

#27

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:)

STATE OF OHIO,)
OHIO DEPARTMENT OF ADMINISTRATIVE)
SERVICES)
(STATE HIGHWAY PATROL))

-and-)

FRATERNAL ORDER OF POLICE,)
OHIO LABOR COUNCIL, INC.)

HARRY J. DWORKIN,
ARBITRATOR

Re: Grievance No. 86-04
Class Action Grievance

A P P E A R A N C E S

On Behalf of Employer

JOHN ALEXANDER, ESQUIRE	Counsel for Employer
MAJOR TOM RICE	Personnel Commander
CAPTAIN JOHN M. DEMAREE	Personnel Officer
LT. D. H. ANDERSON	Personnel Officer
MARLAINA EBLIN	Labor Specialist
SHIRLEY TURRELL	Labor Relations

On Behalf of Union

PAUL L. COX, ESQUIRE	Counsel for F.O.P.
D. H. PLUKET	Toledo District
R. L. GREENWOOD	Granville District (Grievant)
EDWARD T. BAKER	Representative
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JOHN L. SCOTT	New Philadelphia District
ROBERT R. WEST	St. Clairsville District
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THE ISSUES ARE:

I.

DOES THE COLLECTIVE BARGAINING AGREEMENT DATED APRIL 28, 1986, REQUIRE "DOUBLE BACK" PAY EFFECTIVE AS OF THE DATE OF THE AGREEMENT, OR, IS "DOUBLE BACK" PAY EFFECTIVE FOLLOWING CHANGE FROM ROTARY SHIFTS TO PERMANENT SHIFTS AS REQUIRED BY THE AGREEMENT?

II.

IS "DOUBLE BACK" PAY APPLICABLE TO SITUATIONS CONCERNED WITH ATTENDANCE AT SCHEDULED TRAINING SESSIONS?

a) Is the "double back" pay issue with reference to training sessions encompassed in the grievance before the arbitrator, and, is the arbitrator authorized to address such issue?

III.

WAS THE "DOUBLE BACK" PAY PROVISION, ARTICLE 26, SECTION 26.05, INTENDED TO BE APPLIED, AND IMPLEMENTED AFTER ASSIGNMENT TO PERMANENT SHIFTS?

PRELIMINARY STATEMENT AND BACKGROUND:

The collective bargaining agreement was signed, and dated on April 28, 1986. The agreement was signed by the parties following an extensive fact-finding proceeding before Professor Harry Graham who issued his report and recommendations relating to some 35 issues. This is the first collective bargaining agreement between the parties.

Among the provisions dealt with by the fact-finder, and subsequently negotiated by the parties was one that dealt with payment of "double backs", which language provides an additional benefit when a patrol officer is assigned to a shift the starting time of which is less than 24 hours from commencement of his prior shift, in which event he is entitled to time and one-half, including premium pay for the second shift worked. The "double back" provision is by express language not applicable to local emergency situations. The "double back" pay provision is as follows:

26.05 Double Backs

At any time when the starting times of shifts worked by a member are less than twenty-four hours apart, the member will receive one and one-half times his or her hourly rate, including premium pay for the second shift worked except in local emergency situations. A shift worked immediately following a report-back will not be considered a double back for pay purposes under this Article.

Article 26 is captioned Hours of Work and Work Schedules.

Section 26.01 provides for establishment of a permanent shift system, as distinguished from the rotating shift procedure that was in effect prior to the April 28, 1986 agreement. Section 26.01 provides as follows:

26.01

Permanent shifts shall be established. Shift assignments will be made by the facility administrator on the basis of seniority on March 1st and September 1st of each year. The assignments made on March 1st will be for the period from September 1st to February 28th, and the assignments made on September 1st will be for the period from March 1st to August 31st. In accordance with this section, shift assignments will

be permanent and no rotation of shifts will occur. The normal work week shall be forth (40) hours.

It is clear that the contract mandates that a system of permanent shifts be established, with individual shift assignments made by the administrator of each facility on the basis of seniority, there being nine facilities geographically located within the State of Ohio. The contract provides that permanent shift assignments be made on March 1st, and September 1st of each year. Both Section 26.01, providing for "permanent shifts", and Section 26.05 providing for "double back" pay, appear in Article 26, under the heading, Hours of Work and Work Schedules.

