#719

ARBITRATION

BETWEEN

THE OHIO STATE HIGHWAY PATROL

and

O.C.B. Case No 15-03-910330-050-04-01
(Trooper James Roberts Grievance)

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

APPEARANCES:

For the Patrol:

Lt. Richard G. Corbin

For the F.O.P., O.L.C.:

Paul Cox, Esq., Chief Counsel

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
ARBITRATOR

I. THE GRIEVANCE:

The grievance in the case, filed by Trooper James Roberts on 3/30/91, reads in pertinent part: "Name of Grievant: James Roberts, Dan Stockdale, Chas. Linck et. al.

. . . .

Classification: Trooper

O.L.C. Representative: Edward F. Baker

. . . .

Article and Section Number of Contract Violation: 8 Section 8.02; Section 20.11(2)

Statement of Grievance: A letter dated 3-27-91 was sent by Major Hartsell denying 8.02 time to attend an arbitration, but granting 8.01 time. This is in violation of Sections 8.02; 20.11(2).

Remedy Requested: That the above Grievant be granted paid 8.02 time.

II. STATEMENT OF THE CASE:

This case, well presented by the party's advocates, was heard in Columbus, Ohio, on September 6, 1991.

On March 26, 1991, F.O.P. O.L.C. Staff Representative Baker requested "8.02 time" for arbitration committee member and Associate Trooper James Roberts to attend the arbitration of Trooper David Plunkett, and for two other arbitration committee members to attend the arbitrations of two other troopers. The letter of request stated: "This is in conjunction with Section 8.02, and 20.11."

In that regard these two contractual provisions provide as follows:

> **§8.02 Associate Time**
>
> The Labor Council may designate one Labor Council Associate and alternate at each Division facility. The Labor Council Associates are Union Stewards as that term is generally used. The Associate or alternate will be permitted time off, as set forth below, during the work week to attend to administration of the Agreement. During such time, the Associate or alternate shall continue to be paid at their regular rate and shall receive all fringe benefits, seniority accrual and other benefits. When not using time for such purposes, Associates and alternates will perform their regularly assigned job duties.
>
> In addition to the time permitted by the grievance procedure, each Labor Council Associate or alternate shall be permitted to use a reasonable amount of paid time to consult with Labor Council representatives and represent bargaining unit members at grievance meetings.
>
> Labor Council Associates or alternates shall investigate and process grievances for employees and represent employees as provided for in the grievance procedure contained in Article 20 on paid time with no loss of benefits. Each Associate or alternate will notify his or her Post Commander of the necessity to leave their work assignment to carry out their duties in connection with this Agreement. Prior to conducting any activity under this section, Associates or alternates will secure the permission of the Supervising Officer as specified by the

Employer. Permission will be granted after consideration of work operations of the Patrol. Such permission will not be unreasonably withheld. If it should become necessary to deny such paid time in connection with the investigation or processing of a grievance, the time provided in the grievance procedure for action to be taken by the Labor Council will automatically be extended, by adding one (1) day to the time limits contained within the grievance procedure for each day the Labor Council associate is denied time to investigate or process grievances.

Upon entering any work area other than their own and prior to engaging in any steward duties, the Associate shall report to the supervisor of the work area. He shall identify the nature of the activity he is to perform.

§20.11 Representation

1. In each step of the grievance procedure outlined in this Article, certain specific F.O.P. Ohio Labor Council representatives are given approval to attend the meetings therein prescribed. It is expected that, in the usual grievance, these plus the appropriate Employer representatives will be the only representatives in attendance at such meetings. However, it is understood by the parties that, in the interest of resolving grievances at the earliest possible step, of the grievance procedure, it may be beneficial that other representatives or witnesses, not specifically designated be in attendance. Therefore, it is intended that either party may bring additional representatives or witnesses to any meeting in the grievance procedure, but only upon advance mutual agreement among the parties specifically designated to attend providing such additional representatives have input which may be beneficial in attempting to bring resolution to the grievance.

2. The grievant and the associate shall be allowed time off with pay at regular rate from regular duties for attendance at scheduled meetings under the grievance procedure. The grievant and the grievant must be present at an arbitration hearing to have the umpire consider a grievance on its merits.

2. By mutual consent, the parties may waive a hearing and submit the issue on written materials only. By mutual consent, the parties may alter any of the procedures set forth in this Article, or agree to submit non-disciplinary grievances to the expedited procedure provided for disciplinary grievances.

3. At any step in this grievance procedure, the F.O.P. Ohio Labor Council shall have the final authority, in respect to any aggrieved employee covered by this Agreement, to decline to process further a grievance, if, in the judgement of the F.O.P. Ohio Labor Council, such grievance lacks merit or justification under the terms of this Agreement, or has been adjusted or rectified under the terms of this Agreement to the satisfaction of the F.O.P. Ohio Labor Council.

