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**IN ARBITRATION PROCEEDINGS PURSUANT TO**

**AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy

between

CALIFORNIA DEPARTMENT OF FORESTRY ARBITRATOR'S  
EMPLOYEES ASSOCIATION, OPINION AND AWARD

and

STATE OF CALIFORNIA, CALIFORNIA  
DEPARTMENT OF FORESTRY.

Involving NERP Weekend Work assignments

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This Arbitration arises pursuant to Agreement between the CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION, hereinafter referred to as the "Union," and STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF FORESTRY, hereinafter referred to as the "State" or "Employer," under which ALEXANDER COHN was selected to serve as Arbitrator, and under which his Award shall be final and binding upon the parties. Hearing was held on March 6, and April 8, 1987, in Sacramento, California. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for argument. The Arbitrator received the Transcript and record on May 19, 1987.

**APPEARANCES:**

On behalf of the Union:

WILLIAM J. FLYNN, Esquire, Neyhart, Anderson, Nussbaum, Reilly & Freitas  
568 Howard Street, P.O. Box 7426  
San Francisco, California 94120-7426

On behalf of the State;

EDMUND K. (DEAK) BREHL, Esquire, Labor Relation Counsel  
Department of Personnel Administration, State of California  
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## ISSUES

1. Does the grievance cover all bargaining unit (1) Schedule B employees; (2) Schedule B employees in State camps; (3) Fire Captain "Bs" in State camps and/or (4) Fire Captain "Bs" at Los Robles?
  2. Did the State violate the Agreement by requiring Fire Captain "Bs" to work regular (straight time) Friday-Monday work weeks during the 1985-1986 NERP period; and, if so, what shall be the remedy?
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## RELEVANT PROVISIONS OF AGREEMENT

### ARTICLE IV EMPLOYER RIGHTS

#### Section 4.01 Employer Rights

1. Except as expressly abridged by any provision of this Agreement, the State and the Department reserve and retain all their normal and inherent rights with respect to management of their affairs in all respects in accordance with their responsibilities, whether exercised or not, including but not limited to the rights to determine and from time to time to redetermine the number, location, and type of work forces, facilities, operations, and the methods, processes and equipment to be employed; the scope of services to be performed, the method of service, **assignment of duties, and the schedule of work time and work hours, including overtime**;... to alter, discontinue or vary past practices and otherwise to take such measures as the employer may determine to be necessary (sic) for the orderly, efficient and economical operation of the Department of Forestry... (Emphasis added)
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### ARTICLE VI GRIEVANCE AND ARBITRATION PROCEDURE

#### Section 6.15 Immediate Arbitration

Either party may waive the time limits specified herein and proceed to immediate arbitration in any case

where either party alleges the other is threatening to take an action in violation of this MOU, which could result in irreparable injury, in so short a period of time as to disallow the other party from proceeding within said time limits and in circumstances where an arbitrator acting under the usual time limits should not effect an adequate remedy. In any such case, the arbitrator shall have full equitable powers to frame a decision, including an order to the party initiating the grievance to abide by the time limits provided in this section and for a restraining order against the party threatening the action, or any other form of arbitration order that would resolve the matter in an equitable and just manner.

**Section 6.17 Limits of Arbitrator's Authority**

The arbitrator shall be solely authorized to determine if provisions of the Agreement have been violated. The arbitrator is not authorized to add to, subtract from, or otherwise modify the Agreement of the parties, nor to substitute his/her judgment over the drafters of the Agreement.

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**ARTICLE VIII  
HOURS OF WORK AND OVERTIME**

**Section 8.02 Fire Protection Employees (Except Firefighter I and Classifications Referenced in Section 8.03)**

2. Duty Week

b. The full-time fire protection employee will be scheduled to work 53 hours per week during NERP status. There are no hours of guaranteed overtime during NERP status.

4. Shift Patterns (NERP)

a. The scheduling of work will be consistent with the following. Changes between these shift patterns shown may occur at any time with 24-hour advance notice except in emergency or by mutual consent of the employee where notice may be less. The foregoing flexibility of management shall not be exercised in an arbitrary, capricious or discriminatory manner.

- 1. Work 8 8 8 8 8
- 2. Work 10 10 10 10 10

6. Overtime Compensation (NERP)

a. Effective April 15, 1985, fire protection employees on NERP status will receive overtime at 1

**Section 8.03 Other Unit 8 Classes**

#### 4. Overtime Compensation

##### d. Changes Between ERP and NERP

1. Moving employees between ERP and NERP status shall be made with not less than 24-hour notice except...

#### **Section 8.04 Changes Between ERP and NERP**

2. The "Emergency Response Period" (ERP) is that time during which **immediate and extended staff availability** is required by the State on a planned basis (e.g., fire season vegetation burns and Schedule A assignments)...

3. The non-emergency response period (NERP) is that time other than the Emergency Response Period (ERP). Assignments to ERP status during **non-fire** season can be made on an **employee-by-employee basis**. Such assignment shall last for the length of the shift pattern assigned, including days off (i.e., 7 or 14 days, or multiples thereof). (Emphasis added)

#### **Section 8.05 Hours of Work and Work Hour Changes**

The normal work hours for employees...on shifts requiring 8 hours of work will be 0800 to 1200 and 1300 to 1700 hours. The normal work hours for employees on shifts requiring 10 hours of work will be 0700 to 1200 and 1300 to 1800 hours. A Fire Captain (B) may be assigned to a continuous ten-hour day. The ten-hour continuous work day will normally start between 0700 and 0800 hours. (Emphasis added)

A supervisor may, with 24 hours advance notice or mutual consent, adjust the work hours to any other 8 to 10-hour period (depending on assigned shift pattern), including...

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### **ARTICLE XVI AGREEMENT AND TERM**

#### **Section 16.01 Entire Agreement**

1. ...With respect to other matters within scope of negotiations, negotiations may be required during the term of this Agreement as provided in Subsection 2 below.

2. The parties agree that the provisions of this Subsection shall apply **only** to matters which are **not** covered in this Agreement.

The parties recognize that during the term of this Agreement, it may be necessary for the State to make changes in areas within the scope of negotiation. Where the State finds it necessary to make such changes, the State shall notify [Union] of the proposed change 30 days prior to its proposed implementation.

The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 8 where all three of the following exist:

- a. Where such changes would affect the working conditions of a significant number of employees in Unit 8.
- b. Where the subject matter of the change is **within scope of representation pursuant to SEERA.**
- c. Where [Union] requests to negotiate with the State. Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this Agreement. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of SEERA. Unless otherwise provided herein, **or unless changed by mutual agreement**, there shall be **no diminution** of existing wage rates and **substantial** monetary employee benefits during the term of this Agreement. Provided, however, the parties agree to meet and for alternatives to lay off and/or other unforeseen economic crises. (Emphasis added)

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## FACTS

### Generally

The State provides fire protection and other related services throughout the state from about 45 camp and 250 fire station sites. Due to the weather, employment is seasonal and, therefore, about 3,000 employees provide these services, although, during fire season, that number may reach 4,000-5,000. State services are, principally, based on two missions; i.e., protecting State wild lands and forests and providing localized fire protection services under contracts with various public bodies throughout the state. The latter is referred to as "Schedule A" service and the former is referred to as "Schedule B" service.

Employees working Schedule A provide year-round, 24-hour service on a fairly traditional fire department type schedule. Schedule B employees, due to weather patterns, are more seasonally. Thus, layoffs occur in the winter season which the parties generally refer to as the non-emergency

response period (ÑNERPÓ). Once the longer fire season begins, Schedule B employees work emergency response period (ÑERPÓ) shift assignments. ERP assigned shifts often include straight time weekends as part of the regular schedule.

During NERP, those employees not laid off are sometimes given Schedule A assignments. Others are assigned non-fire fighting duties such as construction and maintenance work. Among those classifications working NERP are Fire Captain "Bs" ("FCB") and Heavy Fire Equipment Operators ("HFEO"). FCBs, inter alia, supervise HFEOs and fire crews throughout the various conservation camp work locations. Fire crews, generally, are made up from among Department of Corrections ("Corrections") inmates, wards from the State Youth Authority ("YA") or State Conservation Camps ("CCC").

The State, in many areas, is contractually obligated to provide five (5) day work weeks for Corrections inmates and YA wards.

During NERP, FCBs supervise fire crews doing construction and maintenance work to improve State parks and forests.

The parties' predecessor collective bargaining agreement covering the July 1, 1983 - June 30, 1985 period contained substantially the same management rights clause (4.01) as that in the current Agreement. However, Section 16.01 of the predecessor Agreement contained the following language:

#### **"Section 16.01 Entire Agreement**

This Agreement sets forth the full and entire understanding of the parties regarding the matters contained herein....The parties agree that matters negotiated, but not included in this Agreement shall not be subject to negotiations during the term of this Agreement. If the employer deems it necessary to effect changes that have a **substantial** impact upon matters within the **scope of representation**, other than those expressly referenced in this Agreement, it will meet and confer in good faith prior to making such changes...

