ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 617

OCB GRIEVANCE NUMBER: 04-00-880107-0003-01-07

GRIEVANT NAME: EDGAR, GERALD L.

UNION: OCSEA/AFSCME

DEPARTMENT: AGRICULTURE

ARBITRATOR: SMITH, ANNA D.

MANAGEMENT ADVOCATE: DUCO, MICHAEL P.

2ND CHAIR: BROWN, BRUCE

UNION ADVOCATE: BRADDY, DANE

ARBITRATION DATE: MAY 24, 1991

DECISION DATE: JUNE 18, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: 1) WAS THE GRIEVANCE TIMELY FILED? 2) IF SO, WERE SECTIONS 32.02 & 13.06 VIOLATED WHEN THE EMPLOYER DID NOT COMPENSATE GERALD EDGAR & KATHERINE RABER FOR MILEAGE (22/DAY) FROM THEIR HOMES TO THE COUNTY LINE AS A RESULT OF BUMPING INTO THE NEIGHBORING DISTRICT?

HOLDING: 1) GRIEVANCE IS ARBITRABLE BECAUSE EACH TIME THE GRIEVANTS WERE NOT REIMBURSED FOR MILEAGE A NEW GRIEVABLE EVENT OCCURRED. 2) "THE ARBITRATOR DOES NOT SEE THAT THE EMPLOYER'S ACTIONS WERE ARBITRARY OR CAPRICIOUS. ALL EMPLOYEES SIMILARLY SITUATED WERE TREATED THE SAME ACCORDING TO A STANDARD THAT WAS DEVISED LONG BEFORE THE LAYOFF OCCURRED" (WHICH RESULTED IN THE GRIEVANTS BUMPING INTO THE NEXT DISTRICT).

ARB COST: $983.97

In the Matter of Arbitration Between	OPINION and AWARD #617
THE STATE OF OHIO, DEPARTMENT OF AGRICULTURE	Anna D. Smith, Arbitrator Case No. 04-00-880107-0003-01-07
and	Gerald L. Edgar, Grievant Katherine Raber, Grievant
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO	Arbitrability Personal Vehicle

I. Appearances

For the State of Ohio:

Michael P. Duco, Advocate, Ohio Office of Collective Bargaining
Samuel R. Waltz, Chief, Division of Meat Inspection, Ohio Department of Agriculture

For OSCEA Local 11, AFSCME:

Dane Braddy, Staff Representative and Advocate
Steve Wiles, Staff Representative and Second Chair
Gerald Edgar, Grievant
Katherine Raber, Grievant
Tony DeGirolamo, Arbitration Clerk.

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 10:00 a.m. on May 24, 1991 at the Office of Collective Bargaining, 65 East State Street, Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 12:30

p.m. May 24, 1991. The opinion and award is based solely on the record as described herein.

III. Issues

The Parties stipulated that the issues before the Arbitrator are:

1. Was the grievance timely filed?

2. If so, were Sections 32.02 and/or 13.06 violated when the State did not compensate Gerald Edgar and Katherine Raber for mileage (22 miles per day) from their homes to the County line as a result of bumping into the neighboring district?

3. If so, what should the remedy be?

IV. Stipulations

The Parties stipulated to the following facts:

1) That Gerald Edgar and Katherine Raber were notified that they would be laid off effective September 26, 1987 from employment with the Ohio Department of Agriculture.
2) That they notified the Ohio Department of Agriculture on September 18, 1987 and September 11, 1987 respectively that they were exercising their layoff displacement rights into Meat Inspection District 3-A, Wayne County.
3) That both employees were headquartered in Wayne County following this action.
4) Meat Inspectors are not required to maintain a meat inspection office in their homes.
5) That each employee was advised by Mr. Waltz, Chief of Meat Inspection, that they must get to the Wayne County line on their own upon exercising their displacement rights.
6) The employees bumped into the meat inspection district nearest their homes.
7) There was no meat inspection facility to bump into in District 3-B.
8) The layoff was due to the fact that Poultry Processing, Inc. closed down.
9) Grievant Gerald Edgar signed a waiver for mileage reimbursement from his home at the time he exercised his bumping rights and Katherine Raber did not. The parties, to wit, labor and management, cannot locate a copy of said waiver.
10) Katherine Raber's last day worked was September 22, 1987. She returned to duty December 10, 1987.