Personnel Commander Major Hartsell denied the request by letter dated March 27, 1991. It reads in pertinent part:

"The following is in response to your letter of March 26, 1991, requesting twenty-four (24) hours of 8.02 time. Your request for 8.02 (paid time) for bargaining unit members to attend arbitrations on April 11, 18 and 29 is denied.

Your letter of November 20, 1990 clarified your intent to have arbitration committee members at arbitrations for educational purposes on unpaid 8.01 time. We are willing to grant the use of 8.01 unpaid time for members of your arbitration committee to attend arbitrations as observers and have done so in the past.

The employer does not agree with your new found application of the labor agreement, specifically article/section 20.11(2). Our nearly six (6) years of arbitration history does not support your contention that an arbitration is a meeting as described in 20.11. No such intent was discussed at negotiations. Neither the union or the employer have established a related past practice.

It is in the position of the employer that paid time for observers at arbitrations would be an unnecessary expediture of state funds unsupported by the labor agreement."

The Major refers to Staff Representative Baker's letter of November 20, 1990, which reads in relevant part:

> "It would appear that further education in the form of observing arbitrations would be of considerable value to our grievance committee. As you are aware the grievance committee reviews those matters before they can be heard in arbitration. We would request

8.01 time for a member of the committee to observe each arbitration. ...."

In this regard Section 8.01 provides as follows:

§8.01 Labor Council Delegate and Officer Leave

A bank of 3,000 hours for each year of the Agreement of unpaid time off will be made available to Labor Council delegates and officers for Labor Council business at the discretion of the Labor Council. This unpaid leave may be used in conjunction with paid time such as compensatory time, personal leave and holiday compensatory time at the option of the specific delegate or officer. If such leave is used in conjunction with vacations, employees must give 21 days notice.

The Labor Council will notify the Employer of the names of those employees who may use this unpaid leave. The Labor Council will notify the Employer of the dates of all conferences and will notify the Employer of the dates of all conferences and conventions to which delegates may be sent three (3) months in advance of the event.

Other uses of time by union officers will require notice of 14 calendar days to the Post Commander. In the event of an emergency, as defined by Article 66 of this Agreement, this leave may be cancelled.

Section 8.01 time was granted as requested.

As explained by Grievant Roberts, the Union's grievance arbitration committee is composed of five (5) members, each member being an Associate. One of its functions is to review all grievances, Patrol-wide, as of the step preceding arbitration, and determine, whether or not the grievance will proceed to arbitration. Where it is determined that a grievance will not be arbitrated, the Committee advises the Grievant of the reasons for declining to go to arbitration. Trooper Roberts asserted that he felt that participation in arbitration was a necessary ingredient of the Committee's decision making process, plus we need to advise the O.L.C. arbitration advocate of "little things" in the course of the arbitration hearing. This latter matter was an apparent reference to a case in the recent past where, from the Union's point of view, a Management witness at an arbitration gave some in accurate testimony concerning a Trooper's training, a matter which the O.L.C. advocate would not be expected to necessarily be familiar with.

Staff Representative Baker explained that the grievance arbitration committee was an internal Union committee and process, and a committee not specifically mentioned in the Contract. Baker explained that up until

1989 the Committee made only recommendations to proceed, or not, to arbitration, to himself and Chief Counsel Cox who then made the final decision, but that in 1989 the process was reversed, with Baker and Cox having input and making recommendations to the committee, but the committee making the final decisions on what grievances would go to arbitration.

The record reflects that in January 1991 four separate F.O.P. requests for 8.02 time for grievance arbitration committee members to attend arbitration hearings were denied by the Patrol; 8.01 time was allowed.

Lt. Corbin testified that it was the parties' practice to not pay 8.02 time to grievance arbitration committee members for attendance at arbitrations. He asserted there were in excess of 30 arbitrations in 1989 and there was not so much as a request for such paid time. Lt. Corbin asserted that there apparently was no mutual intent to create a right on the part of the arbitration review committee members to attend arbitration hearings on paid time, or the Union would have sought to exercise the right sooner. Lt. Corbin indicated that the arbitration review committee is paid 8.02 time for those periods spent on deliberations as to whether or not to proceed to arbitration. On cross-examination he conceded that the arbitration review

committee is involved in the administration of the Agreement.

In November of 1986 a could of Trooper Associates were released to attend a grievance arbitration review committee meeting in Columbus. While in Columbus they attended an arbitration hearing for part of their time. This was brought to the attention of Patrol headquarters. It generated the following letter dated November 26, 1986, to Staff Representative Baker from Personnel Commander Major Rice:

" Yesterday, by prior agreement, several troopers were released to attend a scheduled grievance review committee meeting. It was agreed these troopers would be on paid release time during the meeting.

