Eugene Brundige, Former Director OCB (witness), Thomas Park, Highway Worker (witness), Ray Humphries, Auto Mechanic (witness), David McKinley, Highway Worker (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. Grievance Trail
2. Directive A-301 (June 1, 1987)
3. IOC dated 6-19-90 which reads as follows:

Due to emergency cleanup in District 11 Stanley Jacobs will not be in District 4 for the next two weeks. All equipment assignments, leave requests and other supervisory matters will be directed to Robert Paradise until Mr. Jacob's return.

4. IOC dated 7/2/90. The heading of the IOC reads as follows:

To: John Avery, P.E., District Operations Engineer
 From: William Bunkley, P.E., District Deputy Director
 Subject: Emergency Assistance in Belmont County, Shadyside, Ohio provided by District 4 Forces

5. Arbitration Award in G-87-1380 (Graham) dated 7/14/90
6. Arbitration Award in G87-0096 (Rivera) dated 10/22/90
7. J-8 -- Duty Roster 6/17/90
8. J-9 -- Overtime Roster for June 1990
9. J-10 -- Contract 1989-1991

Employer's Exhibits

1. Opening Statement
2. Portion of Negotiation Notes

Union Exhibits

1. Opening Statement

Relevant Contract Section§ 13.15 - Emergency Leave

Employees directed not to report to work or sent home due to weather conditions or another emergency shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the emergency. Employees required to report to work or required to stay at work during such emergency shall receive pay at time and one-half (1-1/2) for hours worked during the emergency. Any overtime worked during an emergency shall be paid at double time.

An emergency shall be considered to exist when declared by the Employer, for the county, area or facility where an employee lives or works.

For the purpose of this Section, an emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee.

Essential employees shall be required to work during emergencies. Essential employees who do not report as required during an emergency must show cause that they were prevented from reporting because of the emergency.

Employer's Statement of the Issue

Did the State declare an emergency pursuant to Article 13.15 on June 17, 1990? If so, for what period of time did the emergency declaration exist? If not, what shall the remedy be?

Union's Statement of the Issue

Did the Employer violate Article 13.15 of the contract between the parties when it refused to pay time and one-half for hours worked and double-time for any overtime hours worked by various Ashtabula County ODOT employees when it represented that an emergency existed in Shadyside, Ohio on June 17, 1990 and thereafter? If so, what should the remedy be?

Facts

Mr. Thomas Parks, an ODOT Highway Maintenance Worker IV of 11 years experience, testified that about 10:30 p.m. on June 17, 1990 that he was contacted by Don Campbell, a Highway Maintenance Supervisor, and "asked if he (Parks) wanted to go out of the district, out of the county, for emergency clean up work." Mr. Parks testified that he first asked his wife "if it was okay" and then told Mr. Campbell "okay."

Mr. Ray Humphries, an ODOT Auto Mechanic III of 4 years service, testified that he was contacted by Steve McClure, the Dispatcher, on June 17, 1990 at about 10:30-11:00 p.m. McClure told him, Humphries said, that he (McClure) had called "the man ahead of me on the list and that he had refused it and asked if I'd like to go to Shadyside for emergency cleanup." Humphries testified that he "asked his friend if it was okay, and she said it was okay with her," so he went. David McKinley, an ODOT Highway Maintenance Worker IV of 22 years experience, testified that on 6/17/90 at 10:00 p.m. he met Mr. Campbell at the main garage who said to him "Dave, you are just the man I wanted to see; did you hear about the flood at Shadyside?" "For emergency clean up, we need someone to take the W-30 loader down there."

John Avery, an ODOT District Operating Engineer of 2-1/2 years service, testified that employees were dispatched from District 4 at the request of Mr. Zook. He said that Shadyside was not an emergency and that he had never told anyone it was an emergency. In addition, he said he had no authority to declare an emergency and no employee had asked him about emergency pay. Mr. Avery was shown Joint Exhibit 4 which he wrote. He said that his use of the word "emergency" was not in the technical contract sense but in commonly used sense. He said the word had no reference to Article 13.15 of the contract. He was shown Joint Exhibit 5 which he said he did receive from William Bunkley. He said the use of the word "emergency" in the heading was not characterizing the situation as a 13.15 situation. Mr. Robert Paradise, an ODOT District Maintenance Engineer of 20 years experience, testified. He said John Avery had called him to provide dump trucks and employees for the Shadyside clean up. He said Avery did not characterize the situation as an emergency. Paradise said he called Don Campbell and asked him to solicit the employees under his supervision. Paradise said he did not tell Campbell that the clean up was an "emergency." He said that he went to the clean up site on various occasions and no employee ever asked him questions about emergency pay. Both Avery and Paradise said that it was unusual for ODOT workers to work on city and county roads.