Another provision relevant to the issues here presented is Article 37 - Education Incentive and Training. Among the pertinent sections are the following:

37.01

The Employer and the employees of the bargaining unit mutually recognize the benefit of continued education and training for professional growth and development. The Employer will provide basic and advanced training programs on a continuing basis based on needs and available funding.

37.02

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

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

Travel time to and from training programs shall be considered as on-duty hours and compensated appropriately.

The agreement defines a grievance as follows:

20.02 Definitions

- (1) Grievance - The word grievance as used in this Agreement refers to an alleged violation, misinterpretation or misapplication of a specific article or articles, section or sections of this Agreement.

20.04

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement.

Where a group of bargaining unit members desire to file a grievance involving an alleged violation which affects more than one member in the same way the grievance may be filed by the F.O.P. Ohio Labor Council provided that at least one member so affected signs the grievance. Grievances so initiated shall be call class grievances. The title on the grievance shall bear the name of the one affected member plus the designation et al. Class grievances shall be filed within fourteen (14) days of the date on which any of the like affected grievants knew or reasonably should have had knowledge of the event giving rise to the class grievance. Class grievances shall be initiated directly at the third step of the grievance procedure.

Following execution of the collective bargaining agreement, the State Highway Patrol issued a revised operating policy dealing with "overtime compensation". The revision was dated May 22, 1986, some one month following execution of signing of the agreement, and, in substance, adopted the "double back" pay

language of the agreement:

DOUBLE BACKS

1. At any time when the scheduled starting times of shifts worked by a member are less than twenty-four hours apart, the member will receive one and one-half times his or her hourly rate, including premium pay, for the second shift worked except in local emergency situations. A shift worked immediately following a report back will not be considered a double back for pay purposes under this article. Double backs will not be scheduled.

During the hearing before the arbitrator the parties stipulated that "double back" pay was not granted until after June 8, 1986, which date coincided with establishment of the permanent shift system, with shifts awarded in each of the nine geographical facilities on the basis of seniority within each facility. At this point it should be noted that, the employer has contended that "double back" pay was not required until after permanent shifts had been assigned; that "double back" payment was not required under the rotating shift procedure that was in effect prior to June 8, 1986. The Union, however, has contended that "double back" payment became effective as of the date of the signing of the agreement, April 28, 1986.

On May 23, 1986, Officer R. L. Greenwood, assigned to district 6, filed a written grievance alleging that he was denied "double back" pay on two instances after signing of the agreement, and during which instances he was assigned to a shift that was less than 24 hours from commencement of his immediately preceding shift. The text of the grievance is as follows:

STATEMENT OF GRIEVANCE: I worked double backs, with schedule and pay stub enclosed, and was not compensated pursuant to the contract.

REMEDY REQUESTED: That all double backs be paid from the date of signing the contract on April 28, 1986, to all employees.

The grievance was denied by the State Highway Patrol management following a Level III grievance hearing, held on June 18, 1986. The Level III decision sets forth the positions of the parties as therein advanced, as follow:

UNION CONTENTION

Trooper Greenwood was required to work a "double back" shift on May 5, 1986 in violation of Article 26, Section 26.05, of the labor contract between the FOP/Ohio Labor Council and the Ohio State Highway Patrol. The grievant wants all "double backs", paid from the date of the signing of the contract on April 28, 1986, to all employees.

MANAGEMENT CONTENTION

Management contends that since the "double backs" in question were scheduled prior to the signing of the contract on April 28, 1986, and involved long range planning in preparation for the semi-annual Civil Disturbance Training, this, along with similar grievances filed prior to the scheduled implementation date, of June 8, 1986, fail to demonstrate "good faith" efforts on the part of the FOP/Ohio Labor Council, Inc.

The arbitrary date of June 8, 1986, for implementation of the "double back" policy was picked after discussion with Mr. Ed Baker, State Representatives of the FOP/Ohio Labor council, Inc., for the following reasons:

1. Pre-planned semi-annual Civil Disturbance Training would be completed by June 8, 1986.
2. The Highway Patrol would have the opportunity to finalize the programming of payroll records in order to implement various portions of the contract.
3. Long range planning for such training is required to assure and determine the adequacy of the work force.

