#219 Wagner

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 5

-and-

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

GRIEVANCE: John F. Kinney, et. al.

CASE NUMBER: G-86-0791

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: October 10, 1988

APPEARANCES

For the Union

John F. Kinney	Grievant
Russell Murray	Executive Director
Brenda Persinger	Staff Representative
Donald W. Snelling	Steward
Linda Fiely	Associate General Counsel

For the Employer

John Thompson	Observer
G. Dewayne Slack	Labor Relations Officer
Harold W. Hitchens	District Construction Engineer
Michael Duco	Advocate

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Transportation, District 5, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit #1).

The arbitration hearing was held on July 14, 1988 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUE

The Parties were unable to mutually agree on the issue. The Union characterized the issue in the following manner:

> Whether the Employer's modifications of the employees' schedules were in violation of the Collective Bargaining Agreement (Joint Exhibit #1)? If so, what is the remedy?

The Employer maintained that the following issue should be considered by the Arbitrator:

> Whether the Employer violated Section 13.07 of the Collective Bargaining Agreement (Joint Exhibit #1) when it adjusted the starting and ending times of the five (5) Grievants for the construction project 839-85? If so, what shall the remedy be?

Based on the evidence, testimony, and arguments introduced at the hearing, the Arbitrator determines that the Union's version of the issue more accurately characterizes the Parties' contentions. The Employer's version, more specifically, is extremely narrow and fails to consider the number of inter-related provisions discussed by the Parties.

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."
(Joint Exhibit 1, Pg. 7)

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME.

"...

Section 13.02 - Work Schedules

For purposes of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e., hours of the day) and days of the week and work area.*

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

Work schedules for employees who work in seven (7) day operations shall be posted at least fourteen (14) calendar days in advance of the effective date. The work schedule shall be for a period of at least twenty-eight (28) days and shall not be changed within that period, except in accordance with reassignment as provided for in Section 13.05.

Within thirty (30) days of the effective days of the effective date of this Agreement, all agencies that operate with

shifts shall canvass and assign individual employee shift preference by institution seniority.
(Joint Exhibit 1, Pg. 18)

Section 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designee has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designee shall have the right to require the least senior employee(s) who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable time, if so requested.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute rest period between the shift and the overtime or as soon as operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the employee will be credited as if he/she had refused the overtime.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime. Emergency Overtime. (sic)

In the event of an emergency as defined in Section 13.15 nothwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency

requirements, regardless of the overtime distribution.

...

Section 13.10 - Payment for Overtime

All employees except those in current Schedule C shall be compensated for overtime work as follows:

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

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

...

Section 13.13 - Flextime/Four Day Work Week

Where practical and feasible, hours and schedules for bargaining unit employees may include:

1. Variable starting and ending times;

2. Compressed work week, such as four 10-hour days;

3. Other flexible hour concepts.

..."

(Joint Exhibit 1, Pg. 22)

JOINT STIPULATIONS DEALING WITH WORK SCHEDULE PROPOSALS

1. On or about February 12, 1986, the union proposed posting of schedules for all employees using the following language:

Section 2 - Work Schedules

For the purpose of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e., hour of the day), days of the week, and physical location. Work schedules shall be posted at least twenty-eight (28) calendar days prior to the effective date of the posted schedule and shall not be changed within said twenty-eight (28) days, except in accordance with reassignment as provided for in this Article. Procedures for selecting shifts shall be defined in Supplemental Agreements.

2. On or about February 24, 1986, the Employer submitted the following counterproposal on work schedules:

> 6.02 - Work schedules
>
> All work schedules shall be established in accordance with the standard work week and are subject to change to meet operational needs.

3. After these two proposals, during negotiations, the parties agreed that posting was unnecessary in 5 day operations.

4. On or about April 14, and again on May 1, the Union proposed the following language on work schedules:

> Section 2 - Work Schedules
>
> For purposes of this Agreement, "work schedules" are defined as an employee's assigned work shift (i.e., hours of the day), days of the week, and physical location. Work schedules for employees who work in five (5) day operations need not be posted. However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such. Work schedules for employees who work in seven (7) day operations shall be posted by the middle of each month for the following month and shall not be changed within that period, except in accordance with reassignment as provided for in this Article. Procedures for selecting shifts shall be defined in Supplemental Agreements.