11) Calculation of unpaid mileage under different assumptions is as follows:

a) Gerald Edgar, 9/30/87 to 4/21/89
370 days * 22 miles = 8140 miles
8140 miles * 22¢/mile = $1790.80

b) Gerald Edgar, 1/4/88 to 4/21/89
308 days * 22 miles = 6776 miles
6776 miles * 22¢/mile = $1490.72

c) Katherine Raber, 8/3/87 to 9/22/87
30 days * 20 miles = 600 miles
600 miles * 22¢/mile = $132.00 (mileage error)
Katherine Raber, 1/4/88 to 4/21/89
246 days * 22 miles = 5412 miles
5412 - 76 mileage error = 5336
5336 * 22¢/mile = $1173.92
$1173.92 - $132.00 mileage error = $1041.92

In addition, the following documents were received as joint exhibits:

1) State of Ohio/OCSEA Local 11 AFSCME Contract, 1986-89;
2) Grievance Trail;
3) Gerald Edgar travel report of 10-9-87;
4) Policy dated 8/30/84;
5) Policy dated 1/2/86;
6) Layoff documentation;
7) Memo dated 9/25/87;
8) Memo dated 10/20/87;
9) DMI districts at time of layoff;
10) Current DMI districts;
11) §13.06 of 1986-89 contract;
12) §32.02 of 1986-89 contract.

V. Relevant Contract Clauses

Article 13 - Work Week, Schedules and Overtime

§13.06 - Report-In Locations

All employees covered under the terms of this Agreement shall be at their report-in locations ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the Employer in dispensing discipline.

Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel time counted as hours worked.

Employees who work from their homes, shall have their homes as a report-in location. The report-in location(s) for ODOT field employees shall be the particular project to which they are assigned or 20

miles, whichever is less. In the winter season when an employee is on 1,000 hours assignment, the report-in location will be the county garage in the county in which the employee resides.

For all other employees, the report-in location shall be the facility to which they are assigned.

Article 25 - Grievance Procedure

§25.02 - Grievance Steps

Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event....

§25.03 - Arbitration Procedures

....Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

....Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement....

Article 32 - Travel

§32.02 - Personal Vehicle

If the Agency requires an employee to use his/her personal vehicle, the Agency shall reimburse the employee with a mileage allowance of no less than twenty-two cents ($.22) per mile. If an employee uses a motorcycle, he/she will be reimbursed no less than eight and one-half cents ($.085) per mile.

VI. Background

This case has its genesis in a job abolishment among State meat inspectors that occurred in 1987 when a District 3-B poultry

processor located in Holmes County closed. The grievants, Gerald Edgar and Katherine Raber were among those whose jobs were eliminated. They were notified of the layoff and their bumping rights on September 9, 1987. On September 18 and September 11, respectively, the grievants elected to displace meat inspectors in the neighboring Wayne County, which is located in District 3-A. Both employees resided and worked in District 3-B at the time of the layoff and displacement, and there were no jobs to bump into in this district.

Before the layoff, the grievants were reimbursed 22¢/mile for use of their personal vehicles to get from their homes to the facility to which they were assigned. When they bumped to the facility in the neighboring district, Samuel Waltz, Chief of the Division of Meat Inspection, explained that they would be paid mileage only after they crossed into their new district, i.e., from the Wayne County line to the facility. Mr. Edgar signed a waiver that had the effect of agreeing to forego mileage reimbursement from his home to the county line. He testified that at the time he was upset about the layoff and believed the waiver applied to all meat inspectors. Ms. Raber signed no such waiver and Mr. Edgar's cannot be found. Mr. Edgar commenced working in Wayne County in September. Ms. Raber was on leave until December 10, when she reported to work at the facility in Wayne County. Neither grievant was paid mileage from their homes to the county line until a redistricting took effect in April, 1989, which put Wayne County into the same district as their homes.