Donald E. St. John, ODOT Highway Maintenance Supervisor of 18 years, testified. He said he was called on 6/17/90 by Don Campbell and asked if he wanted to go and help with the clean up. He said the word emergency did not occur and that the call was a request not an order.

Donald A. Campbell, ODOT Highway Maintenance supervisor II of 7 years experience, also testified. He said he was called by Mr. Paradise to get equipment and personnel for the clean up. He said he worked with the Radio Operator Steve McClure and James Brown, Assistant Supervisor, who were ordered in to help him call up workers. Mr. Campbell said they used the overtime call out sheet (see Joint Exhibit 8) and called in strict rotation. He said when he called, he asked the persons if they wanted to volunteer. In particular, he said, he had specifically told Dave Parks, the Union Steward, that he had heard no mention of "emergency." Campbell said he was very careful not to use the term "emergency" because Labor Relations Officers had previously warned about improper use of the word. Mr. Campbell was asked about employee Wentz whose name appeared on the overtime roster. Mr. Campbell said Wentz refused the overtime and was not disciplined.

David Parks, ODOT Highway Maintenance Worker II with three years service and the lead Grievant, testified on rebuttal. He said that no one has used the word "emergency" to him directly during the situation. Nor, he said, had he ever specifically asked about an "emergency."

Mr. Eugene Brundige testified for the state about the negotiations surrounding section 13.15. Mr. Brundige was the chief negotiator for the state, Director of OCB, and former Chief of Labor Relations for ODOT.

Mr. Brundige said that the genesis of 13.15 lay in a prior ODOT event. A snow storm happened in Southwestern Ohio, and no clear procedure existed for a declaration of an emergency. A process was developed: Director of DAS, Director of Highway Safety, and OCB were to discuss the event; the test is to be the "badness" of the roads. If they conclude that an emergency exists, the Chief of Staff is to be told and a Declaration is to be made by the Director of Highway Safety. Voice mail is to be used to notify Departmental Designees and Radio/TV. Special instructions are to be given to employees either not to come in or come in late. He said no such procedure happened with regard to Shadyside.

Mr. Brundige said the current contract added nothing substantive to 13.15. He testified that repair and cleaning after

mud slides were foreseeable ODOT jobs.

Employer's Position

This case involves the utilization of forces assigned to the Ohio Department of Transportation for the purpose of restoring the transportation system in and around Shadyside, Ohio in June of 1990. The employees involved in this Grievance are assigned to the maintenance division within the Ohio Department of Transportation. The village of Shadyside and the surrounding area was struck by a flash flood on June 14, 1990. Employees of the Ohio Department of Transportation assigned to the Ashtabula County maintenance facilities, which is under the direct authority of District 4, were dispatched to assist with the clean up at Shadyside. Shadyside, Ohio is located in Belmont County which is maintained by the District 11 forces of the Department.

Employees of the Ohio Department of Transportation District 11 were deployed in large numbers to clear and restore transportation routes in and around Shadyside. The Department of Transportation deployed employees and equipment from several Districts to assist in the restoration of the transportation system in the-area.

Union will argue that this situation was portrayed as an emergency to the employees of Ashtabula County when those employees were contacted to work in Belmont County. Article 13.15 is the contractual language upon which the Union will focus. The employees were solicited for an overtime opportunity pursuant to the overtime call out policy in effect at the time. The employees were given an opportunity to elect to participate in an assignment that would result in overtime. Employees were given a choice to accept or decline the opportunity and some of the employees did decline. The Shadyside assignment was not characterized as an emergency as defined in the contract when the information was conveyed to supervisory personnel.