After execution of the collective bargaining agreement, the Office of Budget and Management issued a Fiscal Summary which, "summarizes the fiscal impact of the proposed agreement" between the State of Ohio and the Fraternal Order of Police. Among the subject matters dealt with was the financial liability of the State of Ohio in implementing Article 26, which was referred to in the following form:

...It also provides that "double backs," or hours worked by an employee when he has a shift commence less than 24 hours from the time he commenced work on his prior tour of duty, be limited and compensated at time and one-half of the employee's regular rate of pay. Current practice requires the Troopers to work shift schedules that rotate weekly and Radio Technicians to work second shift and weekends. There currently is no premium pay for double backs.

Fiscal Effect: Minimal - The major provisions of this Article should not lead to additional costs. Premium pay for double backs should be minimal because this practice will be used only in emergencies.

POSITION OF FRATERNAL ORDER OF POLICE:

The F.O.P. characterizes the grievance filed by Officer Greenwood as a "class action" grievance seeking an order from the arbitrator in the form of an award that, the Employer pay "double back" compensation to all employees entitled thereto from April 28, 1986, the date of signing of the agreement. As stated in its post hearing brief, the F.O.P. states that:

...The grievant is seeking to force the Employer to pay double back pay in all these circumstances failing within the definition of a double back

for which no exception was provided in the contract. The Employer has failed to follow Section 26.05 as it was originally intended. (Union's Post Hearing Brief, page 1).

The F.O.P. concedes that commencing with June 8, 1986, on which date the permanent shift system was established the Employer commenced paying "double back" to eligible employees pursuant to Section 26.05; however, between April 28, and June 8, 1986, the Employer failed to grant "double back" compensation on the basis that "it had not yet implemented permanent shifts". However, the F.O.P. reasons that the contract contains no language permitting the Employer to withhold "double back" pay until the officers were assigned permanent shifts.

In addition, the F.O.P. charges that even after June 8, 1986, "double back" situations occurred with reference to scheduling at the Ohio State Fair, and on training days, none of which events was an emergency, or local emergency situation. In the foregoing respects, additionally, the F.O.P. claims that the contractual requirements have not been observed.

The F.O.P. maintains further that officers who are scheduled for training sessions are eligible for "double back" pay, and that the contract language makes no exception in such situations. In support, the F.O.P. cites the recommendation of Fact-Finder Graham, in which he recommended in part that:

"When employees are required to work a double back, it is recommended they be compensated at the rate of time and one-half."

Accordingly, it is reasoned that the "double back" pay language was intended to apply to all situations "that met the 'double

back' definition", as recommended by the Fact-Finder, and set forth in Section 26.05.

The F.O.P. reasons that there is no basis, or rationale that would support any exception to implementing the "double back" pay provision on the basis advanced by the Employer that, a condition precedent was the permanent shift system which was not established until June 8, 1986, some five weeks after the contract was signed. Arguments advanced by the Employer that it would have been inconvenient, and would result in a hardship to have immediately implemented the "double back" pay provision is not regarded as a proper justification. The F.O.P. charges that the State Highway Patrol, having failed in its position before the Fact-Finder with reference to "double back" pay, is seeking to "reverse its losses in arbitration", and, is seeking to gain through arbitration that which it was unable to achieve through fact-finding.

With reference to situations in which officers are scheduled for training sessions that commence less than 24 hours after commencement of the employee's preceding shift, the F.O.P. asserts that nothing in the contract permits the Employer to avoid payment on the basis that training sessions are not covered by the "double back" pay provision. Moreover, the F.O.P. reasons, Section 37.02 was clearly intended to deal with training sessions, and addressed specific terms and conditions such as, work day, lunch, break periods, overtime, travel time, and overnight stays. The language of Section 37.02 makes no mention of "double back" pay. Accordingly, the conclusion is warranted that "double

back" pay applies to training sessions, as well as other "double back" situations. There is no specific language that exempts training sessions from "double back" payment. The F.O.P. reason that, had the parties intended to exempt training sessions from the application of Section 26.05, "such a modification of procedure should be specifically set forth." Reasoning further:

...If the parties had intended that the proposed double back section was not to be applied to training situations, similar provisions could have been inserted to prevent such an application. The absence of such language is indicative of the fact that the parties had not such intent when they tentatively agreed to Section 37.02. (Union's Post Hearing Brief, page 6).