Prior to the layoff the relevant history of employer policy and practice on reimbursement for personal vehicle use begins with a memo dated August 30, 1984, which states in part,

> DMI field personnel living within their assigned meat inspection district will continue to use their home as their headquarters point for the time being. DMI field personnel living outside their assigned district will use the point at which they cross the county line bordering the district as the point at which their daily mileage reimbursement starts and ends.
>
> (Joint Exhibit 4)

On September 10, 1984, the Agency stated its intention to review the policy as it regards personnel living outside their districts (Union Exhibit 2). Over a year later, on January 6, 1986, Policy Memo #7 was issued. It states in relevant part,

> A field employee will be headquartered at his/her home or official residence for the purpose of mileage reimbursement. (Joint Exhibit 5)

Notwithstanding this language, Samuel Waltz, author of the memo, testified that the practice since 1984, up to and including the 1987 layoffs, was that meat inspectors residing outside their assigned district had to get to the district on their own. A few exceptions were employees on temporary assignment or who crossed districts before the 1984 policy was implemented. He further testified that the reason the Agency reimbursed for any distance to the report-in location was to create equity between employees driving State cars and those driving personal vehicles. He further testified that the reason for Policy Memo #7 was to put policies in writing in preparation for up-coming negotiations on the first contract between OCSEA and the State.

In late December, 1987, Mr. Edgar learned that other meat inspectors were receiving mileage reimbursement from their homes. Believing the differential treatment was on the basis of his having exercised bumping rights in a layoff, he filed a grievance on his own and Ms. Raber's behalf on January 7, 1988. Said grievance was processed through the grievance procedure to arbitration, where it presently resides, for findings on arbitrability and, if arbitrable, on the merits. At the hearing, the Arbitrator heard argument on arbitrability. Holding that a preliminary determination could not reasonably be made from the bench on the basis of these arguments, she withheld ruling on this issue pending presentation of the case in full by the parties. Arguments, discussion and ruling on the procedural and substantive issues will hereinafter be bifurcated in accordance with Article 25 of the Agreement.

VII. Procedural Arbitrability

Contentions of the Employer

The Employer points out that the grievance was not filed until four months after the grievants bumped into Wayne County. It claims that they thus accepted the Employer's interpretation of compensation for travel and waived their right to grieve. Any Union claim that time limits of the Contract should be extended because it did not know of the adverse action should be rejected, consistent with arbitrator holdings elsewhere.

The Employer contends that even if the Union's continuing violation theory prevails, the arbitrator is still barred by the 30-day limitation which begins with the first violation.

The fact is, the Employer goes on, these employees accepted the policy for four months and claim their grievance was triggered by a discovery that they were being treated differently. Yet Mr. Waltz testified that the other employees who bumped out of the district were treated the same. Only employees staying within their district were treated differently from the grievants.

The Employer therefore asks the Arbitrator to find that she has no jurisdiction to decide the case on its merits because the grievance was untimely filed.

Contentions of the Union

The Union contends that the grievance was timely filed and makes several arguments. Its first theory is that each time the Employer failed to fully reimburse the grievants for their mileage, a new grievable event occurred. Under this theory of a continuing violation, it asks the Arbitrator to find that the grievance was timely filed and award damages back to the initial infraction or, at least, to the date of the grievance.

The Union's second approach is that the violation did not occur when the Employer informed the grievants of its mileage reimbursement decision, but when it actually imposed the adverse policy. Thus, the September 22, 1987 date is irrelevant as only a notice of intent and no actual harm was given. Under this theory,

the Union seeks recovery of full damages back to the date of the initial violation.

Third, the Union claims that the employees were not aware that they had a grievable loss until they learned that other employees were not subject to the mileage limitation policy.

Findings on Timeliness

The Arbitrator rejects the Employer's position that these employees accepted their Employer's mileage limitation policy for four months and therefore waived their right to grieve. Rather, each time the grievants were not reimbursed full mileage a new grievable event occurred. That nearly four months of these events took place before a grievance was filed does not make a recurrence in the fourth month nonarbitrable. What matters is whether the grievance was filed within the time limitations of any one of the events.

Moreover, the Arbitrator does not believe that the grievants deliberately sought to amass a back liability for the Employer. She is persuaded that Mr. Edgar did not think that he had been adversely affected by the mileage limitation until he came to believe--erroneously or correctly--that he and Ms. Raber had been treated differently from other employees.

The denial of mileage reimbursement is held to be a continuing act. Since the Grievant was filed before 10 days following the last in the series (January 7, 1988 occurring before April 21, 1989), it was timely and, therefore, procedurally arbitrable.

VIII. Merits

Contentions of the Union

The Union claims that the language of §32.02 is clear. It obligates the Employer to reimburse mileage if a personal vehicle is required. It does not make it a matter of discretion. For the Employer to say that this provision and the policy of January 2, 1986 contemplates that the employee will commute to the work site at his own expense is disingenuous. If this had been the intent, it would have been articulated.