5. The parties agreed that in the negotiations surrounding the inclusion of the words "However, where the work hours of such employees are determined by schedules established by parties other than the Employer, the Employer shall notify employees of any changes in their work hours as soon as it is aware of such," three specific examples were discussed: Agriculture Meat and Egg Inspectors; Tax Inspectors; and, ODOT Construction Project Inspectors.

6. The Employer is not arguing that "posted regular schedule" as used in Section 13.07 of the Agreement does not apply to five day operations.

JOINT STIPULATIONS DEALING WITH FLEXTIME/FOUR DAY WORKWEEK PROPOSALS

1. Union's First Proposal: Section 14. Flextime/Four Day Workweek

The parties agree that flextime will be implemented where appropriate and desirable. The number of flextime positions that can be granted in any given workplace shall be determined by Supplemental Agreement. Where more employees request flextime positions than are available, the employee(s) with the greatest seniority shall have preference. The scheduling of flextime positions shall be by mutual arrangement between an employee and his/her supervisor.

Where four-day workweek arrangements currently exist, they shall continue unless the employee requests to work a five-day workweek. Such a request shall not be denied.

2. Union's Second Proposal: Section 14. Flextime/Four Day Workweek

The parties agree that flextime and four-day workweeks and other alternative work schedules will be implemented where appropriate and desirable. The number of flextime and four-day positions that can be granted in any given workplace shall be determined by Supplemental Agreement. Where more employees request flextime or four-day positions than are available, the employee(s) with the greatest seniority shall have preference. The scheduling of positions shall be by mutual arrangement between an employee and his/her supervisor.

Where flextime and four-day workweek and other alternative arrangements currently exist, they shall continue unless the employee requests to work another schedule. Such a request shall not be denied.

3. The Employer's first counter proposal offered no provision on Flextime.

4. Union's Third Proposal: Section 14. Flextime/Four Day Workweek

The parties agree that flextime and four-day workweeks and other alternative work schedules will be implemented where appropriate and desirable. The number of flextime and four-day positions that can be granted in any given workplace shall be determined by Supplemental Agreement. Where more employees request flextime or four-day positions than are available, the employee(s) with the greatest seniority shall have preference. The scheduling of

flextime positions shall be by mutual arrangement between an employee and his/her supervisor.

Where flextime and four-day workweek and other alternative arrangements currently exist, they shall continue unless the employee requests to work another schedule. Such a request shall not be denied.

5. Employer's Counter Proposal with Handwritten Oral Counters of the Union:

Where practical and feasible as determined by the [Joint Labor-Management Committee], hours and schedules for bargaining unit employees may include:

1. Variable starting and ending times.

2. Compressed work week such as: four 10-hour days.

3. Other flexible hour concepts.

[Where flexible hour arrangements currently exist, they shall continue unless discontinued by the Labor Management Committee.]

(Note: Those items in brackets represent the hand written oral counters.)

6. Employer's Counter Proposal:

Section 13. Flextime/Four Day Workweek

Where practical and feasible as determined by the Agency, hours and schedules for bargaining unit employees may include:

1. Variable starting and ending times.

2. Compressed work week such as: four 10-hour days.

3. Other flexible hour concepts.

7. Last Best Offer: Provision ultimately agreed to by the Parties.

6.13 - Flextime/Four Day Work Week

Where practical and feasible hours and schedules for bargaining unit employees may include:

1. Variable starting and ending times.

2. Compressed work week such as: four 10 hour days.

3. Other flexible hour concepts.

CASE HISTORY

District Five of the Ohio Department of Transportation, the Employer, services a number of counties within its geographic area. John Kinney, a Project Inspector III, four (4) other Project Inspectors, and one (1) Highway Worker, the Grievants, filed the present grievance alleging that the Employer modified their work schedule to avoid the payment of overtime. Project Inspectors have a number of responsibilities. They administer the inspection of contract work to assure that all work is performed by the contractors; and that the contractors are in compliance with the plans, specifications, and special provisions. Inspectors also obtain required field measurements for documentation of completed work to determine pay quantities as well as to assure contractor compliance with specifications (Joint Exhibits 7 and 5). Michael A. Barrett, a Highway Worker II, was performing the work of a Project Inspector at the time of the filing. The Parties indicated that he was temporarily transferred in accordance with a 1000 Hour Assignment negotiated by the Parties (Joint Exhibit 1, Article 14 - 1000 Hour Assignment, Section 14.01-ODOT, Pgs. 23-24).

