

Before the STATE EMPLOYMENT RELATIONS BOARD

**Teamsters Local 436, affiliated with the International Brotherhood of Teamsters,
AFL-CIO [Maintenance unit] Employee Organization**

And

SERB Case No. 2023-09-0752

Ohio Turnpike and Infrastructure Commission, Employer

Fact Finder Sandra Mendel Furman J.D.

FACT FINDING REPORT AND RECOMMENDATION

INTRODUCTION

The hearings in this matter took place on 3/22/24 and 6/3/24 at the headquarters of the Ohio Turnpike and Infrastructure Commission [OTIC] in Berea, Oh.

The parties presented witnesses and exhibits as evidence in support of their respective positions. Bargaining committee representatives were present on both sides. OTIC legal representatives were Patrick Hoban Esq., Anthonia Ogbechie, Esq. and Jennifer Rieker, Esq. who is OTIC General Counsel.

The Employee Organization [Union] was represented by Joseph Mando, Esq. Various Memoranda of Understanding (MOU) and Tentative Agreements (TAs) were reached at earlier stages of the bargaining process before factfinding commenced. Those agreements are not reflected in the discussion herein.

Prehearing/Position statements were timely filed by each party.

A mediation session occurred on 3/22/24 on day one of the scheduled factfinding. Multiple issues were resolved in that session. In the interim weeks before the second session, up through the morning of the second session on 6/3/24 other items in dispute were resolved by the parties. Those TAs were signed and are not before the Fact Finder [FF] at this time.

This report issued on the one remaining matter in dispute after a full hearing on 6/3/24.

Background

The Union represents approximately 222 employees in a service and maintenance unit. It has been the certified bargaining agent since 2001. The cba defines the BU as “all regular full-time nonsupervisory field employees in the Maintenance Department of the Commission, except section clerks and sign shop clerks.”

The OTIC is a political subdivision of the State of Ohio. It has an Executive Director and a professional and supervisory staff. Its activities and policies are overseen by a Commission appointed pursuant to ORC 5537.02(A).

The mission [in abbreviated form] of the OTIC is to maintain and operate the 241 miles of toll road in northern Ohio between Indiana and Pennsylvania year round.¹ There are three other BUs at the OTIC. The Union represents the other bargaining units [BU]: Radio Room Unit; Full Time Toll Collectors and Part Time Toll Collectors. The negotiations for the above BUs have been completed. The other three BUs have ratified and executed their collective bargaining agreements with OTIC. The three other CBAs’ terms being 2024-2026.

The work of the BU in this matter is divided by the seasons. From October through March it is deemed snow and ice season when the primary focus of the Maintenance Unit is keeping the Turnpike free of snow and ice. The other months the primary focus is on road maintenance and upkeep.

Issue before the Factfinder: OTIC proposal to eliminate CBA language concerning daily “job pick” by seniority in Article 7 section 7.9 and in Article 36 Section 36.1.

Statutory Factors

¹ The FF has abbreviated and significantly condensed discussion of the OTIC scope of work. The Turnpike has fourteen service plazas which it maintains as part of its operations. The discussion at the hearing related to the road operations relating to maintenance and repair and snow and ice removal. The documents made part of the record provided a comprehensive overview of the operations, administration and purpose of the OTIC. See also OTIC Pre hearing statement pp. 3-13. Union Ex.1 provided much background as well.

RC 4117.14(C)(4)(e) and (G)(7)(a) through (f) direct the FF “to take into consideration” the following criteria in reaching recommendations on each of the issues in dispute:

- (a) Past collectively bargained agreements, if any, between the parties;
- (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (d) The lawful authority of the public employer;
- (e) The stipulations of the parties;
- (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

The FF considered each and all of the above factors in her recommendations as relevant and as noted below.

DISCUSSION

Current CBA language [CCL] states in relevant part:

Article 2 Management Rights

2.1 Except as expressly limited by relevant statutes and codes or provisions of this Agreement, and reserving unto the Commission any and all management rights which, by law, may not be bargainable, the Commission shall have and retain, solely and exclusively, all other managerial responsibilities, power and authority, which shall include, but not be limited to the following:....**to assign work to such employees in accordance with the operational needs of the Commission; and to direct the work**

force, except as expressly modified or restricted by a specific provision of this Agreement.