The governing policy of implementation is Policy Memo #7, dated January 2, 1986. This policy was promulgated for contract compliance and to achieve equity between those driving their own vehicles and those issued state vehicles. It states that field employees will be headquartered in their homes for purposes of mileage reimbursement. Meat inspectors are field employees; they therefore are headquartered in their homes. While policies and work rules do not rise to the level of contract language, they do require consultation with the Union and only the Union can waive rights granted by them. There was no discussion with the Union. The requirement to forego mileage to the county line was unilaterally imposed by the Employer pursuant to a layoff. Consequently, the Grievant had no right to waive the negotiated benefit of mileage reimbursement. Moreover, Arbitrator Harry Graham has held (in G87-1922) that voluntary side deals do not supercede the Contract. Additionally, the waiver cannot be found--probably because it is patently in violation of the Collective

Bargaining Agreement. It must be held to be void. In sum, the Union contends that the waiver of mileage reimbursement is void and the policy of headquartering employees in their district should be upheld.

The Union goes on to say that the same result can be obtained without crossing the policy hurdle by application of §13.06, which states in relevant part that employees who work from their homes have their homes as report-in locations.

A further point argued by the Union is that the issue is moot, since the Agency started reimbursing these employees for the miles claimed in April, 1989.

Finally, the Union draws the Arbitrator's attention to a case it claims is analogous to the instant one (Jim Trotter and Ted Summers), wherein meat inspectors headquartered in their homes outside their districts and driving personal vehicles on official business won a summary judgment for full mileage reimbursement.

The Union asks that the grievance be upheld in its entirety and that mileage be reimbursed in full at the rate of 22¢/mile back to the date of the initial violation.

Contentions of the Employer

The Employer contends that historically meat inspectors have been headquartered in the district where assigned, not in their homes. Meat inspectors maintain no office in their homes nor do they have business phones there. Instead, there is an office in each meat plant. Moreover, meat inspector starting time is geared to the plant's starting time. The report-in location is not the

home. Indeed, the Union does not claim travel time from meat inspector homes to their plant as hours worked. The governing sentence of §13.06 is "For all other employees, the report-in location shall be the facility to which they are assigned." Consistent with this historical definition, the Grievants were informed when they exercised their rights to bump into Wayne County that their headquarters was to be Wayne County.

The Employer further contends that its mileage reimbursement policy exceeds the Contractual requirements of §32.02. In 1984 it settled the Trotter-Summers lawsuit. To achieve equity with meat inspectors who drive State vehicles, it determined to pay mileage to those meat inspectors using their personal vehicles, and to reimburse for mileage to their first facility if they lived within their headquarters district, since those with State vehicles drove them to their first assignment. This was the policy defined by the memo of August 30, 1984. The Union contends that the Employer's omission of the headquarters distinction from the January 2, 1986 policy precludes the Employer from applying it. The Employer disagrees, asserting that it is the Employer's policy, not a Contractual requirement, that meat inspectors be paid for travel to their first facility. The policy is not clear that those who live outside their district would be denied commuting mileage, but it is also not clear that they would get it. The Employer says that its policy is that full mileage, from home to facility, is paid to those who live within their districts.

The Union, observes the Employer, seeks a strict interpretation of §32.02, but the Employer requires all employees to drive their personal vehicles every day to get to work. §32.02 contemplates that employees will get to their report-in locations at their own expense, and the meat inspectors' report-in location is the first plant of the day. The Employer's policy to pay mileage to the first facility, once the employee gets into the plant's district, thus exceeds the requirements of §32.02.

The grievants state that other employees were treated differently, claiming the basis of that discrimination was the exercise of their Contractual bumping rights. In fact, the Employer counters, other employees who bumped out of their districts were treated the same as these, while those who bumped within their districts continued to have full commuting mileage paid. Yes, various employees were treated differently, but their situations were different.

The Employer also explains that the reason Mr. Edgar was fully reimbursed when he worked in Carroll County was that he was on temporary assignment at the discretion of the Employer. On the other hand, Mr. Edgar bumped into Wayne County at his own discretion. He might have chosen to move there rather than commute. Thus, if an employee's district changes because he chooses to exercise his rights to change districts, the Employer ought not to be penalized. Otherwise, the Employer could be held to the absurdity of paying commuting costs from District 1A to 10B.

The Contract, the Employer argues, should be construed to avoid absurd results.