Unless otherwise provided herein, or unless changed by **mutual** agreement, there shall be no diminution of existing wage rates and **substantial** monetary employee benefits during the term of the Agreement.... emphasis added)

In February, 1985, the United States Supreme Court issued its **Garcia v SAMTA** (citations omitted) decision holding that State and local governmental bodies were covered by the Fair Labor Standards Act's (ÑFLSAÓ) minimum wage and maximum hour provisions. Among others, this decision had a significant impact on firefighters who do not usually work a 40-hour week; e.g., prior to **Garcia**, FCBs worked 72-hour weeks in ERP and 40-hour weeks in NERP.

The protracted negotiations on the current contract ended in July, 1985. In the negotiations, the

Union, **inter alia**, sought, and finally obtained, a four day work week for FCBs and certain other employees.

During the negotiations, the Union's chief spokesman was its attorney, Ronald Yank. Yank testified that the State's chief negotiator was Bab Bark{1} from the Department of Personnel Administration ("DPA"). Among other things, the parties changed the language in Section 16.01 of the Agreement.

According to Yank, Bark had several reasons for wanting to modify 16.01 as written in the predecessor Agreement. Generally, the reason was a DPA concern that 16.01 should be uniform throughout the large number of State bargaining units. The language in 16.01 in most of the other bargaining units was different from that in the Union's predecessor Agreement, but was, however, the same as in the corrections agreement with the California Correctional Peace Officers Association ("CCPOA").

Yank and the Union negotiating team were concerned about making any changes in 16/01 because two arbitration awards addressing the same language in the Corrections/CCPOA agreement had produced favorable results from its standpoint. Generally, the arbitrators equated non-cost item changes during the term of the agreement with State Employer-Employee Relations Act ("SEERA") requirements; i.e., if the State intended to change non-cost items, the parties had to first meet and confer in good faith. However, in negotiations, as part of the total package, a substantial pension improvement was obtained by the Union, and it, **inter alia**, agreed, on certain conditions, to modify 16.01 to bring it into conformity with the other State bargaining units.{2}

Yank further testified that the agreement to change 16.01 was conditioned on Bark's agreement that it would be "understood" that, although the language changed, in the Union's bargaining unit, it would have the same meaning as the predecessor language (T. 74). Bark agreed.

Additionally, because of the cosmetic change in language, Yank wanted, and received, a side letter from Bark stating that the new language meant the SEERA requirements{3}; e.g., that an unfair labor practice under SEERA on non-cost changes would be a violation of 16.01 and the Entire Agreement, including Section 4.01 (T. 87).

One of the camps from which fire protection services is provided is the Los Robles Youth Conservation Camp ("Los Robles") in the San Luis Obispo Ranger Unit area. The change from ERP to NERP status in Los Robles occurred on or about December 10, 1986. On February 10, FCB Mike Rico was assigned a four day, Friday-Monday shift requiring weekend work at straight time. On or about April 7, Union Rank an File Representative David Gowan held informal discussions with local management to try to resolve the problem of what the Union believed was a violation of past practice.

On April 14, Gowan filed a class action grievance "on behalf of all affected employees in San

Luis Obispo alleging, **inter alia**, that FCBs, in violation of 16.01, were being routinely scheduled for NERP weekend coverage which they had not previously been "routinely" subjected to during NERP. The Union felt the action violated SEERA and past practice. In remedy, Gowan sought:

"Discontinuance of the practice of scheduling employees weekend coverage during NERP unless mutual agreement is reached between management and the affected employee and [Union] if necessary."

On May 20, Ranger in Charge Franklin Frank denied the grievance. Frank asserted the matter was covered by Section 4.01 and, **inter alia**, that:

"...Based on our need for weekend coverage and the authority to establish schedules under the MOU, I must deny the grievance and continue our current scheduling practices..."

The grievance was processed up to the third level where, on June 27, State Director Jerry Partain responded to the grievance by advising Gowan, **inter alia**, that:

Most [FCBs] have worked a five-day NERP duty week exclusive of weekends. This schedule allowed [Employer] to meet its contractual obligations with [YA] for five-day crew coverage, Monday through Friday. During negotiations in July, 1985, the parties reached agreement on a four-day duty week for [FCB]. The four-day week substantially lessened [Employer's] ability to provide crew coverage during NERP. In fact, it is more difficult and sometimes impossible to meet this obligation. If [Employer] employees do not work weekends and take an additional day off on Friday or Monday. Then crew coverage cannot be maintained on those days in many locations.

There are only two approaches available to the [Employer]. One is to work with the [Union] on alternate shift patterns as allowed by the contract. The second is scheduling employees for weekend coverage during NERP so that [Employer] can maintain crew coverage on Fridays and Mondays.

Section 16.01 of the agreement provides that each party waives the right to negotiate over matters raised in negotiations or covered by the contract...The matter of scheduling work was discussed during bargaining and it is covered by the contract.

Section 4.01 clearly allows the employer to establish and change work schedules and take measures to insure orderly, efficient, and economical operations..."

On July 18, Gowan processed the grievance to Bark at the fourth level. Gowan, **inter alia**, advised Bark that the grievance was on behalf of all affected employees but specifically, [FCBs] at the Los Robles YCC. Further, in response to Partain's assertion that the four-day week

substantially lessened the Employer's ability to provide crew coverage during NERP, the issue had been addressed during bargaining and, as a result, the Employer allocated additional PYs to prevent this from happening and the fact that there was a coverage problem had nothing to do with the employees, but was due to a lack of planning. Finally, Gowan asserted that the issue of weekend coverage was not discussed during negotiations.

Thereafter, on October 8, Yank wrote Bark to confirm that Bark and Labor Relations Officer Linda Stephenson met with Union representatives on October 7 and the Union demanded arbitration on the grievance. Yank, *inter alia*, also advised Bark that:

"I believe that [Employer] would join with [Union] in asking that we have an arbitration hearing on this matter **at the earliest possible moment**. that is, it is a Class Action Grievance, and with each passing week, literally tens of thousands of dollars in additional damages for back pay (potentially) continue to mount. Therefore, to hasten communications, I am also enclosing a copy to Tal Jones and Deak Brehl, so that either or both of them can give it to the attorney who will be handling the arbitration for the employer (if it is not either of them)." (Emphasis in original)

Stephenson testified that, at some point during the processing of the instant grievance, she discussed it with Bark. Bark told her the Union had requested immediate arbitration.

### **Additional Bargaining History**

It is the Union's evidence that, when the parties' initial Agreement was bargained in 1982, Yank dealt with chief spokesman David Crippin. Crippin was subsequently replaced by Bob Clifford from DPM. However, Employer Labor Relations Officer and chief spokesperson, Peggy Lucas, was present throughout the negotiations.

Yank testified that the Union initially proposed that the Employer could not change terms and conditions of employment not otherwise set out in the Agreement without mutual agreement. The initial Employer position was that, for items not covered, it could change anything it wanted to change. Over a number of bargaining sessions, the parties finally agreed to apply SEERA standards by referencing a number of SEERA words of art; e.g., "scope of representation."

Yank and Crippin spent a considerable amount of time at the bargaining table discussing the law in this area including, *inter alia*, the **Ford Motor Co.** Decision wherein the United States Supreme Court held that the employer's unilateral change in the prices of the vending machine food was a change in working conditions which had to be agreed upon through bargaining. Eventually, the parties agreed to use the term "significant" with Yank conceding that if the change had less than a **de minimus** impact on a **de minimus** number of people, it was not within the "scope of representation." However, it would be understood that changes impacting more than a **de minimus** number of people was within the "scope of representation." Crippin agreed that whenever the term "significant" was used in Section 16.01, everything would be

considered within the "scope of representation" unless the change was **i de minimus**.

Once the Employer agreed with this language in 16.01, Yank let the Employer's team know he did not care if the management rights (4.01) clause "went on for pages and pages." Again, according to Yank, the lead-in phrase Except as expressly abridged by any provision of this agreement" was, at the table, understood to carve out from management rights anything within the "scope of representation." Yank told the Employer committee "if it was within the scope of representation, it was ours." {5} If not, it was theirs. Once this agreement was reached, Crippin left. Lucas then "loaded up" the management rights clause and the Union had no problem with her doing so because of the agreement on 16.01. {6}

Yank also testified that, if the Employer wanted to change an existing practice related to a non-cost item, it had to give the Union 30 days notice, meet and confer and, if impasse was reached, its last best offer could be implemented. Cost items, on the other hand, could not be changed without mutual consent. To Yank, cost items are anything that would be considered part of a total compensation package or part of a total budget. Overtime had traditionally been considered a cost item (T. 81)

Paul Graham, a Schedule B fire apparatus engineer in the Tuolumne Ranger Unit (San Andreas) and Loyd Johnson, an FC dispatcher in the Emergency Command Center, St. Helena Headquarters, Lake Napa Ranger Unit, were on the Union's 1985 negotiating team. According to Graham, who was co-chairman of the team, there were numerous discussions of the need for "PYs" during negotiations. The need for PYs was not limited to FCBs. Management was especially concerned about whether they could get additional PYs from the Governor's office. At the end of the negotiations, management put the four-day work week on the table. Bark and DPM Counsel Tal Jones left negotiations to see if they could get the PYs in order to implement the four-day week. Subsequently, they came back to the bargaining table with assurances from the Department of Finance and final agreement on the four-day week was reached.