The actions of the Employer clearly demonstrate that this assignment was not treated as an emergency. In the event of an emergency as defined in Article 13.15, the Employer has reserved the right in Article 13.07 to vary from the overtime requirements set forth in Article 13.07. Testimony will establish that the Superintendent did not vary from the established procedure for soliciting overtime. In fact, testimony will establish that this procedure was utilized throughout the District when employees from other counties were dispatched to Shadyside.

The State will establish through the testimony of N. Eugene Brundige, former Director of the Office of Collective Bargaining, that the situation at Shadyside was not a declared emergency pursuant to Article 13.15. Mr. Brundige's testimony will define what was said in negotiations in both 1986 and 1989 concerning the language of Article 13.15.

Union's Position

On June 14, 1990, a devastating flash flood occurred in Shadyside, Ohio, prompting then Governor Richard Celeste to declare an emergency in and around Shadyside, Ohio.

On the evening of June 17, 1990, between the hours of 9:00 p.m. and 11:30 p.m., various Ashtabula County ODOT employees were contacted by Don Campbell, Ashtabula County Superintendent and Stephen McClure, Ashtabula County Radio Dispatcher. The employees were told that they were needed in Shadyside, Ohio for emergency clean up due to the flood.

The Employer, ODOT, consistently referred to the flood and the work performed during the flood as an emergency when addressing the situation to Ashtabula County ODOT employees.

Discussion

In the Cowell decision (Joint Exhibit 7) this Arbitrator discussed Article 13.15 as follows:

"The contract section to be interpreted is 13.15. This section directs that employees who are "required to stay at work during such an emergency shall receive" double pay for overtime. "Such" an emergency apparently refers to the first sentence of 13.15 which speaks of "weather conditions or another emergency". Thus, an emergency is not limited to a weather condition situation. The second paragraph states that an emergency "shall be considered to exist when declared by the Employer, for the . . . facility [at which] an employee . . . works."

The third paragraph defines emergency for the purpose of this section, i.e., § 13.15 (or when an employee who works overtime gets double pay.) "An emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment."

Thus, the contract creates a term of art. While the word "emergency" is used in other Sections (See: 13.05), a special meaning is specified in this section. The job of the Arbitrator is to interpret the contract. She may not add to the contract or subtract from the contract; however, where the words are subject to two plausible meanings, interpretation is the job of the arbitrator."

The first question is whether cleaning up roads after a significant flood is "normal or reasonably foreseeable to the place of employment and/or position description of the employee." While a flood of this magnitude appears not to be a normal event, a clean up (after a flood) where mud covers highways is "reasonably foreseeable to the place of employment, i.e., ODOT, and to the position description of the employees (Highway Maintenance Workers).

In the Cowell decision, this Arbitrator also stated "In addition to 'defining' emergency, the contract designates the Employer as the 'declarer' of such emergencies. Logically, the Employer did not want every employee deciding what was

'unforeseeable' or 'normal'. The section does not state who in the management chain of command can declare an emergency."

In this case, three employees testified that the person who called them used the word "emergency." In one case, the person who allegedly used the word was the Dispatcher. The Arbitrator does not find that a worker can "rely" on such a characterization by a fellow bargaining unit employee. The two other instances allegedly involved Mr. Campbell, a member of management. Mr. Campbell denies the use of the word and specifically recalls telling the Union Steward Mr. Parks that he had no knowledge of an "emergency." Mr. Parks (Thomas) testified that he asked his wife if he should take the overtime and Mr. Humphries asked his friend. Such conduct is inconsistent with an "emergency" during which overtime is mandatory. Moreover, both Mr. Parks and Mr. McKinley indicated that Mr. Campbell "asked" if they wanted to go. Lastly, all the evidence indicates that Mr. Campbell followed the call up procedure for voluntary overtime, conduct inconsistent with an emergency (Joint Exhibit 8).

The Union points to the use of the word "emergency" in the two IOC's (Joint Exhibits 6 and 7). Neither of the IOC's were "declarations" of emergency, and since they were written after the call up (6/19/90 and 7/2/90), they could not have been relied upon (sufficient to implicate the concept of an estoppel).

Award

Grievance denied.

Date: April 24, 1991
Rhonda R. Rivera
Arbitrator