Both Tpr. Slagle and Tpr. Dungan were released to attend the committee meeting. They both sat through the Arbitration case involving Tpr. Sweval, which started at 10:00 A.M. and concluded at 2:50 P.M.

In order to prevent any misunderstanding, please make sure these troopers understand they will not be paid for the time spent at the arbitration hearing. The amount of paid time will be limited to the actual time spent at the grievance review committee meeting.

The effected trooper's District staff has been notified and will work with them to make sure the correct amount of on-duty time is carried for payroll purposes."

No grievance was filed at that time.

The record reflects that some changes to the 1986 Agreement were made in the current contract. No changes relevant to the issues here were made to Section 8.02. In addition to changing the designation "Representation" at Section 20.09 in the predecessor Contract

to Section 20.11 in the current Contract, there were some language changes and additions as a comparison readily reveals. Set forth below are the provisions of Section 20.09 [vs. 2011 of the current Contract] of the predcessor Contract:

§20.09 Representation

1. In each step of the grievance procedure outlined in this Article, certain specific representatives are given approval to attend the meetings therein prescribed. It is expected that, in the usual grievance, these plus the appropriate Employer representatives will be the only representatives in attendance at such meetings. However, it is understood by the parties that, in the interest of resolving grievances at the earliest possible step of the grievance procedure, it may be beneficial that other representatives or witnesses, not specifically designated, be in attendance.

Therefore, it is intended that either party may bring additional representatives or witnesses to any meeting in the grievance procedure, but only upon advance mutual agreement among parties specifically designated to attend providing such additional representatives have input which may be beneficial in attempting to bring resolution to the grievance.

2. An employee-grievant and the Labor Council employee representative acting as an Associate in accordance with Article 8 shall be allowed time off with pay from regular duties for attendance at scheduled meetings under the grievance procedure. An employee-grievant and the Labor Council employee representative acting as an Associate in Accordance with Article 8 will not receive overtime pay to engage in grievance activities provided herein; however, grievance meetings at Step 1 and Step 2 shall usually be held during normal working hours.

3. Employees shall have the right of Fraternal Order of Police, Ohio Labor Council representation and/or counsel upon request at each step of the grievance procedure. The Fraternal Order of Police, Ohio Labor Council, Inc. shall be the exclusive representative of the employee in all matters pertaining to the enforcement of any rights of the employee under the provisions of the Article.

Chief Counsel Cox, chief spokesman for the Union at both the 1985 negotiations for the parties' initial Contract, and at the 1989 negotiations for the current Contract, indicated in his testimony that Article 20 was worked out in essentially executive session, and away from the bargaining table, between himself and the Patrol's chief spokesperson, O.C.B. Director Brundige. Cox testified that he expressed to Brundige that the F.O.P. had a major concern that the Union's leadership participate in the later steps of the grievance procedure, and that Brundige indicated that Section 8.02 covered that. Cox conceded that it was not specifically discussed between him and Brundige that the F.O.P. wanted arbitration review committee members to attend arbitrations on 8.02 time. Captain Anderson, who participated as a member of the Patrol's negotiating team in 1989, testified that just prior to the Brundige - Cox executive session type format, there were four principle issues vis a vis Article 20-Grievance Procedure, namely: the Union wanted to be present at the lower steps of the grievance procedure; the parties differed over arbitration, the Union seeking FMCS panels and the Patrol adhering to retention of a standing panel; whether discipline should be handled on an expedited or on a traditional manner; and whether or not the loser should pay

the cost of the arbitration. According to Anderson, after Cox and Brundige went into executive sessions, Brundige (and/or Breece, Brundige's assistant) would from time to time report to the Patrol's negotiating committee as to discussions in the executive sessions with Cox. Anderson, having reviewed his 1989 negotiation session notes, testified that Brundige did not inform the bargaining committee of any concern on the F.O.P.'s part for having Union representatives at the higher steps of the grievance procedure.

Both parties introduced prior arbitration decisions. Thus the Patrol introduced the decision of Arbitrator Harry Dworkin in OCB Grievance No. 87-1009, issued 10-22-87. In this Award the Grievant was an Associate out of the Toledo Post serving on a Labor/ Management Committee and a Health and Welfare Committee. He sought 8.02 leave and pay for bringing the members of the Ravenna Local Lodge up to date on the activities of the Committees. Ravenna is located a considerable distance, some 130 miles, from Toledo. This request was denied and the Grievant grieved. Arbitrator Dworkin denied the grievance. In doing so he made the following findings and observations:

> "[T]he Arbitrator views the core of the grievance [as] concerned with whether paid leave is contractually warranted....