The F.O.P. reminds the arbitrator that pursuant to express language appearing in the contract, (Section 20.07, (6)) the arbitrator is precluded from adding to, subtracting from or modifying any of the terms of the agreement. Accordingly, inasmuch as Section 37.02 deals with terms and conditions that are specifically applicable to training assignments, and is silent as regards "double back" pay, the language cannot serve as the basis for excluding "double back" compensation where employees qualify during training assignments.

By way of summary, the F.O.P. urges that Section 26.05 be applied so as to accord substantive meaning to the provision as intended by the parties; accordingly, "double back" pay should be awarded to all employees in qualifying situations, including those that arose prior to, and after Juen 8, 1986. The F.O.P. reasons that, there was "no justification for the Patrol's failure to follow the contract after April 28, 1986, the day it was signed

and the Arbitrator should order the Employer to live within the language of the contract."

The F.O.P. requests relief in the form of an award that would specifically render Section 26.05 applicable to training situations:

...No exceptions to the double back language for training situations is found anywhere in the contract including Section 37.02. There is no justification for the Employer to except training from the double back pay provisions of 26.05. (Union's Post Hearing Brief, page 9).

The Employer should also be directed to pay "double back" in all other situations, including assignments to the Ohio State Fair, and other scheduled shift changes; "the circumstances do not justify amending the contract before it expires."

Finally, the F.O.P. represents that the grievance filed by Officer Greenwood be dealt with as a "class action" or policy grievance, by reason of which "All those employees who have been denied double back pay should be made whole. The double back section was intended to require premium pay for scheduling circumstances that caused hardships to employees..." (Union's Post Hearing Brief, page 9).

POSITION OF EMPLOYER:

As a threshold statement, the Employer viewed the issue before the Arbitrator as considerably less in scope than advanced by the F.O.P. The Employer's statement of the issue to be resolved in the form of an award is, as follows:

Do the specific pay, hours of work and overtime provisions of Article 37 (Training) of the collective

bargaining agreement of the parties prevail over the general provisions of Article 26 (Work Schedules) relating to "permanent shifts," so that §26.02 ("Double Backs") is inapplicable to training programs of the Employer? If not, what shall the remedy be? (Employer's Statement of Issue).

As indicated in the text of the Employer's statement the dispute is concerned chiefly with whether the "double back" provision is applicable to attendance by officers at scheduled training sessions. As to this facet, the Employer maintains that Article 37 (Training) is separate and apart from, and prevails over, Article 26 which provides for "double back" pay, and mandates establishment of permanent shifts in accordance with seniority, thereby abolishing the prior system of scheduling on the basis of rotating shifts. Although maintaining its position that the grievance before the Arbitrator is substantially more limited in scope than claimed by the F.O.P., the Employer has, in its presentation, and post hearing brief, addressed all aspects of the dispute as presented before the Arbitrator.

The Employer refers throughout in its brief to the text of the grievance filed by Officer Greenwood in which he alleges that he worked two shifts which he claims were compensable pursuant to Section 26.05 at one and one-half his hourly rate and that, the two shifts constituted "double back" situations.

Additionally, the Employer maintained its objection throughout the hearing to expanding the issue beyond that designated in the grievance, and limited to the claim that the grievant was entitled to "double back" pay for the two shifts for which he was

scheduled on two specific dates. The Employer takes issue with the Union's efforts to include in the grievance purported claims on the part of other officers in the nature of a "class action" grievance; the Employer states that, "only matters directly related to grievant Greenwood and those similarly situated are properly ripe for determination."

As regards Trooper Greenwood, his grievance stems from the fact that, on May 6, 1986, he was assigned to a riot training session, and "commenced his duties less than 24 hours after the starting time of his prior shift." A second occurrence is described in the grievance which arose on August 10, 1986, at which time he was assigned to State Fair duty, less than 24 hours after commencement of eight hours of training duty on the previous day.