According to Johnson, prior to this break in negotiations, Bark told Stephenson and Employer negotiating team member Steve Brown that if they could justify and identify to him what PYs they needed, he would go back and ask for them. When the bargaining session reconvened, Jones presented the package with the four-day week. Jones specifically stated, "We have the PYs and here's our proposal."

Johnson further testified that he wrote paragraph 2 of Section 8.04; i.e., the ERP definition. There was a broad discussion at the bargaining table trying to pinpoint the ERP period. However, it was clear that ERP could be on an individual basis at certain times of year; e.g., when an employee was needed on an extended staff availability." Thus, during NERP, if planned staffing needs required it, an employee could be put on ERP.

Union President Dan Nichols testified that the Union did not give up anything in the 1983

negotiations on the 1983-1985 contract to obtain a constant rate of pay. (JX 2, p. 39). According to Nichols, adding the constant rate of pay was a way to get employees more money -- 7 1/2% in 1983 and 1984. During the 1984 reopener negotiations, the Union proposed going from NERP to ERP with 48-hour notice. The parties eventually agreed on 24-hour notice. However, weekend work was not discussed at all.

It is the State's evidence that when Crippin left the bargaining table in 1982, Lucas was responsible for the bulk of the bargaining. She was at every negotiating session. Prior to Crippin leaving the table, Lucas could recall no discussion between Crippin and Yank concerning the management's rights and entire agreement clauses. She did not know whether the two had side bar discussions concerning the matter.

On March 12, 1982, DPA "sun shined" its proposals on no-strike, entire agreement and management rights clauses. The proposals were for all employee organizations, not just the Union's; i.e., Unit 8. The proposal served as the starting point for bargaining from the State's position. However, Lucas created her own proposal on the management's rights clauses. On June 21, the parties reached a tentative agreement on the management's right clause which was signed by Yank, Lucas and others. The tentative agreement was ultimately adopted as part of the initial agreement and remains essentially intact (4.01). At the bargaining table, management explained that because the Employer was an emergency response organization, it had to have the flexibility to be able to do what was necessary with the restrictions negotiated being the only exceptions.

In Lucas' opinion, nothing in the agreed upon Employer rights clause, in 1982, restricted management's ability to schedule work. Lucas did not recall Yank, at any time in the negotiations, stating that, as long as they got the entire agreement language, he did not care if the management's rights clause went on for pages. The only thing she remembered Yank saying was that the balance between the two clauses would be if the Employer was to vary a past practice and that practice was of such substance as to require a 15% differential or some other similar drastic change, the parties would have to meet and confer if it had not been discussed at the bargaining table. More specifically, Lucas saw a number of prerequisites to bargaining under 16.01. There had to be 1) a practice that 2) was not discussed at the bargaining table or that the Employer was changing "drastically," 3) it would cause a diminution of employee monetary benefits and 4) it was within the scope of bargaining, under that situation, the Employer had to meet and confer. Lucas neither said she wanted to "load up" the management's rights clause nor said it was "cosmetic." In fact, management, including Lucas, was not exactly certain as to what the past practices had been. Management wanted to be able to change any such practices:

"...with the exception of heavy-duty, substantial or monetary changes [management] could not unilaterally change those past practices without bargaining." {7}

Stephenson, who was on the Employer's 1985 negotiating team, testified that someone other than Johnson wrote the second paragraph of 8.04. Further, when the four-day week was originally suggested to her, it was for the summer only. Once adopted and applied during NERP, field staff

management in the camps were somewhat surprised and, therefore, adjustments had to be made.

According to Stephenson, during the 1985 negotiations, the parties agreed to "pattern variations" to the continuous duty week. Thus, in certain circumstances, for example, employees could work Monday-Tuesday, Thursday-Friday with Wednesday off. The actual agreements on pattern variations are worked out locally between camp management and employees or the Union representative. {8}

Stephenson further testified that early in the 1985 negotiations, the Union took the position that it would not agree to anything that would allow the Employer to work employees on weekends. Roger Helm, for the Employer, stated, "We have done that and we will continue to do it" (T. 243). The Union then referred to the San Diego grievance wherein it thought the Employer committed not to do it. Stephenson said that that was not the case; the Employer was reserving the right to do it. The Union again said it would not agree to anything in the contract. Stephenson was relieved, in fact, that the Union did not put a formal proposal concerning the issue on the table. {9}

Stephenson remembered a side bar discussion out in the hall during the 1985 negotiations with Graham, Nichols, Johnson and Brown wherein Brown and Stephenson asked the Union representatives to go back to the bargaining table and clarify "on the record" the fact that there would be sufficient PYs to cover the four-day week. Stephenson and Brown wanted to be sure the record reflected a commitment by DPA to provide staff necessary to provide coverage determined by the Employer.

According to Stephenson, specific days of the week for the four-day week were never proposed. The Employer never said work days would not include weekend days. However, there was a substantial discussion of recruitment problems for FCBs, many of whom had opted for FCA schedules. The Union proposed the four-day week as well as an additional 10% in pay to solve the problem.

### **September and October, 1985**

On or about September 19, 1985 the Union held a Board meeting in Sacramento. Bark, Jones and Stephenson had been invited because labor and management representatives had met the day before to discuss problems with contract administration. Yank was also in attendance on September 19. Various subjects were discussed, including a NERP weekend problem in Region V.

According to transcribed notes taken in shorthand by the Union's secretary at the Board meeting, Graham raised the issue because he had heard that field staff managers would have the flexibility to require NERP weekend work assignments. Stephenson, who did not know that the Union's secretary was taking shorthand notes, responded that field staff management was told that they would have the flexibility to meet operational needs, but if it was abused in any way for any reason they could probably expect not to see a further contract allowing such flexibility. The notes show Graham stated that nothing was mentioned during negotiations about management having

the flexibility due to local needs. The Union felt, and it would continue to feel, that there was no way that it would let the Employer determine what their needs were when the previous NERP assignments had been Monday-Friday, 8-5 coverage. Stephenson responded that field staff management needed the flexibility because they did not expect to go to the four-day week in NERP and the Department of Finance was still refusing to add PYs. Graham stated that he understood the need for crew coverage during NERP assignments and the Union had never had a problem with that, but there was no reason to bring in Saturday and Sunday. The Union was willing to discuss crew coverage problems affecting Mondays or Fridays, but Saturdays and Sundays were out.

According to the notes, Stephenson, inter alia, stated that it was management's hope that the problems could be worked out "ahead of time." Yank stated that he had a hard time understanding how the parties negotiated from a five-day Monday-Friday work week to a four-day work week, at a time when no one mentioned weekends, and now the Employer discovered a need to have people working Saturday and Sunday when they are not working under the five-day work week. The Union team felt sandbagged.

Graham further testified that, on October 11, at State headquarters in Sacramento, he and Bob Togstad, then rank and file representative for Region 23, {10} saw Stephenson said she did not "know what the God damn deal is, they're not going to work weekends. It's not our intent to work people on weekends." (T. 129)

Thereafter, in late October, Graham received a call from Sheraton Swift, the Union's Director for Amador-El Dorado, advising that the Ranger Unit was going from ERP to NERP and that employees were going to be directed to cover engines on weekends. Graham was upset and called Stephenson who told him he would take care of it. Subsequently, Swift called back and said the problem had been taken care of.

Stephenson testified that, when Graham told her the Region V rumor, she stated that she was not going to worry about it until a decision had been made. {11} Later in the month, a second situation arose in which weekend work during NERP was contemplated at Amador-El Dorado. Nichols and Graham spoke to her, asking that she do something about it as it was a contract violation. She told them that she would get back to them. She then talked to the Director and, for internal political reasons, they chose not to work FCBs at the fire stations in question on weekends. Stephenson did not remember whether a grievance was filed in that case.

### **September, 1986**

It is the Union's evidence that, on September 9, 1986, Barrett, Nichols, Union representatives Ken Stone and Marvin Eaves met with State management representatives Hank Weston, Ranger-in-Charge of the camps, Jim Wagner, Gary Ross, Robin Marrs, from Labor Relations, and others. The NERP issue was discussed including, inter alia, the fact that the Union would take the problem to arbitration and what may be the remedies. Weston told Barrett that the State had made an error; i.e., the NERP issue just slipped by them during negotiations. The Union disagreed in

light of the bargaining history, but said it had cooperated and suggested alternatives that would mitigate management's overtime costs. { 12 }

Graham testified that Weston stated that weekend work was needed because the Employer had not submitted appropriate budget change proposals to obtain PYs that were discussed during bargaining. Eaves testified that Weston said that the Employer had not done its homework when it asked for PYs, but no one was going to the Department of Finance and say that management screwed up.

Stephenson testified that, at the meeting, she said that the Department of Finance was getting "squirrely" and questioned the need for 13 additional PYs. However, it was Stephenson's opinion that 13 additional PYs would not have provided sufficient coverage to match the Union's position in this case because the State would need 90 additional PYs, not 13; i.e., 45 camps times 2 PYs.