[for Associates] to attend a local lodge meeting for the purpose of updating the member as regard [Committee] activities....

* * * *

Section 8.02 provides for paid leave for certain purposes....for labor council associates....

One type of paid leave is subject to, and conditioned on the requirement that the purpose of the leave be 'to attend to administration of the agreement.' It is therefore patently clear that the parties negotiated a paid leave provision subject to specific restrictions, as distinguished from general appearance participation in Union meetings. The paid leave with which the parties, and Arbitrator, are here concerned is of a designated category, as distinguished from other types of paid leave.

* * * *

It is evident that the parties intended, and chose to delineate, and distinguish as between different types of leave, and activity for which payment would be made. Such distinction is reflected by the language of

> Section 8.02 that, the associate 'shall identify the nature of the activity he is to perform' when entering another work area for the purpose of engaging in the functions of an associate.... .
>
> As regards the instant case, the language provides that paid leave is to be provided for the purpose of attending to the 'administration of the Agreement.' The parties have deemed it appropriate to expressly set forth the type of activity for which paid leave would be provided, including mandatory paid leave, and paid leave that is reasonable and subject to the exercise of sound discretion."

Arbitrator Dworkin then goes on to note that the parties have subscribed to certain practices, concerning which he disavows any intent to modify, such as a practice whereby "associates....have been granted paid leave for the purpose of attending meetings of committees recognized by the collective bargaining agreement." He then contrasts the circumstances of the case before him from that "practice" observing that "the Grievant's purpose....was not to participate in [Labor Agreement Committee] meetings; rather, his attendance was for the express purpose of updating the local

lodge membership as regard committee activities which does not appear in the agreement to automatically warrant granting of paid leave. ....[T]herefore ....the type of activity, and purpose for which the grievant desired to attend the Ravenna meeting 'did not fall within the intent of the language found in Section 8.02.'" Arbitrator Dworkin concluded:

> "In the judgment of the Arbitrator, the language negotiated by the parties governing paid leave of associates....does not apply to local lodge meetings the purpose of which is to discuss the activities on a state-wide basis of two contractually recognized committees of which the grievant was a member. Such activity does not reasonably fall within the purview of 'the administration of [the] Agreement. In event the parties should deem it appropriate to extend paid leave on a mandatory basis to other types of Union activity, such request should be the product of negotiation, and specifically set forth in the Agreement. Such extension of benefits cannot, however, be achieved through arbitration."

The F.O.P. introduced the decision of Arbitrator Harry Graham in OCB Case No 25-18-1-19-90-18-05-02, which issued 6-30-90, involving the Ohio Department of Natural Resources and the F.O.P., O.L.C., Inc., which, as Arbitrator Graham recites, the parties agreed.... [would] govern....bargaining unit one which covers the Ohio State Highway Patrol" i.e. the unit here.

In that case the parties phrased the issue as:

> "Did the State....violate Article 10.01 [here Article 8.02] of the....Agreement when it denied paid release time to FOP Associates for the purpose of attending meetings with FOP Staff Representatives to discuss the implementation of and provisions of the new Labor Agreement?"

Both parties argued different viewpoints as to the meaning and scope of the Associates' contractual right to "consult" with Labor Council representatives. Arbitrator Graham concluded that the State did violate the Agreement. In so concluding he found in pertinent part as follows:

The subject of Article 10 of the Agreement is FOP time. Section 10.01 provides for payment of Associates for time spent on administration of the

Agreement. In the first paragraph of Section 10.01 the parties have agreed that Associates "will be permitted reasonable time off during his/her normal tour of duty to attend to the administration of the Agreement." That phrase should be read in conjunction with the language in the second paragraph of Section 10.01 establishing use of a "reasonable amount of paid time to consult with Labor Council representatives...." When the Staff Representative of the Union went about the State conducting meetings to discuss the new Agreement it was to assist the Associates with its administration. The meetings were held for the express purpose of orienting the Associates to changes in the Agreement that had occurred during the course of negotiations. It is a requirement of administration of the Agreement that Associates be knowledgeable of changes in order to effectively carry out their function as the first line representative of their constituents. The meetings held by the Staff Representative, Ed Baker, were part and parcel of the administration of the Agreement and as such meet the test for eligibility for paid time off duty.

* * * *

> The restriction on provision of paid time to Union Associates is the restriction of reasonableness. The Union cannot seek an

inordinate amount of time to acquaint its Associates with new contract changes. The determination of whether or not that has occurred must wait orientation meetings following negotiation of future Agreements.

