In the Matter of the Arbitration between Metropolitan Taxicab Board of Trade, Inc. and New York City Taxi Drivers Union Local Union #3036, AFL-CIO

The Undersigned, as Impartial Chairman under the Collective Bargaining Agreement between Metropolitan Taxicab Board of Trade, Inc., hereinafter referred to as the "Employer," and New York City Taxi Drivers Union, Local Union #3036, AFL-CIO, hereinafter referred to as the "Union," has been requested by the Employer to grant an extension for the commencement of the "weekly pay check," pursuant to Article IX of the Collective Agreement.

Article IX (Weekly Pay Check) reads:

Section 1. By the 17th of November, 1968 all employees including but not limited to all taxi-cab drivers and inside personnel, including mechanics, service employees and maintenance personnel, shall be paid by check each week.

Section 2. The Employer may request the Impartial Chairman to grant an extension of this time if it can show good and sufficient reason for the granting of such extension.

On September 25, 1968 representatives of the Employer and Union, hereinafter referred to jointly as the "parties," orally set forth to the Undersigned their respective positions on the issue. The parties were also afforded an opportunity to state their contentions and arguments in written form, to be submitted by a fixed date.
Based on the record before me I make the following findings of fact:

1. The constituent members of the Employer, hereinafter referred to as the "Industry," have made a good faith attempt to computerize payroll bookkeeping in an effort to meet the November 17, 1968 deadline. A computer system which was installed in January, 1968, failed, and was discontinued at considerable loss.

2. The Industry interviewed and negotiated with at least six other data processing and computer service companies with a view towards establishing the necessary programming for a weekly payroll. Following several months of developing programming techniques for the Industry, some of the computer companies were able to start trial runs in May, 1968.

3. Unfortunately, in each case, technical difficulties and other mechanical problems developed, which required further study and changes in methods by the computer companies. One piece of trial equipment, a "data phone," used by the computer company which contracted with a substantial number of industry corporations, proved to be unsuitable and was finally abandoned in favor of a different piece of equipment to transmit information to the computer. Another computer company found by example, that it had to change
its procedure from taking information from the
trip cards to utilization of the police sheets.

4. Though test runs of equipment to be used are
now under way, additional work and time will
be required to eliminate what the computer com-
panies refer to as "the usual initial technical
problems."

5. Not only is the Industry not yet efficiently
equipped with the necessary computers and data
processing services, but it is impracticable,
if not impossible, to attempt to commence the
new service during a quarter. The computer com-
panies insist that the program must commence
with the beginning of a quarter. This is so be-
cause the computer has been or is being programmed
to carry cumulative totals for each employee on
days worked (quarterly for the attendance bonus;
annual for vacation credits, etc.) Also at the
end of each respective reporting period the com-
puter will prepare the necessary tax forms and
information for filing W-2s, Federal Depository
receipt information and similar data. If the
systems were commenced on any day other than the
beginning of a quarter, the computer would not be
able to prepare these required records since it
would not have all of the information in its
memory bank. And, to commence the system during,
rather than at the beginning of a quarter, would
impede preparation of necessary legal documents including Internal Revenue reports because more than a single source for the information would have to be used - the manually recorded books and records up to the day that the data processing system took over, and the information produced by and recorded within that system thereafter.

I am persuaded, based on the foregoing facts that the Employer has shown good and sufficient reasons for a reasonable extension of the commencement of the "weekly pay check." Accordingly, based on my authority under Article IX Section 2 of the contract, and having duly heard the proofs and allegations of the parties, I render the following

AWARD

The Metropolitan Taxicab Board of Trade, Inc., on behalf of each of its members, is granted an extension of time for the commencement of the weekly pay check to the quarter commencing January 1, 1969.

Eric J. Schmertz
Impartial Chairman

DATED: October 9, 1968

STATE OF New York )
COUNTY OF New York )

On this 9th day of October, 1968, before me personally came and appeared Eric J. Schmertz, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
Taxi Drivers Union Local 3036, AFL-CIO
and
Metropolitan Taxicab Board of Trade, Inc.,
on behalf of Circle Maintenance Corp.

Award

This proceeding is between Taxi Drivers Union Local 3036, AFL-CIO, hereinafter referred to as the "Union," and Metropolitan Taxicab Board of Trade, Inc., on behalf of Circle Maintenance Corp., hereinafter referred to as the "Company," before the Undersigned as Impartial Chairman under the applicable Collective Bargaining Agreement.