The Employer maintains that training programs are specifically provided for in the labor agreement, and must be considered a condition of employment separate and apart from Section 26.05 relating to "double backs", and that the premium pay was not intended to be applicable to training programs. Moreover, the Employer reasons that the cost factor resulting from the "double back" provision was dealt with by the Ohio Office of Budget and Management in its report. The cost of "double back" pay was projected on the basis that it did not apply to training sessions, and was limited to normal work schedules.

The Employer argues that the "double back" pay provisions of Article 26 were intended to be applied "in conjunction with the permanent shift provisions of that same Article", and therefore,

it logically follows that it was the intent of the parties to apply "double back" premium only after the permanent shift system was implemented, which was June 9, 1986. Pursuant to the manifested purpose, and intent of the parties "double back" payment was not required until the permanent shift system had been implemented, thereby replacing rotary shifts.

The Employer maintains that it was not liable for "double back" pay until the permanent shift system had been implemented; inasmuch as the permanent shift system was established on June 9, 1986, the claim of Trooper Greenwood for "double back" pay on May 6, 1986, is without merit.

Prior to signing of the first collective bargaining agreement, on April 28, 1986, state troopers worked on a rotating shift basis. Under such system, some officers experienced starting times that were less than 24 hours after the starting times of their prior shifts.

The Employer reasons that, whereas Section 26.01 mandates a permanent shift system, as distinguished from rotating shifts, it was necessarily required, and an implied condition of the language employed by the parties that a reasonable period of time after April 28, 1986, the date the agreement was signed, would be required in order to implement the permanent shift system. This period of time is referred to by the Employer as the "transition" period. Moreover, only a short period of time elapsed from the signing of the agreement, until June 8, 1986, when permanent shifts were assigned in accordance with seniority within each district, which involved a period of only some five weeks.

The Employer reasons that no "double back" pay is warranted for shifts worked prior to June 8, 1986, even though such shifts had starting times of less than 24 hours after the starting times of their prior shifts.

The Employer contends that its position is valid, and logical, and supported by the relevant provisions relating to the subject matter, all of which should be considered by the Arbitrator in seeking to determine the intent of the parties; the entire collective bargaining agreement must be considered, and the meaning of each paragraph determined "in relation to the contract as a whole."

The Employer points out that Section 26.01 provides the "mechanism of the seniority-based bidding system";

Within the foregoing framework, it is logical that Section 26.05, "Double Backs", was intended by the parties to serve as an integral part of the new permanent shift system. In the Agreement, the Patrol retains the right to determine the numbers of personnel which will be employed at any given time to carry out its statutory mission...(Employer's Post Hearing Brief, page 7).

In the judgment of the Employer the "double back" language of the agreement was designed to serve as a "penalty clause" so as to discourage scheduling employees subject to the permanent shift system "in a way which sets those regular shifts too close together." However, the penalty consequences were intended to apply after the permanent shift system had been implemented. Payment of the wage additur was not contemplated prior to transition from a rotating to a permanent shift system; "it is illogical and repugnant to an unclouded reading of the agreement as a whole"

to enforce the "double back" provision (Section 26.05) prior to establishment of the permanent shift system.

The Employer reasons that the fact that an officer successfully bids on a permanent shift would not warrant payment of "double back" for the first shift following the successful bid. The transition in some instances would "necessitate commencement of the first day of the new shift less than 24 hours after the starting time of the last day of the old shift." The foregoing argument is deemed applicable as regards the testimony of a Dispatcher whose "double back" claim resulted solely from the change from her previous, rotating shift to the first day of her permanent shift on June 8, 1986. The Employer reasons that:

...Clearly, fairness and standards of contract interpretation which seek avoidance of absurd or nonsensical results gravitate against allowing a bargaining unit member to create an enhanced pay status through his or her own selection of shift. (Employer's Post Hearing Brief, page 8).

The Employer concludes that, "double back" pay is not applicable to situations that arose prior to implementation of the permanent shift system. The parties clearly intended a "transition" period for implementation of both the permanent shift system, and "double back" pay requirement.