Marrs testified that he did not recall Weston saying that the Employer screwed up in bargaining and did not get sufficient PYs.

Weston did not testify at the hearing. However, Stephenson talked to Weston and Marrs about the September 9 meeting. Although Weston is neither in Labor Relations nor was a member of the negotiating team, he told Stephenson that he supported the Employer's contention that camp employees can be required to work weekends as part of their regular shift without overtime. Weston also told Stephenson that the issue of PYs was discussed at the meeting.

## **NERP Weekend Work History**

### **(a) Testimonial Evidence.**

Duane Gaddy, presently at Los Robles (Cuesta), has been an FCB for six years supervising YA wards. He previously worked at Parlin Fork CC (1976-1977) and Antelope CC (1982) before transferring to Cuesta in 1984. Gaddy testified that prior to 1985, the NERP work week was Monday-Friday at all these camps. Although Rico was the first FCB assigned a regular weekend shift at Los Robles, Gaddy was first assigned regular weekends in April, 1985 (UX 5). Between March 9 and April 5, 1987, he was assigned weekend shifts on the four weekends with Tuesday-Wednesday-Thursday off. He was the only FCB on duty those weekend days (UX 6). Between February 9 and March 8, FCB Richardson had the shift and between January 12 and February 8, FCB Clark had the shift.

Sam Mendenhall is an FCA at Squaw Valley Station, a Schedule B location. Mendenhall testified that all Schedule B employees that he has known, or has talked to, worked a Monday-Friday shift. Since July 1, 1985, this has not changed; i.e., no one has been assigned a regular NERP weekend shift. If, in the past, he was called in to work a weekend day, he would receive extra compensation. Mendenhall also checked the pay vouchers of Renny Leroy at Miramonte CC from October, 1981 through December, 1985. Leroy was never regularly assigned Saturday or Sunday work during NERP.

Johnson testified that he takes a morning status report at the St. Helena ECC which shows the availability of all personnel in the unit. According to Johnson, no one works a regular weekend NERP shift.

Vince Eddinger, an FCA at the St. Helena ECC, described how morning status reports are taken over the radio. St. Helena ECC is on year round ERP status. However, no status reports are taken during NERP weekends because "there's nobody there." The same is true of Konocti CC.

William Shirey, an FCB at Pine Grove CC ("PG")<sup>{13}</sup> has been with the Employer since 1956 and has worked his way up through the ranks.

According to Shirey, prior to 1985, no one worked regular scheduled NERP weekends at PG.

Graham testified that there are two Corrections camps in the Tuolumne Ranger Unit -- Vallecito and Baseline and one YA camp (DeWitt Nelson). According to Graham, prior to the new contract, every employee at the camps worked a Monday-Friday shift with weekends off. After the four-day week took effect, employees worked Monday-Thursday or Tuesday-Friday. Further, since there are no beds at DeWitt Nelson, FCBs even have ERP weekends off.

Barrett, who succeeded Graham as State Rank and File Representative in December, 1985, is an FCA at Sunol Station in the Santa Clara Ranger Unit. It was his understanding, after spending most of his 15 year career working Schedule B, that prior to July 1, 1985, Schedule B employees worked Monday-Friday NERP schedules.

Barrett was involved in negotiating six limited term alternate shift pattern agreements at Antelope Camp in Region II. The State had a crew coverage obligation problem on Mondays and Fridays during NERP due to the institution of the four-day week. The local agreements provided that, upon mutual agreement, there could be alternate shift patterns; e.g., Monday-Tuesday, Thursday-Friday with Wednesday off. Barrett knew the State needed additional PYs to take care of the problem, but the legislature was not in session. He thought this Band-Aid approach constituted a reasonable solution which also gave the State time to fix the problem.

Robert Linn, State Forest Ranger-in charge of Oak Glenn YA Camp, testified that the camp has a 2.2 mile access road which must be plowed in the winter. During NERP, depending on the weather, plowing must also be done on Saturdays and Sundays and, therefore, at least three FCBs must be on duty. A great amount of the plowing work is done after the 10-hour day period. Weekend work has been going on since 1985 (T. 290).

Additionally, FCBs must supervise 7 fire crews with 12-17 wards on each crew when working "on the grade", outside the camp.<sup>{14}</sup> Linn must assign FCBs regular weekend work so they would not have to be called back from home. All have families and live outside the camp. For example, in January, 1984, two FCBs worked full weekends, three worked Saturdays or Sundays, but all

received extra compensation. In January, 1985, because of an informal agreement to work partial weekends, FCBs worked 12 Saturdays and 9 Sundays, but no full weekends, and were paid straight time (UX 21).

In February, 1985, after YA received approval to go to 7-day work weeks, the camp hired 7 new FCBs for a total of 13. When the 1985 ERP season ended, the camp nevertheless stayed on the regular ERP schedule. Linn asked if anyone had any problems with doing so. Most said they would just as soon keep their regular days off.

However, as far as having an official meet and confer session with the original 6 FCBs -- it did not happen:

"It was an around the coffee table discussion if anybody had problems." (T. 293) Linn felt he could order regular weekend work shifts. To Linn, Saturday and Sunday are just another day. However, he does need to schedule overtime for vacations, holidays, sick leave, training sessions, etc.

Randolph Munoz, an FCB in Oak Glenn for over three years, testified that the expansion from 60 to 130 was in 1984, not 1985. According to Munoz, Union representative Eaves was at a meeting around the coffee table where extra crew coverage needs because of the YA security problem was discussed and agreed upon. However, this was not a "meet and confer" meeting, just an informal discussion. Munoz agreed with Linn about work schedules; i.e., at Oak Glenn, crews work the same NERP and ERP.

Robert McDonald, Camp Superintendent at Washington Ridge, a YA camp, testified that Washington Ridge is a hundred man camp with five crews. Prior to 1985, no one at Washington Ridge worked Saturdays and Sundays. However, since the start of the four-day week, he has worked two FCBs on regular weekend shifts. When employees work the five-day week prior to the current Agreement, an FCB supervised a crew consisting of an HFEO and wards on Saturdays doing equipment maintenance. This has not changed; i.e., an FCB is assigned to supervise "swampers" and an HFEO. However, crews do not work regularly on grade on Saturdays.

David B. LeMay, State Forest Ranger II in the Tehama-Glenn Ranger Unit, testified that he has worked for the Employer for about eleven years. He was an FCA from 1977 through 1979 and was regularly scheduled on NERP weekends at the Cambira Forest Fire Station in the San Luis Obispo Ranger Unit. He provided either station coverage, fire prevention activities either in parades or at fairs, filling out burning permits or doing other project work at the station. The burning permits were issued four to six times per year and he would fill the permits out on Saturday and Sunday at the beginning of the two-week open burning periods. He received straight time pay for the NERP weekend work. Further, when he was a Forest Ranger I at San Luis Obispo, he worked FCAs on the same type of schedule that he had previously worked.

Over the last year at Tehama-Glenn, FCAs covered weekend work at the station. When weekend work was needed, volunteers were usually requested. If there were no volunteers, he would assign someone to do the work.

According to LeMay, it was his understanding that over the last year or so FCBs worked either NERP Saturdays or Sundays at Cuesta CC in San Luis Obispo and at the camps in Tehama-Glenn supervising maintenance and vehicle repair. Also, at the Ishi CC, individuals worked weekends in order to cover Mondays and Fridays to have people available over the weekend for vehicle repairs.

LeMay was aware of the fact that the Union has grieved the issue of whether or not the Employer can work people on NERP weekends. However, LeMay did not believe that that grievance was part of the instant matter. Further, at Ishi, LeMay knew that there was a local agreement with the Union that allowed certain weekend work. The agreement took effect in 1986.

Marrs testified that he double checked with John Knight, formerly an FC at Eel River CC, to see if he had worked weekends while an FC. Knight told Marrs that he had worked weekends because the Camp Ranger had announced that it was necessary to provide some weekend coverage. Knight said that he had agreed to work weekends and that he had no problem with it. Further, Knight told Marrs that the ranger was quite candid in saying that somebody would have been assigned to do it or they would have been on a rotating schedule if there were no volunteers.

Marrs further testified that, in preparation for the arbitration, he had looked at a lot of Employer records and found that there was a general practice throughout the state that HFEOs were scheduled for, usually, Tuesday-Saturday shifts or Wednesday-Saturday shifts. This has been for maintenance purposes; e.g., the buses are in camp on the weekends and the HFEOs are responsible for maintaining those buses.

Additionally, Marrs reviewed the records for FCBs. He testified that he found "some" evidence of weekend work. For example, although FCBs did not work Saturdays and Sundays during NERP, he found six FCBs who, in early 1984, worked various schedules, including Saturday regular shifts at Calaveras Fire Center.<sup>{15}</sup> However, Marrs did not know the circumstances; e.g., whether employees had requested weekdays off from EMT training.

Eaves, recalled as a rebuttal witness, testified that he told Linn how the Union felt about the weekend work problem. Linn said he would write to Nichols and tell him the weekend work problem at Oak Glenn would be done on a trial basis and he wanted Union support. However, prior to that time, no one worked a regular shift on NERP weekends. It was at the end of ERP in 1984 when Linn proposed the trial period; i.e., this was prior to Section 8.04, (2) of the current contract taking effect.