The dispute involves the Union's grievance on behalf of Mr. Max Azulay, a Union Committeeman employed by the Company as a driver.

A hearing was held on November 1, 1968, at which time all concerned were afforded full opportunity to present evidence and argument and to examine and cross-examine witnesses.

The grievance is granted in its entirety. Mr. Azulay, hereinafter referred to as the "grievant," is a committeeman enjoying super-seniority under the contract. One of the express benefits of super-seniority is the right to select a day off. The grievant selected Sunday as his day off each week and is entitled to that selection. Accordingly the Company is directed to grant the grievant, unconditionally, his selection of Sunday as his off day.

Obviously the seniority provisions of the Collective Bargaining Agreement, as all other terms and conditions, must
be applied uniformly and equally to all parties covered. It would be manifestly unfair to enforce the seniority provisions against one employer or constituent member of the Metropolitan Taxicab Board of Trade, while violations of or variations from the same seniority provisions by other members are allowed or ignored. For the result, of course, would be to place the former at a distinct competitive disadvantage with the latter. Junior employees, assigned Sunday work under the seniority clause, might quit that employer, and instead obtain jobs elsewhere in the industry with other employers, who, by ignoring the seniority requirements, are willing to grant the more desirable day off.

The resultant inequity is patent. The employer adhering to the seniority requirements of the contract is penalized. He suffers a depletion of scarce personnel, lured to other employers as a direct result of the unrestricted practices of those employers in violation of the contract.

To prevent this, as Impartial Chairman, I shall insist, and shall direct that the seniority provisions of the contract, as well as all other provisions thereof, be equally and uniformly enforced, applied and administered at and by all parties to the Collective Bargaining Agreement. The Union has the duty to police the contract toward this end, and the Board shall take steps to inform each of its members of this directive.

With regard to the specific problem raised by this case, it is my determination that no member employer under the contract may grant nor may the Union allow newly hired employees
or employees with less seniority Sunday as a day off, if by doing so the seniority rights of more senior employees are violated.

For implementation of this decision the Union shall conduct an investigation of the manner in which the seniority provisions of the contract are being applied at the following companies:

Tone Operating Co.
Fare Co.
M & S Maintenance Co.
Zebra Co.

The Union shall determine whether any of the practices at the aforesaid employers are in violation of the seniority requirements of the contract. If so, and if not ceased in accordance with the foregoing directive or by direct negotiations, the Union shall grieve such violations to arbitration before the Undersigned. Violations of the seniority provisions of the contract by any other employer shall be handled by the Union in the same manner.

Eric J. Schmertz
Impartial Chairman

DATED: November 1968
STATE OF New York
COUNTY OF New York

On this day of November, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
Local 307 United Papermakers and
Paperworkers, AFL-CIO

and

Natvar Corporation

The Undersigned Arbitrator, having been designated in
accordance with the Arbitration Agreement entered into by the
above-named Parties, and dated June 1, 1966 and having duly
heard the proofs and allegations of the Parties, Awards, as
follows:

The Company violated Article VII Section 13
when on June 16, 1967 it paid Carl Giangrasso
six hours pay at his base rate. Mr. Giangrasso
should have been paid four hours pay at time
and a half for the hours 12 noon to 3 P.M. and
straight time for the hours 3 P.M. to 6 P.M.
The Company shall adjust his pay accordingly.

Eric J. Schmertz
Arbitrator

DATED: February 1968
STATE OF New York )
COUNTY OF New York )ss.:  

On this day of February, 1968, before me personally
came and appeared Eric J. Schmertz to me known and known to
me to be the individual described in and who executed the
foregoing instrument and he acknowledged to me that he execu-
ted the same.

File #68A/931
In the Matter of the Arbitration between
Local 307 United Papermakers and Paperworkers, AFL-CIO

and

Natvar Corporation

In accordance with Article XIV, Fourth Step, of the Collective Bargaining Agreement dated June 1, 1966 between Natvar Corporation, hereinafter referred to as the "Company," and Local 307, United Papermakers and Paperworkers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate Article VII Section 13 when on June 16, 1967, it paid Carl Giangrasso six hours pay at his base rate?