III. THE PATROL'S POSITION:

The Patrol takes the position that "the Union must prove the Employer violated Article 8, Section 8.02 by refusing to authorize paid union time for grievant to attend an arbitration. The Union's [case]....will center on the meeting of Section 20.11(2)." But, asserts the Patrol, "the Union's application of Section 20.11(2) was alleged only after the parties, supposedly in good faith, agreed certain bargaining unit members would be permitted to attend arbitrations for 'educational purposes' on unpaid union time."

Pointing out that the grievance did not arise until March 1991, the Patrol asserts that the evidence shows that "both parties had the same expectation regarding the application of paid union time for arbitration participants. That expectation did not include increasing the Employer's cost of arbitration by offering paid time to non-witness bargaining unit members."

The Patrol asserts that that expectation is clearly shown by the Union's "letter of request dated November 20, 1990. That letter, from FOP/OLC Staff Representative Ed Baker, requested unpaid time for union arbitration committee members to attend arbitrations for educational purposes. This piece of evidence speaks for itself."

The Patrol asserts that "it is impossible for the union to claim the parties negotiated or established a practice of applying section 20.11(2) in the fashion they now assert. In addition, careful review of the language in Article 20 supports the employer's position on the issue. Specifically, the word "meeting" found in Section 20.11(2) is found in steps one (1) through three (3) of the grievance procedure, but is not found in step four (4) or five (5). The evidence shows the parties have never considered an arbitration, step five (5) of the grievance procedure, to constitute a meeting as referred to in section 20.11(2). The fact the union submitted thirty (30) grievances to arbitration under the language now in dispute, before they discovered their alleged negotiated right, gives substantial support to the Employer's position."

Quoting from the Elkouri's learned arbitration treatise How Arbitration Works, 4th Edition, pages 451 and 452, which states 'where practice has established

a meaning for language contained in [a]....contract....., the language will be presumed to have the meaning given it by that practice.' "The parties' practice of not having alternates or associates attend arbitrations on paid time favors the Patrol's position, asserts the Patrol.

In its Level III decision, the Patrol took the position, and adheres to same, that "Grievants at arbitration are represented by the legal staff of the FOP/OLC who are eminently qualified to protect the rights of grievants. The Employer did not negotiate a guarantee that an alternate or associate would attend arbitrations for the same purpose.

The Union's argument regarding a right to paid time for grievance committee members to attend arbitrations is not supported by Article 20.11(2) or the practice of the parties."

At Step 4, the Patrol, through the Office of Collective Bargaining, expressed its positions by way of asserting that "[n]either party has previously interpreted either Article 8.02 or Article 20.11 to mean that a Labor Council representative or Associate is entitled to paid leave to attend arbitration proceedings. Representatives of management and the Union have in fact agreed that Associates who attend these proceedings as observers would be on unpaid time....."

In its closing statement the Patrol asserts that the notion of the F.O.P.'s arbitration committee members attending arbitration hearings on paid time is not a new one, and that similar requests in 1986 were denied, such that now, a Contract later, a specific provision for such would be required.

The Patrol also points out that the F.O.P. initially asked for arbitration committee members to attend arbitration hearings on unpaid time under Section 8.01, for educational purposes, and that this shows that the F.O.P. appreciated that 8.02 time was not contemplated for such. What the F.O.P. really wants, asserts the Patrol, is another set of eyes and ears at the arbitration hearing; but the O.L.C. representatives provided for are fully capable of representing any grievant, and hence committee members presence is unnecessary, and this circumstance illustrates that it was, accordingly, not contemplated by the parties. One less Trooper on the road, and attending an arbitration hearing is just not justifiable or reasonable. It's a matter of public safety as well as expense to the Patrol.

With respect to the F.O.P.'s intent testimony vis a vis the course of the negotiations, the Patrol

asserts that it demonstrates that there never was any specific request made, or representation to the effect, that the language being agreed to by the parties contemplated the presence of arbitration committee member the arbitration hearings on paid time.

The Patrol contends that since the effective date of the current Contract there have been approximately thirty (30) arbitrations, and yet the question of the right of arbitration review committee members to attend arbitration hearing has not heretofore come and and the Patrol therefore suggests that this circumstance indicates that indeed the parties never intended that the arbitration review committee attend arbitration hearings on paid time.

The Patrol asserts that the Opinion and Award of Dr. Harry Graham cited by the F.O.P. is irrelevant to the issue at hand; there, unlike here, the F.O.P. had a reasonable expectation that paid time would be granted.

Pointing to the Dworkin Award, the Patrol asserts that the F.O.P. could have negotiated into the Contract the right of the arbitration review committee to attend arbitration hearings on paid time, but didn't. It bolsters this assertion by pointing to Captain Anderson's testimony to the effect that the specific

matter of arbitration review committee members attending arbitration hearings on paid time was never expressly discussed at the bargaining table, and while OCB Director Brundige kept the Patrol's bargaining committee, which included Captain Anderson, informed as to his executive session type discussions with the F.O.P.'s Chief Counsel Cox, Brundige never advised the Patrol's Committee that the F.O.P. was seeking such paid time for the arbitration review committee.