Article 7 Seniority

...

7.9

Except where amended, **seniority shall prevail** in ... **work assignments**,...

Article 36

36.1

The Commission shall make a reasonable effort to permit all work assignments in Maintenance to be awarded by seniority. In the event previously bid work assignments cannot be performed because of weather, equipment breakdown or other unforeseen conditions, the affected employees may be reassigned.

Emphasis added

The OTIC seeks to eliminate the CCL in Article 7.9 regarding a mandate to fill work assignments by seniority and eliminate the related language underlined of Article 36.1 regarding permitting all work assignments in Maintenance to be done by seniority.

Testimony from the Maintenance Superintendents from the eastern and western sections of the State [the OTIC divides up its eight work locations into eastern and western divisions; each having four work sites for day's start and finish] described the operational problems and interference with goals of the OTIC due to the seniority restrictions on job assignments.

Testimony indicated that both managers were frustrated by the lack of ability to cross train personnel; to have a type of learning on the job atmosphere where a more skilled, [possibly] more senior employee would work with a lesser skilled employee to enhance skills and increase productivity. Due to the CCL, the managers are duty bound to allow the job pick process by seniority to dictate who is assigned to which task and which piece of equipment the BU member uses that day. This job pick process takes between 5-20 minutes each day-at each building.

Both managers testified that there is little to no ability under CCL to have persons assigned to tasks that a BU employee needs to learn or become more proficient at

operating/performing. There are work assignments made under the current job pick protocol when OTIC maintenance and repair is slowed down and/or is done inefficiently. These situations likewise increase the possibility of equipment misuse or injury due to the BU member's inexperience or lack of familiarity.

Operations are hindered by the lack of experience/skill on a certain assignment. With a six month probationary period, since the operation switches from road maintenance and upkeep during the spring/summer/early fall months to snow and ice removal for the other half of the year, depending on when a hire comes in s/he may be utterly unfamiliar with the tasks and responsibilities to be performed in the other work cycle.

Without management's ability to assign based on experience not just seniority alone, there are problems with efficiency. The statement made was-the work gets done, but it could be done more efficiently and with a greater ability to develop employee job skills. Sometimes because of these inefficiencies caused by the job pick another work day has been added to the schedule. The other comment made is that not all employees are equally good at all the tasks that need to be performed. Without the current ability to assign work based upon skill and experience, there are instances where an employee ends up on assignments where s/he lacks the ability to perform as needed.

Per management testimony, in a long-term job situation, a different employee could be assigned under job pick every day of the long term job assignment. This built in possibility for inefficiency does not meet the OTIC public service mission.

Another problem with the current system relates to recruitment and new hires. When a person is interested in working at the OTIC, s/he is advised about the range of assignments available. But because of the seniority job pick, that opportunity may not be actualized for years due to job pick. The new hire gets "what's left" and disgruntlement is the result.

Under present circumstances there is no ability to pair a newer employee with a more skilled employee for training purposes. If job pick is eliminated managers will be

making assignments based upon need and skill; and on the job training for less experienced employees can be better managed.

Both managers see the elimination of the job pick as resulting in greater training opportunities; greater safety and more job efficiencies all around for the reasons detailed above. Their opinion is that the six month probationary period is insufficient and more training opportunities are needed and are hampered by the job pick provision. It is the expectation that all employees in the maintenance group should be able to run each and every one of the twenty-three pieces of equipment regularly used for BU work.

The OTIC witnesses conceded that there might be a problem with morale during the transition period if the job pick is eliminated. But the goal and intention of eliminating the job pick is for managers to assign according to skill sets at the start of the workday. It is the intent to have a more efficient operation 365/24.

The Union's case explained the absolute expectation of BU employees that once s/he gained in years of service, s/he could pick the job that best suited their interests, skills and ability. This was known to the employee upon entering the workforce. The job pick was/is a direct incentive to stay and perform the duties of jobs of lesser personal interest to wait for the moment when seniority allowed the free agency of having an assignment suited to that BU member.