Harold W. Hitchens, District Construction Engineer, testified that the Employer reviewed its procedures and practices shortly after the Parties negotiated the current Collective Bargaining Agreement (Joint Exhibit 1). Specific

attention was allegedly placed in the appropriate staffing of construction projects. One of the numerous projects evaluated by Hitchens was Project No. 839-85; the Grievants were assigned to this road construction project. Hitchens noted that the following factors were scrutinized during the investigation: the manpower assigned to the project; the contractor's projected schedule and his accomplishments; the number of subcontractors presently working on the project and the number to be employed in the near future; the number of available employees during peak construction time.

Hitchens' investigation allegedly indicated that Project 839-85 was overstaffed during the morning and evening portions of the shift. In other words, the Employer determined that the project would be managed in a more efficient manner if the greatest number of Project Inspectors were available during mid-day.

On October 3, 1986 the Employer issued an Inter-Office Communication which notified all employees that their starting times would be staggered as of October 6, 1986 (Joint Exhibit 3). This policy modified the existing schedule which required the Grievants to report to work at 7:30 a.m. and to complete their shift at 4:00 p.m. It appears that Union representatives contacted the Employer after the issuance of the above notice; and they requested that the starting times be assigned according to seniority status. The Employer complied with this request and a new schedule was developed (Joint Exhibit 13).

On October 14, 1986 the Grievants filed the following grievance contesting the scheduling change:

"...

What happened? (State the facts that prompted you to write this grievance.) Work hours were changed to prevent the payment of overtime management rights were used to violate contract and changed work schedule (see attached)

When did this happen? (Be specific.) On the afternoon of Monday Oct 6 1986

Where did this happen? (Be specific.) On Proj 839085 Lic SR 79 12.53

..."

(Joint Exhibit 2, Pg. 1)

The Grievants requested the following remedy as a consequence of the above violation:

"...

That O.T. be allowed per contractors working hours and all eligible employees overtime lost be paid for the hours contractor worked and that employees will be returned to their normal working hours and actions of this nature cease now and in the future and any other appropriate remedy deemed necessary by an arbitrator.

..."

(Joint Exhibit 2, Pg. 1)

On October 21, 1986 a Level I Grievance Hearing was held by the Parties. The Employer denied the grievance by providing the following justifications on October 23, 1986:

"...

That the Employer has the right to utilized (sic) variable starting and ending times for its employees where practical and feasible. That Article 5 and Article 13.13 of the labor agreement gives Management this right. The changes in the starting and ending times was done to meet the departments (sic) operational needs, with this method being an efficient, practicable and effective means in carrying out the departments mission. Therefore, the Employer did not violate the labor agreement in the scheduling of its

employees, being such, this grievance is denied in its entirety.

..."

(Joint Exhibit 2, Pgs. 4-5)

A Level II Grievance Hearing was held on November 14, 1986. The Employer, again, denied the grievance. A formal response was provided by the Employer on November 19, 1986. The following finding articulated the Employer's justification for the denial:

"...

I find that while the contract states schedules would not be changed to avoid the payment of overtime, that this does not give the employees an absolute vested right to a specific amount of overtime. The Employer must have work to do in order for overtime opportunities to be available. In the instant case, more than enough employees were standing around during the day to do the work of the employer than were needed. Consequently, the employer found a more efficient way to schedule---notified the employees of this change and made it. I find no contractual violation in their actions. Grievance denied.

..."

(Joint Exhibit 2, Pg. 8)

The Parties were unable to settle the dispute at the subsequent stage of the grievance procedure (Joint Exhibit 2, Pg. 10). The grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

The Union argued that the Employer violated the Agreement (Joint Exhibit 1) by illegally modifying the Grievants' work schedules. This modification, moreover, resulted in the avoidance of overtime payments to the Grievants.