So it is that the Patrol urges that the grievance be denied.

IV. THE F.O.P.'S POSITION:

The F.O.P. takes the position, as articulated in its opening statement, that Article 8 - F.O.P. Time, Section 8.02 Associate Time, providing as it does for permission for Associates "to attend to administration of the Agreement," on paid time, embraces a grant of permission for the arbitration review committee members to attend arbitration hearings on Section 8.02 paid time. Section 20.11, subsections 2. and 4. do likewise.

Past practice is not involved here, asserts the F.O.P. Management can not be permitted to say that because you've never attended arbitration hearings on paid time before, you can't do so now. Rather, the underlying issue here is who decides, the Employer or the Union, what Section 8.02 administration-of-the-Agreement paid time is to be used for. The issue here, asserts the Union, is whether or not Union officials can participate in the administration of the Agreement, which issue must clearly be answered in the affirmative in light of the permission granted for such in Section 8.02.

Pointing out that the F.O.P. operates with a grievance and arbitration review committee, which committee, comprised of some five (5) Associates, in pursuance of administering the Contract, determine whether or not a grievance goes to arbitration, the Union asserts that attendance at arbitration hearings by said committee members,

in order to give advice to the O.L.C. presenter/advocate and to bring back for the committee's deliberations the cummulative learning experience which attendance at arbitration hearings would create, is clearly a form of administering the Agreement, which activity, on paid time, is expressly permitted and granted in Section 8.02.

It is the Union's position that it is for it to decide what is and what is not administration of the Contract, and that the Employer can't go behind that judgment, where specific grounds for denial, such as operational necessity, is not involved. In support of this contention the Union points to Dr. Harry Graham's decision in OCB Grievance No. 25-18-1-19-90-18-05-02, rendered June 30, 1990. As described by Dr. Graham, Section 10.01 of the Unit 2 Contract, is similar to the language of 8.02 of the governing Contract here, and the language of 10.01, embraced the requirement to grant paid time to Associates for meetings with an O.L.C. staff representative conducted to familiarize the Associates with changes in a newly negotiated Collective Bargaining Agreement. Dr. Graham found that "[t]he meetings....were part and parcel of the administration of the Agreement and as such meet the test for eligibility for paid time off duty," according to the F.O.P., Graham failed to find relevant Management's past practice contentions.

The F.O.P. contends that were the Arbitrator to find for Management, he'd be restricting the Union in its discharge of its duty of fair representation, and telling the Union that it can't go about discharging said duty in the manner it wishes to do so.

In its closing statement the F.O.P. asserts that it is understandable that the Patrol doesn't want to increase the costs of arbitration by paying Associates for attendance at arbitrations, but such a consideration is simply not relevant here, since the Contract simply provides for such.

It's the Union's contention that Management concedes that the arbitration committees' activities are directly involved in the Union's discharge of its duty to represent its members, and constitute administration of the Agreement, with the consequence that it can't logically be said that attendance at arbitration hearings is somehow not administration of the Agreement. Any distinction sought to be made vis a vis the activities of the arbitration committee as tantamount to administration of the Agreement is mere hair splitting, and ought not to be sanctioned, argues the F.O.P.

The Union argues that if on a case by case basis it is reasonable to say that there is a reasonable

connection between attendance at the arbitration hearing and administration of the Contract, then, absent same consideration of operational necessity, permission to attend, and on a paid basis, must be granted by the Patrol. The Union argues that Arbitrator Harry Dworkins Award of 10-22-87 in OCB Griev. No. 87-1009 supports its contentions in this regard.

The past practice contentions of the Patrol are a red hearing, asserts the Union, because its internal operations were different during the period of time that the Union was concededly not seeking paid time for arbitration committee members to attend arbitration hearings, namely, not until relatively recently did this committee decide (versus only recommend) which grievances went to arbitration and which did not. This change in intra-Union operations called into play a different application (versus "interpretation") of the Contract.

Administration of the Contract is directly involved here; the Patrol simply doesn't want to pay. If it reasonable to allow 8.02 paid time for grievance arbitration committee meetings, then there is no choice, argues the F.O.P., but to find it reasonable to allow 8.02 paid time for the grievance arbitration committee's attendance at arbitration hearings.

So it is that the Union urges that the grievance be sustained.

V. THE ISSUE:

The Patrol sees the issue as:

"Does Article 8, Section 8.02 and Section 20.11(2) require the employer to grant paid leave time to a non-witness bargaining unit member to attend arbitrations. If so, what shall the remedy be."