The two Union witnesses were very clear about the importance of the job pick language. It was a goal and an expectation and of very high value not just to the two witnesses at the hearing but to the BU as a whole. One witness stated that he waited twenty years to acquire sufficient seniority to have job pick apply to his work assignments. The importance of job pick was described as follows: "everyone can fit in and be useful if he can do a job he knows and can do and likes to do." The sentiment repeatedly expressed was: "I paid my dues to get where I am at." Per the witness: job pick creates job harmony and better inter employee communication because all employees understand the selection process.

There was discussion about the challenges of barrel setting and lifting which is a routine aspect of the highway maintenance. The concern was that persons who had by

virtue of seniority been able to opt-out of assignment to that task would now be assigned to do it with possible health and safety consequences.

The Union testified that it was concerned about possible retaliation/favoritism being in play once seniority job pick was no longer the determinate for job assignments. The Union testified that OTIC did not use the labor-management meetings as a forum for discussion about concerns it may have had about job pick.[Note: OTIC witnesses disputed this assertion and testified that there have seen such discussion-specifically regarding delays caused by the job pick.]Union witnesses testified that the current job pick process virtually eliminated grievances over job assignments.

ANALYSIS

The FF was fully aware of the Union interest in having this CBA language maintained both through caucus with the Union committee, the statements of its counsel likewise supporting the “no change” outcome and the testimony at the hearing. As a witness put it: money isn’t the issue; employees do not want to “sell” seniority. The overwhelming majority of the BU wants to retain this CCL. The job pick was described as making OTIC a better place to work.

The FF had to weigh and evaluate the competing interests. The Union had in its favor a very strong factor of bargaining history: the benefit of job pick had a twenty-two year history. There was no direct evidence that any one particular-let alone multitudes-of work situations created more time and money for the OTIC under this language. Hand in hand with this extensive bargaining history was the fact that the Employer has in the past failed to achieve its aims to strike this language in past rounds of bargaining. RC 4117.14.G.7.a. weighs heavily in the Union’s favor. But it alone is not enough to sustain the Union’s position.

On the other hand, under facts and circumstances twenty-two years ago- not part of the record- OTIC [OTC then] gave up an inherent, intrinsic, fundamental management right: to assign work. Sufficient testimony existed in the record that this provision-job pick-is unique to OTIC. The FF has never in over four decades of labor relations work seen

this in a CBA before. The Union introduced no other evidence of this language in any CBA. That lack of evidence is conclusive proof that this is “outlier”, anomalous language.

Statutory factors RC 4117.14 G.7.b.,c. and d. are all in OTIC’s favor.

RC 4117.14 G.7.b. states:

Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work,...

The job pick by seniority provisions are unique; OTIC provided ample evidence that this work assignment language was inconsistent with other public sector, service/maintenance contracts surrounding the Ohio Turnpike. The Union was forced to acknowledge that the daily job pick language here at issue was unique to its OTIC contract, and that it has no other contracts containing similar language. Indeed, it was conceded this provision is *sui generis*.

RC 4117.14 G.7.c. states:

The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

OTIC presented several examples of how the CCL providing for daily job picks on the basis of seniority could easily result in work being performed less than optimally/efficiently due to the supervisors being restricted from making job assignments on a basis of skill and ability or other managerial concerns. Due to the inefficiencies the interest and welfare of the public are not served by the CCL providing for job picks in seniority order. Similarly, the need to assign currently only the most senior person who elects to the assignment is not the normal standard of public service. OTIC’s proposed elimination of the CCL providing daily job picks is more consistent with the standard work assignment language found in collective bargaining agreements.

RC 4117.14.G.7.d. states:

The lawful authority of the public employer;

OTIC’s mandate is statutorily defined in RC 5537. It operates 241 miles of turnpike in Ohio for the benefit of business, travelers and commuters 365 days a year/24 hours a day. The CCL infringes upon OTIC’s exercise its normative statutory right to manage its work assignments without a cba violation. This restriction on an inherent

management right-to assign work-whilst bargained away multiple CBAs ago, cannot continue in the absent of continued consent by OTIC to surrender its statutory right.