**(b) Grievances, Grievance Settlements, and Other Written Evidence.**

It is the Union's evidence that in late September, 1986, Barrett and Nichols met with Stephenson and Bark in Bark's office. The Union was talking about taking the matter to arbitration because Stephenson had informed them that the Employer had no intention of going after additional PYs or overtime funding. She said her only option was to work employees on a continuous four-day week during weekends.

Thereafter, on December 12, Charles Martin, an FC at DeWitt Nelson CC, filed a grievance alleging he was required to work weekends during NERP which violated Section 16.01. On January 29, 1987, Partain, in a Third level response, discussed the grievance and, **inter alia**, advised Martin that:

"Most [FCBs] have worked a five-day NERP duty week exclusive of weekends." {16}

Pursuant to subpoena, Barrett obtained and summarized (UX 21) time slip data from the months of January, 1984 and January, 1985 for employees in Region I, old V and VI. The data indicated that of the 1,047 employees in one summary, a total of 8,376 weekend days, of which 123 Saturdays were worked, 81 Sundays were worked, and 11 full weekends were worked. {17} Of these days, 70 weekend days were worked at straight time and 156 weekend days were paid at overtime rates. According to Barrett's calculations, in only one case (San Diego) did anyone work a full weekend without some type of overtime compensation. {18}

Nichols testified that, in 1982, the Union was going to file an unfair labor practice charge against the Employer because management, in the Mendocino County Region, was going to change schedules to assign employees regular weekend shifts to facilitate vegetation management burns during NERP. However, the unfair labor practice was not filed because the Employer agreed to meet prior to its filing. Thereafter, on January 12, 1983, a settlement of the problem was reached {19} wherein it was agreed, **inter alia**, that:

"In settlement of the [Union] Mendocino unfair labor practice charge against the [Employer], the parties have met and conferred and have agreed to the following policy.

If the Chaparral Management Program (CMP) requires work shift changes during non- fire mission, these guidelines shall apply:

2. Managers and supervisors shall seek to staff projects with qualified volunteers; when there are not enough volunteers available, employees will be selected and assigned to the prescribed CMP project by management...
3. Overtime will be authorized for CMP projects scheduled on the employees' regularly scheduled days off (normally Saturday and Sunday) after completion of the normal forty-hour week..."

Nichols, Johnson, Eddinger, Lucas and others executed the agreement. Nichols also testified that in 1983 and 1984, the parties negotiated the constant rate of pay. In 1984, the Employer issued a directive stating that employees would continue the 72-hour week during NERP. The Union filed for immediate arbitration asserting that the Employer was making a substantial change and violating past practice in violation of 16.01. A settlement was reached on or about October 26 wherein the Employer agreed to return affected employees in NERP areas to a 40-hour week "in the same manner as in years past." Stephenson's letter to Nichols also, inter alia, stated:

"[Employer] will do so while still reserving all legal contentions it has in regard to your grievance and in regard to future negotiations. [Union] reserves its contentions as to the grievance and in the upcoming negotiations... Nothing in this agreement shall preclude the [Employer] from invoking Section 8.01..." (UX 11)

Subsequently, a dispute arose over pay for employees affected by that settlement. Thus, on April 11, 1985, Barrett filed a grievance on behalf of Schedule B employees in Region V. On or about October 11, a settlement, with Bark's approval, was reached wherein it was agreed that, in Regions I, II, IV and V, employees ordered to remain on NERP on a 72-hour duty week instead of the 40-hour duty week were appropriately compensated with either overtime or CTO. (UX 12){20}

Dennis O'Brien, an FCA at the San Marcos Fire Station in the San Diego Ranger Unit, testified that, in March, 1984, 20 to 24 employees were assigned regular shifts on weekends during NERP. On March 1, a grievance was filed alleging that the Employer had unilaterally changed the normal work schedule for employees to avoid compensating for overtime in violation of 16.01. On that same day, Nichols wrote Bark and Andrews advising of the Union's request for immediate arbitration.

On June 4, Partain sent a Third level response to Nichols wherein he confirmed that, in a meeting between representatives of the parties on May 17, it was agreed:

"...that because the union did not have an opportunity to meet regarding this issue, overtime compensation (CTO) would be credited to those employees whose work schedules were changed from Monday through Friday.

In addition, the [Employer's] intent was, and continues to be, to notify you in advance of proposed changes which have substantial impact and provide an opportunity to discuss these proposed changes with you or your representative..." (Emphasis in original){21} On June 13, Nichols wrote Partain to advise that, although the Union was happy to reach agreement, it did:

"Not agree with whatever understanding or understandings management has of the agreement the parties reached regarding the Entire Agreement section of the contract. Much more than "a meeting" or "notice" is required if a change in work schedules is even

arguably to be legal. Furthermore, the only impact required on bargaining unit members or on [Union] because of the bargaining history of the word "substantial," is that which is not "de minimus."

In November, 1985, a NERP crew coverage problem arose at the Vallecito CC. On November 19, Camp Superintendent Daniel Lang wrote Calaveras Chapter Rank and File Representative Leonard Shepherd to discuss the recently approved four-day week NERP schedules. Lang, *inter alia*, advised Shepherd that:

"Section 8.02.4 does not allow for any alternative scheduling pattern during the NERP. This situation is causing problems for both employees and managers, as I will explain.

Although [FCs] in [CCs] only work four days per week, camp crews must be covered five days per week, Monday-Friday, as required by [Employer's] interagency agreement with CDC.

Traditionally [Employer] employees in [CCs] have not worked on weekends during the NERP because there is no demand for fire crew coverage during the NERP..." (UX 14)  
Lang went on to explain the particular problems he believed he was going to encounter.

Thereafter, on December 10, he added an addendum to his November 19 letter which made it clear that he was addressing only Vallecito and it was not his "intention to establish and precedent" for use of these shift patterns in any other unit without prior consent of the Union.

On December 29, the Union advised Lang that it approved the alternate shift pattern until ERP began in 1986. Lang was further advised that the Union felt that the "root problem is inadequate PYs to staff for an approved NERP duty week as defined in MOU Section 8.02 #4." A copy of the Union's letter was sent to Stephenson, among others.

On October 14, 1986, Joseph Keating, State Department Director for Management Services, issued a notice to all State Regional chiefs. Keating summarized the results of a September meeting with Union officials in which those officials advised that they would no longer approve alternate NERP shift patterns, even though they may be acceptable to employees. According to Keating, the Union believed its decision would mean that the State must get permission to either add staff or pay overtime.

After seeing Keating's notice, on November 4, Barrett, with a copy to the Director of DPA, sent out a memo to the Union Board, all Chapters and camps, concerning alternate shift pattern agreements. The memo discussed the problem in general; that the side (local) agreements were reached; that such side agreements would continue to be approved if (1) the agreement was non-precedential and not entered into to reduce management's obligations and (2) all employees affected must agree in writing that the agreement would not adversely affect any other employee;

that, on September 9, the parties had met to discuss the issue; that he advised management the Union would no longer okay the local agreements due to management's failure to get the PYs needed; that alternatives were discussed; e.g., paying overtime or switching individuals to ERP status during NERP pursuant to 8.04(3); that the Employer's October 14 notice demonstrated its intent not to honor its commitment; that the Employer preferred a contest in arbitration between 4.01 and 16.01"; and, that:

"The NERP weekend issue is pending arbitration as a result of a class action grievance filed on behalf of employees at Los Robles Camp. Hopefully, it will go to arbitration soon. The issue now, of course, goes far beyond the camp program and impacts all rank and file employees."

It is the State's evidence that, through job postings and job descriptions, FCBs and all other Department employees are on notice that weekend work is a requirement of the job. Lucas testified that the Mendocino settlement of the unfair labor practice charge the Union file, after also filing a grievance, was reached only after management got word from a PERB attorney that the Union had made a **prima facie** case. The Employer also received an unofficial message that the matter had to be negotiated. According to Lucas, the settlement was to have no precedential value in any other way (T. 223). At no time did Lucas ever say that weekend scheduling should not have been done.

Additionally, although he did not know where it was prepared, Linn discussed the hypothetical 100-person camp, on a NERP schedule, with five crews with no FCBs working weekends (EX 10) and with FCBs working weekends (EX 11). Each example shows 10 FCBs. When no FCBs work a weekend schedule, it is clear that the total number of FCBs on duty each day are 10 on Tuesday, Wednesday and Thursday, but only 5 on Monday and Friday. However, with weekend work, a camp can schedule 6 FCBs on Monday and Friday, 8 on Tuesday, Wednesday and Thursday and 2 on Saturday and Sunday to provide the necessary work coverage. Also, the latter schedule means there is increased overtime opportunities for FCBs on Mondays and Fridays.

The April, 1987 Oak Glenn work schedule (EX 12) demonstrates that 8 FCBs work Tuesdays, Wednesdays and Thursdays throughout the month; 5 FCBs work Fridays and Mondays and 4 FCBs work Saturdays and Sundays. However, none of the FCBs worked a full NERP weekend with Tuesday, Wednesday, and Thursday off.