A threshold issue was raised by the Union concerning the

propriety of certain Employer arguments. The Union maintained that prior to the arbitration hearing, the Employer never cited Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules) as support for its managerial actions. The Union, therefore, maintained that the Employer should be precluded from presenting evidence in support of this position, as well as arguing this Section as justification for its actions.

The Union argued that even though the Employer cited Section 13.13 (See Pg. 5 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.13 - Flextime/Four Day Work Week) throughout the various steps of the grievance procedure, this Section was inapplicable to the present dispute. In support of this notion, the Union referred to bargaining history surrounding this Section of the Agreement (Joint Exhibit 1). Russell Murray, Executive Director, testified that this provision did not allow the Employer to impose unilateral changes in work schedules. Rather, this Section provided employees with a potential benefit; a benefit requiring mutual agreement, by both the Employer and its employees, concerning alternative work schedules.

The Union, moreover, alleged that the stipulations dealing with the various contract proposals surrounding this Section strongly support Murray's testimony. Since the Parties never mutually agreed to the staggered starting and ending time procedure, the Union asserted that the Employer could not rely on this Section as justification for its action.

The Union offered a number of contract interpretation arguments in support of its position. First, the Union urged that the posting exception contained in Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules) does not impinge upon employees covered by Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 (Overtime). The latter provision precludes the Employer from changing its posted regular schedule to avoid the payment of overtime.

Second, the Union maintained that "regular schedule" as used in Section 13.07 of the Agreement (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime) does apply to ODOT Construction Project Inspectors. The Union referenced a recent award authored by Arbitrator Drotning (Ohio Bureau of Employment Services and Ohio Civil Service Employees Association, No. 6-86-70, Drotning, 1987) in support of this interpretation. Arbitrator Drotning ruled that Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime) was generally applicable to all employees.

Third, the Union asserted that a number of exhibits introduced at the hearing accurately documented that the "regular" or "normal" working hours for the Grievants are 7:30 a.m. to 4:00 p.m. The first document referenced by the Union was Directive No. A-203 which was issued on March 1, 1985. It

provides in pertinent part:

"...

A. Hours of Work

...

3. The normal working day for employees of Field District Crews (Survey, Construction, County Maintenance) will consist of an 8-hour work period starting at 7:30 a.m. with one-half hour allowed for lunch.

..."

(Joint Exhibit 10)

A second set of documents referred to the Grievants' Position Descriptions (Joint Exhibits 4-9). All of these exhibits specify normal working hours from 7:30 a.m. to 4:00 p.m. The Union argued that notations in the Ohio Classification Specifications (Joint Exhibit 11) indicating that working hours may vary with contractors hours should be discounted by the Arbitrator when interpreting the applicability of Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime). Both the Position Descriptions (Joint Exhibits 4-9) and Classification Specifications (Joint Exhibit 11), more specifically, have not been negotiated by the Parties, and thus, cannot be used to modify rights and responsibilities contained in the Agreement (Joint Exhibit 1).

Last, the Union asserted that the Employer has misapplied the exception contained in Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules, and Overtime, Section 13.02 - Work Schedules). The Union argued that a third party did not set the Grievants' schedules; but that the

Employer established the schedules when it staggered their shifts. Testimony provided by John F. Kinney, a Project Inspector III, allegedly supported this argument. The Union also maintained that prior to the issuance of the scheduling change notice (Joint Exhibit 3) the Grievants worked hours established by the contractor, while subsequent working hours were established by the Employer. The Union emphasized that the contractor's hours remained relatively constant throughout the entire period.

The Union claimed that these staggered schedules (Joint Exhibit 13) violated protections contained in Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime) because they resulted in the avoidance of overtime payments. The Union noted that a comparison of payroll documents (Employer Exhibits 1-6, Joint Exhibit 12) clearly evidence a substantial curtailment of overtime payments even though the work load on this project remained relatively constant. In fact, Hitchens testified that the new scheduling arrangement resulted in some cost savings. The alleged curtailment of overtime also led to manpower shortages which engendered inefficient inspection services. Excerpts from a Construction Diary (Union Exhibit 3) and a series of Inspector's Daily Reports (Union Exhibit 1) were introduced by the Union as evidence of these negative outcomes. Kinney's testimony purportedly supported statements contained in these documents.