The F.O.P. does not agree to this statement of the issue.

I find the issue to be:

"Does the Contract require the Employer to grant paid leave time i.e. 8.02 time, to the F.O.P.'s grievance arbitration committee members to attend arbitration hearings, and if so, what shall the remedy be?"

VI. DISCUSSION & OPINION:

First addressed are the F.O.P.'s contentions to the effect that arbitration committee members, as associates, are, by virtue of Article 20, Sections 20.11, subparagraph 2. and 4., entitled to attend arbitration hearings with pay at their regular rate. I find no merit to this contention. Thus these subparagraphs make reference to "scheduled meetings under the grievance procedure "and to "the meetings scheduled at each step of the grievance procedure," respectively. A grievance "meeting" simply differs from an arbitration "hearing". This type of distinction was well articulated by Arbitrator Wilber C. Bothwell in Cabot Corp., 50LA230, at 231 (1967). In that case the Contract called for the Company to pay union grievance committee members for participation in "grievance negotiations". Arbitrator Bothwell observed:

> "While arbitration is in one sense a part of the grievance procedure, it is also a different kind of proceeding than that involved in the earlier steps of the grievance procedure. A grievance procedure could exist without any provision for arbitration. Ordinarily, a grievance procedure is more effective if the agreement provides for arbitration of a grievance if the parties are unable to arrive at a proper disposition of the grievance in the

regular steps of the grievance procedure.

> The process involved in meetings to discuss grievances in which members of the Union Committee participate as provided for in Article XII is well described by the term 'grievance negotiations.' In these meetings an effort is made to determine the facts and to arrive at some settlement or disposition of the grievance by agreement between members of management and members of the Union Committee. Disposition of the grievance if it occurs in one of the meetings is the result of discussion and agreement, not adjudication. On the other hand the arbitration parties cannot be described as grievance negotiations. In arbitration proceedings the arbitrator hears the evidence and arguments of both sides and issues a decision or award which is binding on both parties."

Given these differences in the processes of "grievance meetings" and "arbitration hearings", it is clear that Section 20.11, subparagraphs 2. and 4. simply do not grant permission for associates to attend arbitration hearings on paid time; they clearly do grant

permission for associates to attend grievance meetings on paid time.

What of the F.O.P.'s claims based on Section 8.02? In this regard quite frankly I believe that were the language of 8.02 before me in the first instance, and before it was construed by Arbitrators Dworkin and Graham, I would likely not have come up with the same construction. Thus, in my view, the phrase in the third sentence -- "as set forth below" -- simply sets up a series, the components of which are delineated below, and I would have likely found that the subsequent phrase, "to attend to administration of the Agreement," was merely an umbrella and descriptive phrase, describing in a generic sense what all of the specifics in the series[1)] had in common, to wit administration of the agreement. Put another way I would likely not have found that the concept of attending to administration of the Agreement was simply part of the delineated series. But as seen above, Arbitrator Dworkin has found,as far back as 1987, that "paid leave is to be provided for the purpose of attending to the 'administration of the agreement'," and has characterized such as "the type of

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1) Namely, permission to on paid time: "to use a reasonable amount of ....time to consult with Labor Council representatives; to represent bargaining unit members at grievance meetings; to investigate grievances; to process grievances.

activity for which paid leave would be provided." In other words, Arbitrator Dworkin saw activities whose purpose was attending to the administration of the Agreement as a separate and independent component of the series. It appears that the Patrol did so also, for at that point in time, as Arbitrator Dworkin noted, a practice had evolved whereby Associates were paid for attendance at Contractually sanctioned Committee meetings i.e. such attendance was attending to the administration of the Agreement. Thus, absent this viewpoint, of the elements of the series as I would likely see them, none would embrace attendance at Committee meetings. In any event, following the Dworkin opinion and award, in June 1990, Arbitrator Graham in effect confirmed Dworkin's viewpoint[2)] when he found that Staff Representative Baker's meetings on the changes in the new Contract "were part and parcel of the administration of the Agreement and as such meet the test of eligibility." Conceding that there is some measure of ambiguity in the language the parties use in

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2) Arbitrator Graham certainly had a stronger basis for so concluding than did Dworkin, given the specific, and somewhat different from 8.02, language of 10.01 that Graham was construing. But no matter, because the parties, when they agreed to be bound in Unit One by Graham's findings, evidently viewed the language of 10.01 and 8.02 as in effect the same.