The Employer also raises a question of substantive arbitrability. It contends that the Arbitrator lacks jurisdiction because §32.02 makes no reference to use of the employee's personal vehicle to commute to the first facility from the employee's home. The Employer has addressed this issue by policy. Since the Arbitrator is limited by §25.03 to interpretation of the Contract, she is barred from interpreting the Employer's policy and must, therefore, deny the grievance.

Accordingly, the Employer seeks denial of the grievance in its entirety on the grounds of jurisdiction and merits. However, the Employer also argues that its liability should be limited to miles driven after the grievance was filed, for even if there is a continuing violation, the employee cannot be permitted to amass a back-pay liability against the Employer by postponing filing.

Discussion and Opinion

The starting point in resolving this particular dispute is the language of the personal vehicle clause: "If the Agency requires an employee to use his/her personal vehicle,...." This, the relevant sentence of §32.02, has been interpreted by the parties to achieve diametrically opposed and self-serving results. The Union asks the Arbitrator to hold that since the job description for meat inspectors requires a personal vehicle (Union Exhibit 1), the Employer must reimburse for all mileage, including commuting from home to the first and only work location of the day. The Employer,

on the other hand, would have the Arbitrator read this language to exclude the first trip, in effect recognizing that while meat inspectors are required to have a personal vehicle, they are not required to use it to get to work, but only to get from one work location to another. In the Arbitrator's view, both parties' reasoning is flawed to a certain extent, but neither is entirely wrong. If meat inspectors are to have a personal vehicle available during the work day for their employer's convenience, they must have it with them and cannot use public transportation, car pool or other means to get to their first plant. Thus, meat inspectors who are assigned to more than one facility during the day (roamers) and need to have cars to get from plant to plant can be said to use their personal vehicles on the home-to-plant commute by requirement of the Agency. These employees, by the language of §32.02 on its own, would be entitled to a minumum of 22¢ per mile from the time they leave their homes in their personal vehicles. Similarly, an employee who is required to travel to a temporary assignment, and who is not provided a State vehicle, is required to use his/her own vehicle, and is therefore entitled to mileage reimbursement. Contrary the the Employer's interpretation of §32.02, some employees are entitled to home-to-facility mileage reimbursement.

The grievants, however, are stationary field employees, permanently assigned to a single facility. While the Agency requires all meat inspectors to have a personal vehicle, it does not require all to use it during a given workday. Consequently, those who are required to have but not to use their vehicles are

free to get to their single-plant assignment by any means they choose. If they use their own vehicle, they do so by choice rather than Agency requirement, and they are not entitled to a commuting mileage reimbursement. This is where the Union's reasoning is flawed, but the Employer's sound.

The Union argues that its desired result is obtainable by application of §13.06, specifically "Employees who work from their homes, shall have their homes as their report-in location." However, it is clear from the testimony of the witnesses that meat inspectors do not work from their homes, are not on Agency time until they get to their assigned facility, and do not seek compensation for travel time to the facility. None of the exceptions of §13.06 applying, it is clear that the only applicable provision is "For all other employees, the report-in location shall be the facility to which they are assigned." It is equally clear that the Employer has not violated this provision by the events of this case. Moreover, as the Union itself pointed out in its cross-examination of Mr. Waltz, this section of the Contract relates to tardiness and compensation for travel time, not to use of personal vehicles. Using it to construe §32.02 to the Union's liking for mileage reimbursement requires a leap beyond the stretch of the Arbitrator.

The Union further contends that the issue is moot, the employees having commenced receiving the disputed daily mileage reimbursement since the grievance was filed. The Arbitrator finds it curious that the Union presents this argument, since it seeks

something herein it has not yet gained: payment for the period between the displacement of the employees and the redistricting of the Department. There remaining a real controversy despite the calculation and payments of mileage that began in April, 1989, the grievance is not moot.

Another Union argument is that Employer Policy Memo #7, which states in part that "A field employee will be headquartered at his/her home or official residence for the purpose of mileage reimbursement," governs the interpretation and application of §32.02 to these grievants. The Employer seems to agree in part, stating that this policy is predicated on the practice and assumption more fully articulated in the policy memo of August 30, 1984, wherein distinctions were drawn depending on where the field employee lives. The difference between the two positions is that the Union would totally disregard the August 30, 1984 memo, while the Employer claims the relevant portion of the August 30, 1984 memo was never rescinded. More fundamentally, the Union urges the Arbitrator to bar the Employer from unilaterally changing the terms of Policy Memo #7 to deny negotiated rights, while the Employer claims that to do so would require arbitral interpretation of policy, which is not authorized by the Agreement.