The Employer contends further that "double back" pay is not applicable in event an officer subsequently changes from one permanent shift to another pursuant to the semi-annual bid procedure. Implementation of the shift bid procedure would necessarily result in a number of shift changes that may be less than 24 hours from commencement of the employee's prior, permanent

shift. An officer is not entitled to premium pay by reason of being the successful bidder for another, and more desirable permanent shift. To hold otherwise would penalize the Employer "for a situation that he did not create, and could not avoid."

The Employer further contends that "double back" pay is not applicable to attendance at training programs, which are governed by Article 37. This provision is specifically applicable to training programs, and therefore prevails over Article 26 (Work Schedules). Article 37 was expressly designed to apply to training programs, and sets forth with specificity the terms and conditions of employment that govern such assignments. Attendance at training sessions enhances the "professional growth and development" of bargaining unit members, and provides "basic and advanced training programs on a continuing basis based on needs and available funding." Article 7 specifies the manner and rate of compensation while involved in a training program. The contract language deals with the applicable work day, lunch period, and other conditions, which are a departure from the conditions relating to regular shifts. The contract language indicates that the parties intended to grant considerable discretion to the Employer in scheduling training programs "without resort to provisions which limit regular shifts' schedules." The Employer reasons that, Article 37 establishes a "separate system of compensation for training programs" and was designed to constitute the exclusive basis of compensation for employees who participate in training programs. Such, specific provisions must be construed as prevailing over "the more general language***which applies" to

employees assigned to other shifts. The Employer reasons that "specific language [should govern] over general language in an agreement."

The parties, in Article 37, set forth an extensive, and comprehensive list of principles governing compensation for officers assigned to training sessions. This list does not include "double back" as appears in Article 26 which applies to regular shift assignments. The Employer reasons:

...Because the parties dealt with the matter with such specificity, it must be inferred that they intended not to provide for "double backs" in the training context through their exclusion of this item from the Article...(Employer's Post Hearing Brief, page 12).

The Employer maintains that, "double back" pay is not warranted, or required under the terms of the collective bargaining agreement for any period prior to June 8, 1986, and establishment of the permanent shift system; that the contracting parties did not intend, or provide "double back" compensation for attendance at training sessions, and, that Article 37 precludes "double back" where attendance at a training session is scheduled less than 24 hours prior to commencement of the employee's regular, prior shift.

ARBITRATOR'S FINDINGS AND OPINION:

SCOPE OF GRIEVANCE

A threshold matter that warrants consideration is the scope of the grievance, and authority of the Arbitrator. In determining such matters the Arbitrator must necessarily look to

the intent of the parties as set forth in their collective bargaining agreement. Arbitration procedure is a creature of the parties' agreement; the authority of the Arbitrator is derived solely from the agreement. Section 20.02 defines a grievance, as follows:

- (1) Grievance - The word grievance as used in this Agreement refers to an alleged violation, misinterpretation or misapplication of a specific article or articles, section or sections of this Agreement.

Section 20.04 provides for an individual grievance on the part of a "unit member" who claims that a specific violation of the agreement occurred. In addition, a "class action" or "policy" grievance in which more than one bargaining unit member assert that they were affected "in the same way" may also be filed. As indicated above, a "class action" grievance may be filed by the union, and requires that at least one bargaining unit member affected by the dispute also sign the grievance.

Testing the grievance filed by Officer Greenwood, and appealed to arbitration as against the contract language, the Arbitrator finds that the grievance was brought by Officer Robert Greenwood alleging that he worked "double backs", and was not properly compensated. The remedy requested is, that, "all double backs be paid from the date of signing the contract on April 28, 1986, to all employees." Insofar as the form of relief is concerned it would appear that the grievance was intended as a "class action" grievance; however, it does not appear that the grievance was filed by the F.O.P., Ohio Labor Council, as required

by Section 20.04, nor is the grievance designated as a "class action grievance" as required by the language of Section 20.04.

