**********
*
In the Matter of Arbitration *
*
Between * Case No.: G87-1922
*
OCSEA/AFSCME Local 11 * Before: Harry Graham
*
and *
*
The State of Ohio, Department * #513
of Transportation *
*
**********

Appearances: For OCSEA/AFSCME Local 11:

Mike Muenchen
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Mike Duco
Office of Collective Bargaining
65 East State St., 16th Floor
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on February 27, 1991 before Harry Graham. At the hearing the parties were provided complete opportunity to present testimony and evidence. The record in this case was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Did the Employer violate the Collective Bargaining Agreement when employees schedules were modified May 5-8, 1987? If so, what shall the remedy be?

Background: There is agreement over the events that prompt this proceeding. This is a group grievance affecting thirteen Highway Maintenance Workers, three Mechanics, one Clerical Store Clerk and one Mechanical Store Clerk. They work at the Ohio Department of Transportation Xenia Garage and the Huffman Dam Outpost.

In early May, 1987 the Xenia Garage secured the use of a bumpgrinder on a rental basis. It was to be used to improve the condition of State Route 42 in Greene County. The bumpgrinder was to be available to the Xenia Garage for one week, the week of May 4, 1987.

In order to operate the bumpgrinder a crew of 4-7 people was required. People were needed to operate the machine, sweep and haul material and control traffic. A radio operator and a mechanic were also determined to be necessary for the project.

In order to expedite completion of the Route 42 project and to make optimum use of the machine local management in Greene County determined to use the bump grinder on the second shift, from 3:00 to 11:30PM. Employees were asked to volunteer for the project. A sufficient number of volunteers came forward to staff the bumpgrinder operation so that it was unnecessary for the State to assign employees to the project.

The employees who staffed the second shift work

associated with the bumpgrinder operation on Route 42 were normally assigned to the first shift. When they did the repair of Route 42 they worked the second shift. The State paid those employees at their normal straight time rate. In their opinion they should have received overtime pay for their work in connection with the project.

In order to protest what they regarded as a violation of the Agreement a group grievance was filed. It was not resolved in the procedure the parties. They agree it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to 1986-89 Agreement in support of its position in this dispute. In its opinion, that employees who normally worked the day shift were on the night shift during the week in question without overtime pay represented a breach of the Contract. At Article 13, Section 13.07 the Agreement provides that "An employee's posted regular schedule shall not be changed to avoid payment of overtime." That is precisely what occurred in this situation according to the Union. Employees schedules were indeed changed to avoid payment of overtime. As that is explicitly prohibited by the Agreement the Union urges its position in this dispute be sustained.

That volunteers worked the second shift during the week of May 4, 1987 is immaterial according to the Union. If

people are willing to work in contravention of the explicit terms of the Agreement that does not render them any less binding.

When the bumpgrinder left Greene County it was moved to an adjacent county, Preble County. When used in that county in much the same fashion as it was used in Greene County employees received overtime pay. This is the sort of situation that should not occur and indicates that management officials in Preble County had an correct understanding of the Agreement not shared by the colleagues in Greene County according to the Union.

The Union points out that during negotiations for the 1986-89 Agreement the State made certain proposals on this issue. It placed on the table a proposal that would have given it unfettered right to change work schedules as it saw fit. That was rejected by the Union and withdrawn. The language under review in this proceeding represents the agreement of the parties on this issue and is substantially less restrictive than that proposed by the State.

When employees worked on the second shift during the week of May 4, 1987 they incurred certain hardships. Sleep and family life was disrupted. Child care arrangements were altered. These are precisely the sort of disruptions for which overtime pay should be made according to the Union. As no overtime was paid and this is a violation of the

Agreement, the Union urges its grievance be sustained. It seeks an award directing the employer to make overtime payments to the employees who worked on the second shift in Greene County during the week of May 4, 1987.

Position of the Employer: The State points out that this is a dispute involving contract interpretation. As such, it is the Union which bears the burden of convincing the Arbitrator that the State has violated the Agreement. That cannot occur in this case as it did not occur in the State's view.

When the State sought volunteers to operate the bumpgrinder on the second shift it was for operational reasons. The machine was to be in Greene County for one week. In order to secure maximum utility from its availability the local management decided to use it on the second shift to improve the surface of Route 42. This was a strictly operational decision. It was not done to avoid payment of overtime. To the contrary, it was done in the interests of efficiency and economy.