**POSITION OF UNION** The state-wide grievance should be sustained. Section 16.01 clearly encompasses past practices which the State has no right to unilaterally change. Further, Section 16.01 clearly carves out an exception to the rights management has retained in Section 4.01.

Bargaining history presented by Yank on the 1985 negotiations has not been contradicted. Also, UX 25, the 1982 bargaining session notes, at pages 3 and 14 prove Lucas understood the Union was accepting the management rights clause in light of what is now 16.01 (Maintenance of

Benefits). However, the Union acknowledges that, from 16.01, it agreed to exclude **de minimus** changes "such as the color of toilet paper or fire engines." At page 20, Yank makes it absolutely clear to Lucas and she agreed -- a benefit not part of the total compensation package can be changed after meet and confer, but, for cost items, the Employer could not change without obtaining consent of the Union. Additionally, in light of 16.01 and Bark's side letter in the 1985 negotiations, there was absolutely no need for the Union to make additional proposals limiting weekend work.

Overtime is, of course, a cost item. Given the four-day week, the Employer is trying to save costs by scheduling regular shifts Friday through Monday due to the need for Monday and Friday crew coverage. (See, EX 11 and 12) While perhaps understandable, the fact is that they cannot do it without violating 16.01. The Employer has the option of paying overtime or putting some employees on ERP status during NERP. In the latter case, there would be some extra cost, but it would be less than paying overtime rates.

There can be no question as to the existence of a longstanding past practice. Gaddy (Los Robles), Mendenhall, Graham, Nichols, O'Brien, Eddinger and Shirley testified that they knew of no NERP weekend work as part of a regular shift.

For the North Coast Region, UX 3 demonstrates weekend work was either compensated at overtime or was done voluntarily. Further, UX 19, compiled by Barrett from around the state, shows that, with the exception of two employees at Eel River who worked either a Saturday or Sunday (but not both), all employees received overtime if they worked on weekends. UX 21, covering over one-half the state, shows, with one exception, that weekend work was paid at overtime rates. If you include those who volunteered, you still have less than one percent working weekends over the survey's two-year period.

Marrs testified that HFEOs, in certain locations, work weekends. He also found six employees at the Calaveras Fire Center who worked NERP weekends. However, even those employees worked Saturdays -- not Saturday and Sunday.

Additionally, the Employer settled a number of prior problems on this issue. The Mendocino case, UX 9 and 10, covers vegetation burns in 1982. The Employer backed off its effort to work employees weekends on regular shifts during NERP.

The Employer also backed off in the San Diego (UX 13) case. Further, Stephenson admitted the State, through Partain, backed off in the Amador-El Dorado case. Whether it was for political reasons is irrelevant. Additionally, Stephenson admitted the Union's position in the 1985 negotiations was that it would not sign an agreement requiring weekend work.

Employer representatives have also made a number of admissions against interest in this issue -- see, UX 14 (traditionally [Union] employees in [CCs] have not worked on weekends during

NERP because there is no need for fire crew coverage during NERP). See also, Partain's January 29, 1987 letter stating that FCBs did not work NERP weekends.

The bottom line in this dispute is that the Employer miscalculated PYS needed for Monday and Friday NERP coverage. In September, 1985, Stephenson admitted it. In September, 1986, Weston admitted someone did not do their homework.

Apparently, the State believes there are two exceptions in the record; i.e., Oak Glenn and Washington Ridge. At Oak Glenn, for the first time, they decided to run crews seven days a week. This had never been done before. This action violates 8.04 because this is, basically, the ERP schedule. Admittedly, the Union rep and employees agreed to it locally and no grievance was filed.

Washington Ridge is an example of the basic problem in the case. In NERP, FCBs were assigned Friday through Monday regular shifts. However, this is after the 1985 contract. The Union's entire case relies on the pre-1985 past practice.

Finally, this is a state-wide case. It is not limited to San Luis Obispo/Los Robles. The Union filed for immediate arbitration because employees were losing their weekends. Both parties, as UX 15 and UX 16 demonstrate, treated the case as a state-wide issue. In fact, in UX 15, it is clear that the Employer has not limited the issue to camps. They want to work employees on weekends without extra compensation throughout the State.

The State has put on little evidence showing that FCBs were ordered to work on NERP weekends. No evidence was introduced showing FCBs were ordered to work Saturday and Sunday.

Once the Arbitrator finds there was a past practice, the remedy must be to pay FCBs three days at one and a half times for Saturday and Sunday work. If, however, only one weekend NERP day was worked, time and a half is due for that day.

### **POSITION OF STATE**

The grievance, which only concerns Los Robles, should be denied. Separate and apart from the fact that Section 4.01 clearly and unambiguously allows the State to work FCBs on weekends, the evidence demonstrates no past practice exists. Further, 4.01 must prevail over 16.01 since both parties knew, or should have known, that there was a possibility of working employees at least one weekend day. In fact, UX 21 demonstrates that there were 70 instances where employees worked either a Saturday or Sunday.

Any number of FCBs have worked regularly scheduled weekend days over the years during NERP. Given the clear and unambiguous language of Sections 4.01 and 8, bargaining history is irrelevant. The State put on its past practice evidence merely to counter the Union's inaccurate

assertions regarding 16.01 practices.

With the transition to the four-day week, the State had to expand crew coverage in the YA camps, for maintenance purposes and to increase Monday, Friday coverage. These are legitimate business needs which the Union has not contradicted.

Moreover, in the 1985 negotiations, when the Union took the position that it would not agree to a contract allowing the State to work employees on regular weekend shifts, the burden was on the Union to bargain such language into the contract. This is because the contract clearly calls for four continuous days work. There is neither a mention of which continuous days nor an exclusion of weekend days. The bottom line is that the Union failed to protect its position at the bargaining table.

Working FCBs regular NERP weekend shifts does not diminish an economic benefit. The record demonstrates that most scheduled overtime is Monday through Friday. Thus, overtime opportunities are increased for FCBs working a Friday-Monday shift because Monday and Friday often require overtime in the camps when there is otherwise minimum coverage.

For example, at Oak Glenn, although employees were given the opportunity to work it out among themselves, Linn would have ordered weekend work if there were no volunteers. This is in keeping with management's practice to try to work things out voluntarily when legitimate operational needs require it. However, management has the right to assign weekend work if it could not be worked out locally.

## OPINION

### **Preliminary Matters**

**1. Issue and Scope of Arbitration** Without question, it was unfortunate that the hearing could not be finalized until the NERP season was almost over. Both parties realize this is an immediate arbitration case pursuant to the provisions of Section 6.15. Clearly, the Union's grievance documents state that on their face and Stephenson acknowledges that Bark recognized it was an immediate arbitration case.

The Arbitrator agrees that the problem had reached the boiling point in 1986. However, any neutral reading of the entire grievance packet (UX 1) demonstrates the grievance was processed as one affecting all FCBs at Los Robles CC. The Union presents no evidence to support a finding that 6.15 (immediate arbitration) filings, per se, mean all affected bargaining unit employees throughout the state are covered by the grievance.

Obviously, this was the Union's test case. However, it was some six months after the grievance was filed, and Keating's notice was reviewed, that Barrett advised his membership that the problem was greater than the pending Los Robles CC arbitration. Finally, the Union argues that,

in fact, the State failed to even mention the scope of the grievance in its closing arguments. Presumably, this implies it conceded it was a state-wide case. The Arbitrator cannot agree. Throughout the hearing, the State took steps to insure that the Arbitrator understood that, even when it did not object to the admission of certain Union evidence, it was understood that it was not conceding the grievance reached outside of Los Robles CC. Although the impact of the decision is clear, in the absence of more persuasive evidence, the Arbitrator must find that the State has not agreed to arbitrate the dispute as broadly as the Union sees it. See, *AT&T v CWA* 106 S. Ct. 1415, 121LRRM3329 (1986).

To resolve the issue on the merits, the relevant evidence is that from Los Robles and the other camps throughout the state. Evidence relating to alleged past practices at stations or concerning FCAs and/or HFEOs, is of little moment. Further, evidence as to what any Ranger or Camp Superintendent "believed or felt" he had the right to do in this area, in the absence of that right being covered by the Agreement or State directive, is not helpful on the past practice issue. The question is what course of conduct did they follow prior to the 1985 Agreement; i.e., were FCBs required to work regular (straight time) NERP full weekend schedules.

Accordingly, if the Union seeks to raise the issue for classifications other than FCBs, it must do so by establishing the merits of its case on the basis of another record assuming, of course, the parties do not address this entire matter at the bargaining table.

## 2. General Rules

As the State recognizes, the Arbitrator's first responsibility is to determine if the language in dispute is clear and unambiguous. If so, he must give the words their plain meaning without regard to extrinsic evidence such as bargaining history<sup>{22}</sup> or custom and practice,<sup>{23}</sup> unless the practice supports a finding that clear language has been amended by mutual action or agreement.

However, if the contract is silent, or if disputed language is found to be unclear or ambiguous, extrinsic evidence may be used to help determine the intent of the parties. Thus, in the face of ambiguous or non-existent language, the parties' custom and practice and bargaining history may be relied upon to resolve the particular dispute.