At least one thing is clear: questions of arbitrability and merits can be closely interwoven. Ordinarily, the Arbitrator would not interfere with a management policy involving a basic management function that does not involve an employee benefit. Here, however, a contractual benefit--travel reimbursement--is involved.

Notwithstanding the restrictive language of §25.03 (Arbitration Procedure), an employer policy or practice that is violative of the expressed language of the agreement can and will result in an arbitration award to the grievants for their loss. It should be obvious that in order to determine whether the practice violates the expressed language of the Agreement, it is necessary not only to interpret contractual language, but also to consider the practice.

What, then, was the policy or practice? Here, the preponderance of the evidence is that the practice was what the Employer claims it to be: meat inspectors were paid only for commuting travel within their facility's district unless they were on temporary assignment at the Employer's discretion. This was consistent practice testified to by Mr. Waltz, despite the language of Policy Memo #7. Against this, the Union offers the words of Policy Memo #7 and two cases. Taking the latter first, the Union claims that Trotter and Summers, whose settlement entry is dated April 8, 1987 (Union Exhibit 4), lived outside their district, but the motion for summary judgment (Union Exhibit 3) states only that they "worked out of their homes, which were considered to be their headquarters," and Mr. Waltz testified that he thought they lived in their districts. Moreover, the Trotter-Summers case is about events that predated the August 30, 1984 memo and seems to have been responsible for it. The Union did not offer any other cases to show that practice was changed in conformity with the policy statement of January 1, 1986.

The Union also states that the January 2, 1986 memo was issued for Contract compliance and equity. This is not true. The August 30, 1984 policy was promulgated for equity reasons, according to the testimony of Waltz, and the January 2, 1986 memo was issued in anticipation of up-coming Contract negotiations. The 1986 memo could not have been issued to achieve compliance with the Contract since the Contract had yet to be negotiated.

In sum, the Employer effectively rebutted the Union claim that the relevant policy is Policy Memo #7. The Arbitrator concludes that the practice in effect at the time of the layoff was that articulated on August 30, 1984, and that the limitation applied to the grievants' mileage reimbursement was the result of a change in their work facility rather than a change in policy, and certainly not the result of unilateral change in a mutually-agreed-to policy.

Next, is this practice in violation of the expressed language of the Agreement? In the first paragraphs of this discussion (beginning on page 14), the Arbitrator read §32.02 to mean that when the Agency does not require the employee to use his/her personal vehicle to get to a temporary assignment or to get from one assignment to the next during the day, the employee is not required to use the vehicle to get from home to work. In other words, <u>having</u> a personal vehicle is a condition of employment not necessitating mileage reimbursement, but <u>using</u> the vehicle at the behest of the Employer does require reimbursement. The Employer's policy in general and actions with these employees in particular do no violence to this interpretation of the Contract. Since the

grievants drove their cars to their assignment in Wayne County by their own choice, the Employer's refusal to reimburse for commuting mileage to the county line was not in violation of §32.02. Indeed, as the Employer points out, its payment of any commuting miles to these employees while on permanent assignment goes beyond Contractual requirements.

Finally, running through the Union's case is a question of equity. It notes that commuting mileage was initiated out of fairness to those who are not assigned State cars and suggests that the grievants were arbitrarily and capriciously denied this equity as a condition of exercising their bumping rights. To begin with, the Arbitrator does not serve to impose her notions of fairness on the parties, but to interpret and apply what they themselves have mutually agreed to be equitable. There is good reason for this, for reasonable people--and I include arbitrators among them--may disagree as to what is fair and equitable. Second, the Arbitrator does not see that the Employer's actions were arbitrary or capricious. All employees similarly situated were treated the same according to a standard that was devised long before the layoff occurred. That the grievants temporarily lost recovery of full commuting costs no doubt displeased them, particularly if they thought they had been singled out, but the Arbitrator does not see that this benefit was guaranteed them by the Agreement.

XI. Award

1. The grievance was timely filed.

2. Neither §32.02 nor §13.06 was violated when the State did not compensate Gerald Edgar and Katherine Raber for mileage (22 miles per day) from their homes to the county line as a result of bumping into the neighboring district.

3. Accordingly, the grievance is denied and no remedy is forthcoming.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
June 18, 1991