OTIC's proposal to eliminate the job pick meets more of the statutory criteria for effectuating the language change it seeks. The greater weight of evidence under the statutory framework favors OTIC's requested change in CCL.

Recommending the desired restoration of management rights to OTIC after such a long period of time comes at a cost. The Union should receive compensation as a quid pro quo for this unwanted, indeed dramatic shift in the workplace. The FF was moved by the Union's witnesses testimony that losing this long enjoyed right will drastically alter the workplace norms that have existed for more than twenty years. Accordingly, the FF recommends a \$1.50/hr. across the board one time supplement retroactive to 1/1/24. OTIC has not argued inability to pay. See e.g. OTIC Exs.2-17; Union Ex.9. This \$1.50/hr. is to be added to the existing base wages prior to the 3.5% general wage increase the parties agreed to that becomes effective 1/1/24, as agreed by the parties.

The Union has recourse to the grievance procedure and to the statutory processes set forth in Section 4117.11(A) of the ORC for future instances of claimed violations of job assignments being based upon alleged illegal or other claimed improper factors. for future instances of claimed violations of job assignments being based upon alleged illegal or other claimed improper factors.

This is as recommended a dramatic change to the workplace. But the inherent management right-the statutory right to assign work-is supported by the weighing of the three RC 4117.14 factors discussed above. OTIC presented its case with regard to the above three statutory criteria in a manner that supports the result below. The FF believes that the \$1.50/hr. general wage increase will fairly compensate current and future BU employees for the loss of the CCL. All rights under the grievance and

arbitration procedure remain intact for the Union to address future concerns with implementation of the recommended changed job assignment protocols.

The parties' current practices regarding job/equipment /shift picks during snow and ice season October-April by seniority should remain unchanged as follows:

- OTIC will assign BU employees to snow and ice duties.
- These employees assigned will bid on snow and ice A and B crews by seniority for the duration of snow and ice season.
- OTIC will determine snow and ice routes and the vehicles assigned to those routes.
- BU employees will bid on a truck/route combination by seniority. [see CBA Article 34.11(D).]

The FF was convinced that this above practice increases safety and efficiency, as it permits employees to become comfortable and familiar with a section of roadway and a particular piece of equipment during the snow and ice season. Employees will also continue to bid on known overtime/scheduled overtime [including snow and ice and other overtime] by seniority. Shift overtime will be assigned pursuant to the CBA overtime equalization process. See CBA Article 35.8

RECOMMENDATIONS

1. The parties' current practice of allowing daily job picks by seniority cease effective the date of ratification. The cba language will read as follows:

Article 7 Section 7.9

Except where amended, seniority shall prevail in filling job vacancies (in accordance with Article 8), layoffs, recall, vacation selection and bumping rights.

2. DELETE Article 36 Section 36.1

3. The BU shall receive a \$1.50 adjustment to the base rate of pay effective 1/1/24 as a one-time compensation for the change in job pick language.

4. The language regarding current seniority selection of snow and ice assignments should be added to CBA section 34.11 (D).

Conclusion

Both parties presented witness testimony and exhibits supportive of the respective positions taken. The Union sought to maintain long established cba language it deemed

most important and rational. The phrase “if it ain’t broke, don’t fix it” came to mind. The OTIC sought to restore an inherent management right -the right to assign work- that from its perspective and stated examples hindered effective management of OTIC operations. This has a negative effect on public services delivered contrary to its mission statement and sound management.

The issue remaining for decision by the FF was well-argued by the respective advocates. By definition the parties had different interests and competing concerns. In making the above recommendations, the FF was mindful of the statute and was well informed by the parties of the elements thereof which supported each party’s self-interest. The FF hopes the report serves the parties to resolve and bring finality for this bargaining cycle to the remaining dispute.

Respectfully submitted,

s/Sandra Mendel Furman JD, NAA

Certificate of Service

An electronic copy of the above report was sent by electronic mail to the State Employment Relations Board, 65 East State Street, 12th floor, Columbus, Ohio 43215; to Joseph Mando, Union Counsel; and to Patrick Hoban and Anthonia Ogbechie, OTIC Counsel on this 12th day of June 2024.

s/ Sandra Mendel Furman