In contract interpretation cases, the moving party, here, the Union, bears the burden to prove, by clear and convincing evidence, that its position is correct. Similarly, the party asserting the existence of a past practice bears the burden to prove, by clear and convincing evidence, the other party's acquiescence to that practice. While arbitrators use varying definitions for past practice, it is well established that a past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and, (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.<sup>{24}</sup>

3. **Bark's Absence** Bark did not testify at the proceeding despite the length of time between the

first hearing day, when Yank testified as to his dealings with Bark, and the second hearing date. This, coupled with the fact that the State did not seek to see the side letter of understanding Yank testified Bark wrote on 16.01 leaves the Union's position entirely unrebutted. Clearly, 16.01 was reached just as Yank described the scenario.

## **Merits**

### **Sections 4.01, 8 and 16.01**

Without question, the State's view of 4.01 is essentially correct; i.e., 4.01 is clear and unambiguous. Thus, 1982 bargaining table discussions on 4.01 between Lucas, Yank and others are of little moment in the resolution of this dispute. Among other things, the Union has clearly agreed that the State can establish and change work schedules, assignments and "alter, discontinue or vary past practices" and otherwise take such measures as it may determine to be necessary for its orderly, efficient and economical operation.

Similarly, in 4.01, given Section 8's silence on the question of which continuous days of the week an FCB can be assigned to work during a four-day NERP week, the State has reserved the right to make the determination. Thus, the rights at issue in this case are, generally, fundamental management rights which, unless bargained away, remain with the Employer. Consequently, it is not difficult to understand why the State has held to its position.

However, equally clear and unambiguous, as Kelly also found, is the phrase "[Except as expressly abridged by any provision of this Agreement..." Here, the Union asserts 16/01 as the exception to 4.01. Thus, the case turns on an analysis of 16.01's applicability to the instant dispute. If it is not applicable, the clear language of 4.01 governs the matter.

As noted, NERP regular shift days are not specified in the Agreement for FCBs. For a substantial period of time prior to the 1985 negotiations, both parties, at their own peril, held to their positions on this issue. During the negotiations, however, the matter was not raised; i.e., both parties merely restated their positions on the issue. This is so even though there were extensive negotiations on the basic four-day week question. But, on the issue of which days would be worked, the Union stated it would not agree to any contract that required weekend work. The State, through Helm, stated it had the right to work employees on weekends. The parties moved to other contract issues. In fact, Stephenson was glad the Union did not make a formal proposal on the matter in dispute.

From this incident, the State argues that the burden was on the Union to negotiate the change at issue. The Arbitrator cannot agree. It is well settled that a party withdrawing a formal proposal at the bargaining table with a statement to the effect that it would stand firm on its position that the right covered by the proposal exists even without the proposed language, has not admitted that the right did not exist. {25}

Similarly, the mere assertion of a party of its long standing position on an issue at the bargaining

table, without some substantive discussions and/or bargaining, does not constitute a matter raised in negotiations within the meaning of the phrase in 16.01.

Section 16.01 presents another precondition to bargaining changes which are not covered by the Agreement. Other matters (i.e., those neither in the Agreement nor raised at the table) must be within the scope of representation. There is no real dispute over this phrase. It is the SEERA reference. At issue in this dispute is the basic question of whether an employee can be required to take a Friday through Monday NERP weekend assignment meaning weekends are paid at straight time when, according to the Union's assertion, NERP weekends were overtime days.

In Corrections, separate and apart from the differences in the bargaining units, Kelly correctly found that:

"It is undisputed that the topic of correctional counselors work shifts is within the scope of representation. The Employer is subject to SEERA... Government Code Section 3516, which is a portion of that Act, defines the scope of representation and provides, in part, that representation shall be limited to wages, hours, and other terms and condition of employment. Clearly, changes in work shifts are embraced by this definition..." Kelly, p. 15

Changes in days of the week one works which affect overtime compensation, like changes in the hours of shifts, are within the scope of representation.

The last paragraph of 16.01(2) provides that, unless otherwise covered in the Agreement:

"or changed by mutual agreement, there shall be no diminution in existing wage rates and substantial monetary employee benefits..." (Emphasis added)

This clause raises two critical issues: (1) was there a change and (2) if so, was it substantial.

### **Past Practice**

The First question involves the past practice evidence on weekend work. The State does not dispute the general fact that FCBs worked Monday through Friday NERP weeks prior to the current contract. More specifically, the Arbitrator credits Marrs' testimony on his review of all of the available time sheets between 1983 and 1985 for the October-March NERP fire season from Regions I, V, and, at that time, VI. {26} These regions represented over half the time sheets in the State. Marrs found no FCB assigned to a regular (straight-time) shift which included both Saturdays and Sundays. Clearly, the State knew, or should have known, that FCBs had not worked NERP Saturdays and Sundays prior to the 1985 Agreement. {27}

Neither Oak Glenn nor Washington Ridge serve as evidence to vary this finding. At Oak Glenn, Linn knew ERO status was required to continue, even though the camp went into NERP status.

Whether or not this, in itself, is a violation of Section 8,{28} is of little moment. The fact is that eaves and the others, literally sitting around the coffee pot, volunteered to continue to work as if they were on ERP status in order to keep their regular days off. Although Linn felt he had the authority to order it, FCBs at Oak Glenn were never required to do it. In fact, requiring FCBs to work never even crossed his mind (T. 293). As to plowing the 2.2 mile access road, Linn's testimony is internally inconsistent. He testified that FCBs must be on duty on the weekend to plow the road, but, when asked how long FCBs have been working NERP weekends, he said that work began in this Camp in 1985. {29} Either FCBs were paid some form of overtime prior to 1985 or they were not working.

However, Oak Glenn raises an issue relating to problems of proof which, in fact, returns to a problem Lucas faced in the 1982 negotiations. Who knows what has gone on through local side-bar agreements in some 300 station and camp locations. Unit 8 is not a large plant in an urban, suburban or rural area or even a group of plants in a metropolitan area.

As noted, the Union carries the burden to demonstrate the Employer's acquiescence to the practice. How can Linn take an action, not covered by the Agreement or Employer rules without informing anyone above him, which action may bind the State to a course of conduct which establishes or terminates a past practice. Although he can be considered an agent of the Employer, the reality of this widely dispersed bargaining unit must be recognized. Thus, even if Linn required the Friday through Monday NERP straight time work, in the absence of cogent record evidence demonstrating that Linn, orally or in writing, alerted others in the Region and/or Headquarters in Sacramento, the Oak Glenn evidence would neither add to nor subtract from an attempt by either side to prove that the other acquiesced in a past practice. Simply put, it would be unreasonable to find that arrangements made at a camp site while sitting around the coffee pot, which no one else finds out about for months or years, is helpful in the resolution of a past practice dispute. {30}

Superintendent McDonald acknowledged that, at Washington Ridge, no one worked a regular NERP Saturday and Sunday assignment prior to 1985. Further, LeMay's testimony about Saturday and Sunday work at Cambria Station is irrelevant. The issue here is Friday through Monday required assignments in camps. FCB weekend work at Cuesta and Ishi did not take place until after the four-day week went into effect. Thus, they are in the same category as the Washington Ridge evidence. Similarly, in the absence of anyone present at the hearing knowing the circumstances of the one exception (San Diego) the Union found in its survey (UX 21), the Arbitrator finds no reason to rely on it. Was this straight time weekend worked voluntarily or was it regularly assigned and directed by management? The weight of evidence leads to a presumption that it was voluntarily worked in light of the other consistent practices during the NERP five-day work weekdays prior to the 1985 contract.

In sum, the Arbitrator finds and concludes there was a consistent course of conduct followed by the parties for numerous years which survived bargaining in 1982, 1983, 1984 and 1985. FCBs did not work NERP Saturdays and Sundays at straight time as part of a required, regularly

assigned work week. On February 10, 1986, the State unilaterally changed that consistent past practice by assigning Rico a Friday through Monday regularly scheduled shift at straight time.

**Substantial** The final 16.01(2) issue is whether such a change was "substantial." Use of adjectives such as "substantial" and "significant" {31} in a labor contract, unless patently obvious under the facts, when it comes to application and interpretation, differs with the eye of the beholder. Kelly, by implication, found changes for correctional counselors at 10 facilities within the definition because it "arguably" affected all of them. While this record is imprecise on the exact number of FCBs working during NERP, and this is the Los Robles test case, one can presume there are more FCBs in 45 locations than correctional counselors in 10 locations.

However, the Arbitrator finds words such as "substantial" carry latent ambiguities and, therefore, bargaining history is an important guide in determining the intent of the parties. As previously noted, Yank's testimony is unrebutted. Thus, Section 16.01(2) must be read in light of Bark's assurances that it would mean the same thing as the prior contract language. Here again, Yank's testimony as to the earlier bargaining history discussions on **Ford Motor Company and de minimus** are substantiated by the testimony and notes from those negotiations. Accordingly, unilaterally changing the past practice not only had a substantial impact on matters within the scope of representation, but also was diminution of substantial monetary benefits since FCBs, even if only Los Robles is used, assigned Friday through Monday shifts lost overtime compensation. Any of the FCBs could have been assigned the straight time weekend shift and, as the evidence shows, more than a de minimus number were during the 1985-1986 and 1986-1987 NERP seasons. The State's argument that FCBs working Monday and Friday could have had enhanced overtime opportunities is unpersuasive when compared to the actual loss of overtime over an entire weekend.