An Inter-Office Communication dealing with overtime

approval and dated October 3, 1986 (Union Exhibit 2) allegedly indicated that the Employer changed the schedule to avoid overtime payments. Kinney testified that this document was orginally attached to the orginal scheduling change notice (Joint Exhibit 3). The Union claimed that the issuance of this document on the same date as the scheduling notice raised certain suspicions concerning the motivation surrounding the scheduling change.

In terms of a proposed remedy, the Union requested that the Grievants be paid for the hours they would have worked at the premium rate had the Employer continued to utilize the scheduling method in effect prior to the October 3, 1986 notice (Joint Exhibit 3). The Union also urged the Arbitrator to retain jurisdiction if he renders an Award in the Union's favor.

The Position of the Employer

It is the position of the Employer that its modifications of the employees' work schedules were not in violation of the Collective Bargaining Agreement (Joint Exhibit 1). The Employer, moreover, asserted that these modifications were not established to avoid the payment of overtime.

The Employer argued that it should not be estopped from presenting arguments outside the scope of its Step 2 response. Further, the Arbitrator should analyze the entire management response as developed in the various stages of the grievance procedure. These responses, in the Employer's opinion, clearly evidence the Employer's reliance on a variety of provisions, and

13.13 (See Pg. 5 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.13 - Flextime/Four Day Work Week). The Employer placed particular import on its Step 3 response, which provides in pertinent part:

> "...
>
> The change in scheduling was done consistent with the contract between the parties. The Union was notified that the change would be coming about and the employer took its actions for efficiency sake, consistent with the contract.
>
> ..."
>
> (Joint Exhibit 2, Pg. 4)

The above statements were cited in support of the notion that the Employer had provided the Grievants with notice concerning an upcoming change in their work schedules in accordance with Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules).

The Employer contended that a ruling in favor of the Union's estoppel argument would frustrate the arbitration process by limiting an arbitrator's ability to resolve disputes in an equitable fashion. Such a ruling, moreover, would violate an axiom of contract construction which requires that contracts must be construed as a whole, rather than a series of mutually exclusive provisions.

For a number of reasons, the Employer argued that the Agreement (Joint Exhibit 1) contains terms and conditions which provide an objective manifestation of the Parties' intent. First, the Employer maintained that the Management Rights Article (See Pg. 3 of this Award for Article 5 - Management Rights) allows the utilization of staggered starting times.

Special attention was placed on several provisions contained in ORC Section 4117.08(c) which deal with the following managerial prerogatives: determining matters of inherent managerial policy; maintaining and improving the efficiency and effectiveness of governmental operations; assigning and scheduling of employees; and the effective management of the work force.

Second, the prohibition contained in Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime) evidences that the Employer may establish work schedules based upon operational needs. The Employer asserted that the language contained in this Section merely precluded the Employer from altering a regular schedule, if the change was undertaken to avoid the payment of overtime. All other changes, including those initiated for operational purposes, were viewed by the Employer as proper and well within its rights under the Agreement (Joint Exhibit 1).

The Employer argued that the schedule was altered because of distinct operational needs. Hitchens, more specifically, characterized the conditions which led to the scheduling change. His investigation disclosed that the majority of the workload occurred during mid-day hours. Alternate starting times, therefore, mirrored operational needs by providing maximum coverage at mid-day, and less coverage during the beginning and end of the day.

The Employer claimed that the Union failed to establish that the new scheduling arrangement impeded the operation. The Inspector's Daily Reports (Union Exhibit 1) were viewed as self-

Inspector's Daily Reports (Union Exhibit 1) were viewed as self-serving because they were compiled by the Grievants. Even though these documents indicated that on occasion contractors worked without a Project Inspector on the construction site, Hitchens and Kinney testified that it was not always necessary to have an Inspector at the site. In other words, inspection can sometimes take place after a task has been partially completed. Similar arguments were provided by the Employer in response to the evidence and testimony concerning the Construction Diary (Union Exhibit 3).