Pursuant to Section 20 .07, paragraph 6, the parties have expressly limited the authority of the arbitrator:

...The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

While the Arbitrator has expressed fidelity to the negotiated language of the grievance and arbitration procedure, he takes cognizance of the fact that the grievance was considered, and answered by management at the Step III level, which procedure applies to "class action" grievances. In its Step III answer the State Highway Patrol at no time questioned the validity of the grievance as a "class action" grievance, and chose to address the merits. In the Employer's statement of the issue, as well as in its post hearing brief, no objection is raised relating to the scope of the issues presented to the arbitrator. In fact, at the hearing on October 27, 1986, the parties stipulated that the grievance was properly before the Arbitrator for final and binding resolution. No objection, or reservation was registered as to the arbitrator's authority.

In the Employer's post hearing brief no objection was registered to consideration of the grievance as a "class action" matter; "only matters directly related to Grievant Greenwood and those similarly situated are properly ripe for determination", (Employer's Post Hearing Brief, page 2). The Arbitrator therefore

concludes that, the absence of any specific objection as regard the issues to be resolved by the Arbitrator, together with consideration of the grievance at the Step III level, as well as the conduct of the parties at the arbitration hearing, acknowledge authority in the Arbitrator to consider the complaint advanced by the named grievant, as well as other bargaining unit members affected by the alleged violation. The grievance before the Arbitrator must be viewed, and considered as a "class action" grievance. The Arbitrator observes further that, had the Employer wished to insist on observance of the procedure governing "class action" grievances, such should have been registered in timely fashion. By failing to object, and addressing the merits both at the Step III level and at the arbitration hearing, such objections must be deemed waived.

EFFECTIVE DATE OF APPLICATION OF "DOUBLE BACK PAY PROVISIONS OF SECTION 26.05; WAS "DOUBLE BACK" PAY CONDITIONED ON ESTABLISHMENT OF PERMANENT SHIFTS?

The F.O.P. argues that the "double back" pay provision was required to be implemented upon signing of the collective bargaining agreement, April 28, 1986. The Employer maintains that "double back" pay was to be applied after implementation of the permanent shift system, which was June 8, 1986, and, that no "double back" pay was warranted under the prior rotating system of shifts. The Employer reasons that both Section 26.05, providing for "double back" pay, and Section 26.01, providing for "permanent shifts" are to be read in conjunction, and that, as a practical matter a "transition" period must be considered to have

been contemplated by the parties, which would render inapplicable "double back" pay until permanent shifts had been assigned on the basis of seniority within each district as required by the labor agreement.

Considering all of the evidence relating to this issue, and the plain meaning of the negotiated language of the agreement, the Arbitrator must conclude that the "double back" pay provision became applicable on April 28, 1986, the date the collective bargaining agreement was signed. Accordingly, the application of this condition of employment was not suspended during the transition from the rotary, to a permanent shift system. Article 2 is entitled Effect of Agreement-Past Practice, and sets forth the declaration of the parties that the "negotiated items" as appear in the agreement shall be "in effect throughout the term of the agreement"; that "no verbal statement shall supersede any provisions of this agreement." It would appear, therefore, that had the parties intended to hold in abeyance the "double back" provision until permanent shifts had been established, such would have been set forth by express language. Failing to do so, the Arbitrator's decision must be consistent with the clear, and unambiguous language of Section 26.05, which contains no language that would suspend operation of the "double back" provision. On the contrary, the language declares, without exception, that, "at any time when the starting times of shifts worked by a member are less than 24 hours apart", the individual officer shall receive "double back" pay. The parties were fully aware that any exceptions

to the foregoing should be set forth, as indicated by the fact that "double back" pay was declared inapplicable in emergency situations. In view of the unqualified language of the "double back" pay provision the Arbitrator must conclude that such condition, and term of employment became effective as of April 28, 1986, notwithstanding the change from rotating shifts to double shifts was not implemented until June 8, 1986. There appears to be both reason and logic in support of the Employer's claim that a "transition" period was necessary; however, the contract does not indicate that it was the intent of the parties to suspend payment until the permanent shift system had been implemented, and the Arbitrator is precluded from adding such condition to the agreement.