In order to efficiently conduct its operations the State secured adoption of a Management Rights clause in the Agreement. It retains the right to "manage and operate" its programs. Reference is made in the Managements Rights clause to Section 4117.08 of the Ohio Revised Code. Language found therein permits public employers to "maintain and improve" the efficiency of their operations. They may also "determine

the overall methods" with which to conduct their operations. That is what the State did in this instance. No violation of the Agreement occurred when it did so.

There have been several arbitration proceedings between the parties over this issue. These disputes are known as the Holten, Kinney, Castellano and Bizjack decisions. Of these, only Holten was decided against the State. It involved a situation where the Employer, the Ohio Bureau of Employment Services, changed the day's off of an employee so that she could work at the Ohio State Fair. The arbitrator determined this was done to avoid payment of overtime. In Kinney the State changed schedules of Project Inspectors. The Arbitrator found it was done to meet operational needs, not avoidance of overtime. Castellano was concerned with the establishment of a night time snow and ice patrol in Geauga County, OH. in the heart of the snow belt. As was the case in Kinney, the Arbitrator found that was done for operational reasons, not to avoid payment of overtime. Bizjack, decided by this arbitrator, was concerned with seasonal schedule changes. I determined this was done for operational reasons, not to avoid payment of overtime as is prohibited by the Agreement. The State urges the same result in this case.

In fact, the employees at the Xenia Garage and Huffman Dam Outpost did not work any overtime whatsoever. They worked a straight shift. Work was done for the normal number of

hours and pay was made at the normal rate. No violation can occur under those circumstances the State insists.

Discussion: Certainly that the Grievants in this case were volunteers does not mean that they can abridge the Agreement. The Union is correct to point out that side deals made by volunteers cannot supercede the negotiated terms of the Agreement. In this situation it is not relevant that people volunteered. They did not work any extra time. They worked their normal number of hours and no more. Had there been no volunteers the State would have assigned people to work the bumpgrinder on the second shift.

The Union bears the burden to demonstrate that the State staffed the bumpgrinder so as to avoid payment of overtime. In this situation the machine was to be available in Greene County for only one week. Route 42 was in poor condition. Maximum use of the machine was essential to improve the road surface. That the State decided to operate the machine on the second shift is permissible under the Management Rights language in the Agreement which must be read in connection with Section 4117.08 of the Revised Code. The language of Article 5, the Management Rights clause, permits the Employer to maintain the efficiency of its operations. Under the circumstances of this case that must include operation of the bumpgrinder on the second shift. It has not been shown in any fashion that the decision to do so was for the purposes of

avoiding overtime pay to employees.

In this situation Paragraph 7 of Section 13.08 of the Agreement is inapplicable. The Employer did not change the employees work schedules. They did so themselves by their affirmative response to the call for volunteers on the second shift. Furthermore, the second shift operation of the bumpgrinder was not done to avoid payment of overtime. Rather, it was done to maximize the utilization of the bumpgrinder and minimize inconvenience to the traveling public.

That some tasks normally performed by the Grievants were left undone or done less completely is insufficient to determine the outcome of this dispute. The function of managerial officials is to manage. This involves deployment of always scarce resources. That the Grievants operated the bumpgrinder on the second shift does not indicate they did so in an effort by the State to avoid overtime payment. In this sense, this case is different from the situation faced by the Arbitrator in Holten. That dispute involved a change of the schedule of an OBES employee so she could perform weekend duty at the Ohio State Fair. It requires no stretch of the imagination to believe she was working out of her classification in an effort by the State to avoid overtime pay. In this case employees were not working out of their classification. Nor were they working out of their work area.

Similarly, that employees in Preble County worked on an overtime basis and employees in Greene County did not no does not prompt a finding in the Union's favor in this case. If the operational requirements associated with use of the bumpgrinder in Preble County convinced management that use of overtime was necessary and they secured the requisite approval does not mandate the same situation occur in Greene County. The Employer is permitted by the Agreement to determine how to manage its programs, subject only to the limitations imposed by the Agreement.

It is the task of the Union to show that the State operated the bumpgrinder in Greene County during the week of May 4, 1987 so as to avoid payment of overtime. It has failed in that task.

Award: The grievance is denied.

Signed and dated this 13th day of March, 1991 at South Russell, OH.

Harry Graham
Arbitrator