Third, the Employer strongly disagreed with the Union's linkage of Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules) and Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime). The Employer emphasized that the Agreement (Joint Exhibit 1) does not vest an employee with a specific amount of overtime. The Agreement (Joint Exhibit 1), moreover, does not require retention of an inefficient work schedule just because employees have previously realized a considerable amount of overtime as a consequence of an inefficient schedule. The Employer alleged that Section 13.07 (See Pg. 4 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.07 - Overtime) was not agreed to by the Parties in an attempt to thwart the type of scheduling changes presently in dispute. The Employer, more specifically, claimed that avoidance in the form of manipulation of daily or weekly work schedules to avoid

the forty (40) hour threshold was contemplated by the Parties.

The Employer distinguished the present grievance from the previously mentioned Drotning Award. The Employer asserted that the schedule was not modified for the purpose of avoiding overtime payments. Rather, the change was undertaken in response to operational needs, and in fact overtime work was not eliminated as a result of the scheduling change (Employer Exhibits 1-6). Unlike Holten, the scheduling change did not result in the performance of work outside the Project Inspector classification, and the work was accomplished in an efficient and productive fashion.

Last, the Employer maintained that the wording of Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules) indicates that the Parties anticipated work scheduling changes. The Employer, moreover, complied with the notice provision once it was determined that the contractors' schedules required a reduction in manning levels.

The Employer disagreed with the Union's interpretation concerning the role of "other parties" in scheduling decisions. The provision, in the Employer's opinion, did not solely deal with situations where an outside party scheduled state workers. An interpretation with such a limitation would restrict the Employer's ability to determine the size and working hours of its work force. Bargaining history introduced at the hearing clearly indicated to the Employer that it could modify the work schedules enjoyed by employees in certain job classifications if

contractors' work schedules were altered.

The potential for featherbedding and the padding of the public payroll were two (2) negative outcomes associated with a ruling in the Union's favor. The Employer asserted that the Union's interpretation would prevent the Employer from changing the work schedule to meet the needs of a project, or to amend an original miscalculation. Such a circumstance would require the Employer to maintain an inefficient schedule, which would result in staffing deficiencies and unwarranted overtime payments.

The Employer offered a narrow perspective in terms of an appropriate remedy, if the Arbitrator ruled in the Union's favor. The Employer, more specifically, asserted that the five (5) permanent Project Inspectors should be compensated for two (2) hours of overtime per week for the period October 3, 1986 to November 15, 1986. This remedy option was based upon the duration of the usual construction season and the associated change in the contractors' work schedules. Both conditions, in the Employer's opinion, reduced the Grievants' overtime potential.

The Employer also argued that one of the Grievants, the Highway Worker 2, was not eligible for any overtime payment. The Employer maintained that this individual was transferred to the project for training purposes on a 1000 Hour Assignment (Joint Exhibit 1, Article 14 - 1000 Hour Assignment, Section 14.01 - ODOT). Since this job status only provides for overtime consideration if permanently assigned employees refuse overtime or are already working, this individual should not be considered

in any potential remedy calculation.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing it is this Arbitrator's opinion that the Employer is not limited to the arguments contained in its Step 2 response. At the hearing, the Employer clarified somewhat its Step 3 response by articulating several arguments dealing with the applicability of Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules). The Arbitrator does not believe that these newly articulated contentions should be barred for the reason that they were not presented during the preliminary stages of the grievance procedure. Cases which eventually reach the arbitration stage of the grievance procedure are often more thoroughly prepared and reviewed by the Parties. Contentions which do not change the facts or substantially alter the scope of the issue should always be available to the Parties. One needs to distinguish the present situation from a different situation where important facts, as distinguished from arguments, may have been withheld by one of the Parties during the earlier stages of the grievance procedure. Such a situation, however, is not the case here. The Employer's Step 3 response, although not fully articulated, should have provided the Union with certain expectations concerning the Employer's arguments. Since the issue discussed throughout the various steps of the grievance procedure dealt with the Employer's ability to alter work schedules, it appears

that one should have reasonably expected arguments concerning the work schedules provision (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules).