Section 26.01, mandates that permanent shifts shall be established on the basis of seniority within each district; assignments to permanent shall be made on March 1, and September 1, of each year. The Arbitrator is aware that in implementing the language of Section 26.01 instances may occur in which a successful bidder for another permanent shift may commence his new shift less than 24 hours from the start of his prior shift, and therefore may assert a claim for "double back" pay. Although it may be argued that it is unfair for an officer to impose a "double back" pay obligation on the Employer by reason of his voluntary bid into another shift, inasmuch as the result follows from the negotiated language of the agreement it is outside the Arbitrator's authority to take cognizance of the alleged "hardship" or "unfairness". The decision must be based on the negotiated language of

the agreement. In event the parties should wish to address this aspect of the case based on their experience, the matter should be presented at the bargaining table.

ARE OFFICERS ENTITLED TO "DOUBLE BACK" PAY PURSUANT TO SECTION 26.05, WHEN ATTENDING TRAINING SESSIONS, OR, ARE TRAINING PROGRAMS GOVERNED EXCLUSIVELY BY ARTICLE 37 OF THE AGREEMENT?

Attendance at training programs, and terms and conditions that shall apply, are set forth in comprehensive manner in Article 37, entitled Educational Incentive and Training. Section 37.01 sets forth the recognition of the parties of "the benefit of continued education and training for professional growth and development", and that advanced training programs would be scheduled on a continuing basis, "based on needs and available funding."

Section 37.02 defines, with specificity, the work day to be observed "for all training programs" including a one hour lunch period, and time for breaks. The parties have further provided in Section 37.02 that, "employees assigned to attend training programs will adopt the schedule of the program." In event an officer attends class beyond an eight hour work day he is expressly subject to payment of overtime. However, in event an officer stays overnight at a particular location while attending a training program, such would not constitute a basis for payment of overtime. Finally, officers attending training programs are subject to the principle of "portal to portal" pay. Travel time to and from the training program location is considered as on-duty hours. Pursuant to Section 37.03, the State Highway Patrol

reimburses officers participating in training or education programs within the State of Ohio to the extent of one half of their tuition fees, subject to achieving an acceptable score for each course attended.

On the basis of the applicable language of the agreement, together with consideration of the evidence, the Arbitrator is of the opinion that inasmuch as attendance at training programs is expressly set forth in the agreement, under a separate subject heading, and the terms and conditions governing participation in training programs are specifically set forth, such provisions govern and control over other provisions of the agreement, including the "double back" provision. It appears from a reading of the pertinent language that Article 37 was intended by the parties to govern attendance at training programs, and therefore the "double back" pay provisions are inapplicable to attendance at training programs. The manner of compensation of bargaining unit employees attending training programs are dealt with separately and apart from the provisions applicable to permanent shifts. The Arbitrator is persuaded that Article 37 establishes a separate system of compensation for officers attending training programs, and that such specific language prevails over other general language including the "double back" provision.

Respectfully submitted,



HARRY J. DWORKIN, ARBITRATOR

A W A R D

I.

Pursuant to the language of Section 26.05 of the collective bargaining agreement, signed April 28, 1986, bargaining unit members whose starting times are less than 24 hours from the start of their previous shift, are entitled to "double back" pay, except in local emergency situations; further, the contract makes no exceptions in change from rotating shifts to permanent shifts; accordingly, bargaining unit members whose starting times from April 28, 1986 were less than 24 hours from the start of their last shift worked are entitled to "double back" pay;

The foregoing obligation applies to situations in which employees on permanent shifts bid for other shifts as provided by Section 26.01; in view of the foregoing findings, the grievants are entitled to be made whole in situations where their starting times of shifts were less than 24 hours apart (Section 26.05), including assignments to State Fair duty, and special events;

II.

The provisions of Article 37 of the collective bargaining agreement governing attendance at education and training programs prescribe the pay, hours of work, and overtime, together with other conditions that apply to, and govern attendance at such programs, and prevail over Article 26, including Section 26.05; accordingly, the Arbitrator determines that the "double back" language of Article 26 is not applicable to attendance at educational and training programs.

AWARD SIGNED, ISSUED AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 9TH DAY OF MARCH, 1987.



HARRY J. DWORKIN, ARBITRATOR