8.02, I am unable and unwilling to conclude that Arbitrators Dworkin and Graham's viewpoint is patently erroneous, and accordingly I regard myself bound by it. At this juncture the parties are simply toofar down the road of a mutual understanding to the effect that at least certain activities constituting attending to administration of the Agreement are to be on paid, i.e. 8.02, time, such as attendance at Committee meetings. The case thus comes down to the question of whether Associates attendances at arbitration hearings was also contemplated by the parties. As has been seen the F.O.P. argues that the plain language utilized "to attend to administration of the Agreement" is expansive, and this circumstance, coupled with logic,demonstrates that the language clearly embraces permission for Associates to attend arbitration hearings on a paid basis, since arbitration hearings unquestionably entail administration of the Agreement. But precisely because of the very expansiveness of the language, it is ambiguous, if for no other reason than, notwithstanding its expansiveness, it must have limits, and just what are they? Indeed, while attendance at a local membership meeting to update the membership on the activities of contractually created Committees in a literal sense is an aspect of Agreement administration, Arbitrator Dworkin none-

theless found that "such activity does not reasonably fall within the purview of 'the administration of [the] Agreement." In other words, Arbitrator Dworkin found a limitation. This ambiguity opens up inquiry into the surrounding circumstances in an effort to clarify the inherent ambiguity and ascertain the parties mutual intent. Directly to the point, much in the surrounding circumstances serves to establish by a preponderance of the evidence, that the parties simply never intended that Associate members of the arbitration committee were to attend arbitrations on 8.02 paid time.

Thus, under virtually the same language in the 1985 Agreement, the F.O.P. sought 8.02 time for grievance committee member Associates, and such was denied. This denial was not grieved. From that point on the F.O.P. was on notice that the Patrol did not view 8.02 as embracing paid time for the grievance arbitration committee's attendance at arbitration hearings. Thus, when it entered into negotiations for the successor current Contract, without expressly seeking 8.02 time for attending arbitrations and without expressly representing that it viewed the language of 8.02 and/or 20.11 as granting persmission to grievance arbitration committee members to attend arbitration hearings

on 8.02 time, as has been seen is the situation here, the F.O.P. must be deemed to have accepted the Patrol's view of the matter. And that they in fact did so can be inferred from the efforts just prior to the request that triggered the instant matter, to obtain 8.01 time, and not 8.02 time,for grievance arbitration committee member Associates to attend arbitration hearings.

Then too, in negotiations the parties are presumed to have some awareness of general accepted arbitral principles, at least where as here, they provide for arbitration. In this regard the Elkouris; in their learned arbitration treatise How Arbitration Works, 4th Edition, 1985, BNA Books Inc., Washington D.C., at pages 188 and 189, observe that:

> " In some cases the employer has not been required to pay union representatives for time spent at arbitration hearings in the absence of a clear and specific contractual requirement for such pay. However, so definite a provision for such pay has not been required in all cases,[3)]

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3) One of the decisions cited in support of this view is Board of Mental Retardation, Lucas County, 69LA864 (1977). In that case union officals had a contractual right "to process grievances on program time." Arbitrator Marvin J. Feldman found at p. 864 that: "[a] grievance procedure contains as its final act, if the claim remains unsettled, the right to arbitration. The processing of grievances therefore means the arbitral process if the grievance is not settled prior to that time. ....The right to process a grievance does not end by failure of settlement prior to the arbitral step but continues through the arbitral step until the final determination of the arbitrator." Of course, as noted earlier herein in connection with the discussion on Section 20.11, I do not subscribe to Arbitrator Feldman's view. Cabot Corp., supra.

especially where there was an established practice for the employer to pay union representatives for arbitration time. ...."

Thus as Arbitrator Stuart Rothman observed in Social Security Administration, 73LA789, 797 (1979): "[T]he substitution through collective bargaining of employer-paid-for....time for an employee to conduct Union (labor-management) activities in place of the normal duties to which the employee has been assigned ought not to be lightly inferred. * * * * In case of doubt or ambiguity in the contract language used, the doubt or ambiguity should .... militate against the interests and the side claiming that the government as an employing agency has waived the requirement that an employee perform his normal duties. It can be done, but the contract should be clear and convincing.[4] " In expressly providing in Section 8.02 that "[w]hen not using time for such purposes, Associates and alternates will perform their regularly assigned job duties," the parties have manifested some awareness of this arbitral principle. Even those arbitrators not advocating strict construction would generally look for a past practice of the Employer paying Union representatives for arbitration time. But as the record amply demonstrates, there is no such past practice here.

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4) As indicated above, I would require only the "preponderance" standard, and not the clear and convincing" standard of proof.

It follows from all the foregoing that the issue posed is answered in the negative, and hence the grievance must be denied.

VII. AWARD:

For the reasons more fully noted above the grievance is denied.

DATED: January 15, 1992

Frank A. Keenan
Arbitrator