In the opinion of this Arbitrator, the Employer did not violate the Collective Bargaining Agreement (Joint Exhibit 1) by modifying the Grievants' work schedules. Generally, many arbitrators have recognized that unless the agreement says otherwise, the right to schedule work remains in management (Taylor Stone Co., 29 LA 236, Dworkin, 1957; Ambridge Borough, 73 LA 810, Dean, 1979; Calumet and Hecla, 42 LA 25, Howlett, 1963). This "right" of management to schedule work, however, can be limited if the Union can prove that scheduling changes have been implemented to avoid the payment of overtime. Both the right and limitation issues were considered in fashioning the present Award.

The Management Rights Article (See Pg. 3 of this Award for Article 5 - Management Rights) and the incorporated rights and responsibilities contained in Ohio Revised Code Section 4117.08(c), clearly provide the Employer with the right to determine matters of inherent managerial policy; maintain and improve the efficiency of operations; and to schedule the employees. Thus, these provisions clearly allow the Employer to alter work schedules in an attempt to improve efficiencies based on operational needs.

Furthermore, review of the Work Week (Joint Exhibit 1, Article 13 - Work Week, Schedules and Overtime, Section 13.01 -

Standard Work Week) and Work Schedules (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules) provisions underscore the Employer's ability to schedule work. Neither of these provisions restrict the Employer's ability to stagger the work schedule by having employees start and finish work at alternating times.

A great deal of evidence and testimony regarding the interpretation of Section 13.02 (See Pg. 3 of the Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules) were introduced by the Parties. This provision, in the Arbitrator's opinion, allows the Employer to establish work schedules. The provision defines work schedules "as an employee's assigned shift." Obviously, if the Employer can make work schedule assignments, the Employer can also establish work schedules. The posting requirements also reinforce the Employer's work schedule arguments. These requirements, more specifically, would be superfluous if the Employer did not have the right to establish and alter work schedules.

A distinction needs to be made differentiating the Employer's right to establish work schedules, and the notification requirement contained in Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules). Once schedules are established, and changes in the employees' work hours are subsequently engendered by schedules established by parties other than the Employer, notification must take place. The right to alter original (Arbitrator's emphasis) work schedules,

therefore, does not have to be linked to any changes in the work schedules of third parties. The Agreement (Joint Exhibit 1) does not restrict the Employer's right under these circumstances. The Employer is obligated, however, to notify employees about any changes in their work hours which are precipitated by altered third party schedules. These types of changes are quite different from the scheduling changes initiated by the Employer. In fact, Kinney testified that after the scheduling change was implemented by the Employer (Joint Exhibits 3 and 13), his work hours, and the work hours of the other Grievants, were periodically altered in response to third party scheduling changes. The above analysis indicates that the Employer complied with the various contractual requirements contained in Section 13.02 (See Pg. 3 of this Award for Article 13 - Work Week, Schedules and Overtime, Section 13.02 - Work Schedules).

In upholding such scheduling changes, this Arbitrator concludes that the Employer does have a right to schedule work with a view to optimize efficiency; and that this managerial action was not initiated to avoid the payment of overtime. Hitchens' testimony was viewed as highly credible in terms of the underlying business necessity justifications offered in support of this action. The evidence and testimony provided by the Union, however, failed to reduce the veracity of Hitchens' testimony. Excerpts from the Construction Diary (Union Exhibit 3) and the Inspector's Daily Reports (Union Exhibit 1) did not establish that the work schedule changes were implemented solely

after the schedules were changed, even though the magnitude of these payments was reduced.

The emphasis placed on the Holten decision by the Union seems a bit far reaching. The present case differs dramatically from the Holten decision. In Holten the Employer changed the employees' days off so that the Ohio State Fair would be staffed on weekends. This modification was clearly a violation of the Agreement (Joint Exhibit 1) because the scheduling change was established to avoid the payment of overtime. The change, moreover, resulted in inefficient operations because normal work could have been performed but for the scheduling change. In the instant case, the hours of work changed while the daily schedule was not modified. The work done on the project, moreover, was based on operational needs and was not negatively affected by the altered work schedule. Overtime avoidance was the primary motivation in the Holten case, while avoidance was not established in the present case.

AWARD

The grievance is denied and dismissed.

October 11, 1988

Dr. David M. Pincus
Arbitrator