Throughout the presentation of the hearing, it was clear that the State's strongest argument concerned its legitimate business necessity. It has to provide crew coverage to YA wards and Corrections inmates under its contractual obligations with those agencies. The Union, not just the State, was aware of that fact.

However, this argument is also fatally defective for nothing in 16.01 as currently written (JX 1) or as previously written (JX 2, pp. 41-42) add this limitation. In fact, it is the Corrections contract, not the Unit 8 contracts, which, **inter alia**, provided:

"...If the employer deems it necessary to effect changes that have substantial impact upon matters within the scope of representation...it will meet and confer in good faith prior to making such changes, **unless there is a legitimate business necessity.**" (Emphasis added)

It is black letter arbitral law that an arbitrator cannot rewrite a labor contract. Thus, no such limitation shall, even by implication, be included in 16.01 of JX 2 which the Arbitrator finds is the controlling clause in this dispute. Simply put, if the State seeks to include the legitimate business

necessity limitation, it must bargain it. {32}

**Remedy** On and after February 10, 1986, through and including the last NERP day in the 1986-1987 season at Los Robles, any FCB required {33} to work a Friday through Monday NERP assignment shall be made whole for lost overtime earnings on Saturday and Sunday. Payment shall be calculated in accordance with the applicable provisions of Section 8 of the current agreement. {34}

The State shall cease and desist from requiring FCBs to work a Friday through Monday regular (straight-time) NERP work week unless and until it bargains an agreement with the Union on such change.

It should be clear that nothing in this Opinion or Award limits the right of the State to ask FCBs to volunteer to work regular Friday through Monday NERP assignments. Similarly, nothing in this Opinion or Award shall interfere with the parties' ability to continue to negotiate limited term alternate shift pattern agreements which, quite clearly, benefit both the State and the employee.

## **AWARD**

1. The grievance covers all bargaining unit Fire Captain "Bs" at Los Robles CC.
2. The State violated the Agreement by requiring Fire Captain "Bs" to work regular (straight-time) Friday through Monday work weeks during the 1985-1986 NERP period. As more fully set out in the above Opinion, the State shall make whole in overtime compensation lost all Fire Captain ÓBsÓ who were required to work a Friday through Monday shift and receive straight-time pay on Saturday and Sunday from and after February 10, 1986 at Los Robles CC.
3. The Arbitrator retains jurisdiction over the case for the sole and limited purpose of resolving disputes, if any, over remedy.

Dated: June 20, 1989 Signed by: Alexander Cohn  
COHN-Arbitrator      ALEXANDER

FOOTNOTES\*\*\*\*\* {1} Bob Bark did not testify at the hearing. {2} On the same day the parties agreed on this item, Yank and Bark reached the same agreement to modify the Corrections/CCPOA contract. {3} The side letter was not introduced into evidence by the Union. The State did not seek to have it produced. {4} Yank occasionally referred to this term as "substantial." (T. 85) {5} Negotiating notes (UX 25) show the "Entire Agreement" clause was discussed on June 16, 1982. {6} According to Yank, at some point after the negotiations Corrections, which had the same 16.01 language as the Employer/Union contract had, tried to change Correctional counselors' hours of work under its management rights clause. Grievances were filed and, according to Yank, two arbitrators held that such changes were within

the scope of representation and had to be bargained. See, the March 9, 1984 Corrections/CCPOA Award issued by arbitrator Kathy Kelly ("Kelly") (UX 26). {7} Lucas changed employment positions in April, 1983. Gloria Moore Andrews was Employer Labor Relations Officer Between January and September, 1984. Stephenson succeeded Andrews. {8} According to Stephenson, numerous agreements were worked out which avoided the necessity for mandatory weekend work assignments. In her opinion, nothing in Section 8.02 limited the Employer's ability to schedule regular weekend NERP shifts. Further, nothing in the Agreement provides that employees only work certain days of the week. {9} Stephenson knew that the Employer's contract with Corrections and YA required it to provide "leadership" for five days each week. Although it varies, inmates work Monday through Friday. {10} Togstad did not testify at the hearing, but see UX 20 supporting Graham's testimony. {11} According to Stephenson, if Region V was getting ready to do something or had done something that would have an impact on the employees, then she would discuss or deal with it in terms of whether or not it was a contract violation. She did not recall having said the Employer was not going to work employees on weekends during NERP. Also, she would not have said they would not work people over weekends. She never said she did not know what the "God damn big deal was." {12} According to Barrett, there was no discussion at that meeting about the scope of the instant arbitration. {13} Shirey worked at PG between 1972 and 1977 and from 1981 to present. {14} In 1984, the number of wards dropped from 80 to 60, but in mid-1985, after a new dorm was completed, the number of wards rose to the present 130. Linn believes Oak Glenn is a 7-day operation because of the access road and the number of wards to supervise. {15} Marrs reviewed the time sheets to obtain the data. He agreed Lang was probably correct when he wrote that people did not work weekends during NERP. (See, UX 14). {16} See, UX 2. {17} This could mean as few as one employee worked the 11 weekends. (T. 198) {18} The backup data shows a few FCS who volunteered for personal reasons. Apparently, Mr. Kriewitz, an HFEO at Cuesta CC, worked NERP Saturdays at straight time as part of his regular shift. Further, even though some employees volunteered to do it, dividing the total number of weekend days by the number of weekend days not paid at overtime rates, only .0084 percent weekend days were worked without some type of overtime compensation. Further, UX 22 is John Knight's handwritten letter stating he worked NERP as part of his regular shift between November 10, 1985 and March 15, 1986, voluntarily. Mr. Ladd, an HFEO, worked Sundays as part of his regular shift at Humboldt CC. HFEOs Garrison and Wara, at Eel River CC, worked a number of weekend days at straight time and one also worked one weekend at straight time. However, the Union was unable to get in touch with either Garrison or Wara to determine the circumstances. {19} According to Nichols, this was not a "no-precedent" settlement. {20} But for these two problems, it was Nichols's understanding that, prior to July 1, 1985, NERP duty was 40-hours, Monday-Friday. If an employee worked a weekend day, he received CTO. During Nichols's six years as a dispatcher in the Fresno-Kings Ranger area, he knew when the daily crews were working, and when everyone was on duty. He could not recall any NERP working weekends at straight time. Further, Nichols, as Union President, presently visits the area two or three times a month. He has noted the status board, showing who is working, is still there. Nichols, however, acknowledged that he generally understood that there were employees who, for whatever reason, wanted off on a weekday and, therefore, agreed to work a weekend day at straight time. {21} Andrews testified that he wrote the letter for Partain. At the time, she did not

have the grievance when she drafted the response. However, she did meet with Nichols and others on the matter because the grievance was filed directly with DPM which wanted the Employer to handle the problem. The grievance concerned an hours (shift) change problem during NERP; i.e., the issue was inadequate notice to employees. However, Andrews acknowledged that, once she saw Nichols's letter, she knew the parties were not in agreement on the issue. {22} Bargaining history may be relevant to show mutual mistake. Absent that, bargaining history relevant in determining the meaning of unambiguous contract language. {23} This is so, even if one party feels the result is particularly harsh or unexpected. See, Elkouri and Elkouri, *How Arbitration Works*, BNA, 4th Ed., p. 349. {24} *How Arbitration Works* (p. 439) {25} *How Arbitration Works*, p. 359. {26} Apparently, the Union also recognized the accuracy of Marrs's review as it, essentially, conceded HFEOs routinely worked Wednesday through Saturday NERP shifts. (T. 414) {27} On the basis of this record, the Arbitrator finds and concludes that Andrews knew it. Superintendent Lang, with whom Marrs agreed, knew it. Further, as late as January 29, 1987, it was clear that Partain knew FCBs did not work regularly scheduled NERP weekdays when they worked the Monday through Friday schedule. And, while the State usually preserved its position on the issue in prior written grievance settlements, it is clear that those working in labor relations either knew it or should have known it. {28} That issue is not before the Arbitrator. {29} Compare Linn's testimony at T. 287 and T. 290. Also, Linn's testimony contradicts Eaves' testimony on when NERP weekend work began. {30} Naturally, the authority of those persons sitting around the coffee pot can change this finding substantially. {31} It is interesting to note that Webster's American Heritage Dictionary gives both words a fairly similar definition; i.e., substantial is "considerable in importance, value or degree." Significant is "important, valuable." {32} It should be clear that this decision concerns only Unit 8's contract and the particular bargaining history surrounding Section 16.01. {33} FCBs, such as John Knight at another camp, who volunteered to work a Friday- Monday NERP shift at straight time at Los Robles CC are not covered by this remedy. {34} The Arbitrator cannot agree with the Union's argument that three days at time and a half for those required to work a Friday through Monday NERP assignment is required. (T. 413-414)

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