A hearing was held in Elizabeth, New Jersey on February 16, 1968 at which time Mr. Giangrasso, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The pertinent part of Article VII Section 13 is the last sentence thereof which reads:

Whenever an employee is ordered in once having gone home, he shall be paid a minimum of four hours pay at time and a half the applicable base rate.

The Union's grievance is that the grievant was not paid in accordance with the foregoing contract section for his
work between noon and 3 P.M. on June 16, 1967.

The grievant's normal shift is from 3 to 11 P.M. During the morning of June 16 he was called at home by his supervisor and directed to report in as quickly as possible. He first indicated an unwillingness to do so but when told it was an emergency, reported in and began work at 12 noon. He continued work up to and thereafter into his regular work shift until 6 P.M. at which time he left the plant on Union business pursuant to permission he had obtained from the Company earlier that week. For the total of six hours worked he received six hours pay at his regular base rate, at straight time. The Union contends that the hours between 12 noon and 3 P.M. constituted a "call-in" for which he was entitled to a minimum of four hours pay at time and a half; plus straight time for the hours 3 P.M. to 6 P.M.

The Union's position is sustained. I find that the grievant met all the requirements of the foregoing contract section. He had gone home from his previous regular shift, and was called back to the plant from his home. He was not "pre-scheduled" to work the earlier hours on June 16 before the call to his home. There is no doubt that he was directed to report in for the hours of work prior to his regular shift in order to meet what the Company characterizes as an emergency. These are the conditions set forth in the last sentence of Article VII Section 13 which entitle an employee to the minimum of four hours pay at time and a half. No other condition is set forth in that sentence. And because the sentence is clear on its face, I find no reason why any
additional condition should be implied.

Accordingly, I reject the Company's contention that an employee is eligible for the premium pay only if he is called in after having gone home and thereafter returns to his home before again reporting to the plant to begin his regular shift. There is nothing in the language of the controlling sentence which requires an employee to make two trips to the plant (one for the call-in and then another to begin his regular shift,) in order to be eligible for the premium pay. Attention is directed to the word "whenever" which begins the last sentence of Section 13. The meaning is clear. To my mind it means that any time the conditions or circumstances which follow are met, the employee is entitled to the premium pay. The condition that the called-in employee make a round trip or second trip to the plant before he is eligible for the premium pay for the period of his call-in, is not amongst those enumerated.

Indeed, in view of the generally accepted theory that call-in pay is designed to compensate an employee specially for an abrupt interference with his off hours or leisure time, a more limited basis for the payment, namely to compensate him only if he makes a double trip to the plant, ought to be expressly stated in the contract. Here it is not.

Nor is the clear language and meaning of the last sentence of Section 13 overturned by past practice, the contention of the Company notwithstanding. The Company asserts that it has never paid the minimum premium when an employee was called in for hours earlier than his regular shift if he worked those
hours and then his regular shift, back to back. In all instances, contends the Company, where the early hours and the employee's regular shift merged, Article VII Section was inapplicable; but the call-in premium was only intended and only paid to make it economically worth while for an employee to make a round trip or second trip to the plant between the end of his call-in and the beginning of his normal work shift. The Company's evidence in support of such a past practice is not persuasive, because it has not distinguished between the instant case and circumstances with which the Union has no objection. For example, the Union would have no cause to complain about an employee who was called in prior to his regular shift and thereafter continued at work through his entire regular shift, because the employee's pay for that day would be exactly the same whether the early hours were treated as a call-in or as overtime. In either instance, no matter how the Company apportioned it, the employee would receive eight hours pay at straight time and the extra hours at time and a half. So, the fact that the Company may have paid employees on the basis of overtime rather than for a call-in in such circumstances is not a practice in support of the Company's position in this case, simply because there is nothing about that formula over which the Union could or should complain. Indeed in that situation the Union construed the extra hours as a call-in though the Company may have treated it as overtime. In any event because the contract prohibits the pyramiding of premium pay no basis for a Union grievance would have been present.

Also it appears that at other times when employees worked
earlier hours and then their regular shift hours back to back, they were not paid the minimum premium for the earlier hours (assuming also that they worked a total of no more than eight hours that day) because they were "pre-scheduled" to work the earlier hours by notice during some preceding day or at least before they had gone home. In such cases they were not "ordered" or directed "in once having gone home;" but rather their work schedule was re-arranged with them before they left the plant. This practice is conceded by both parties, and the Union neither objects to it nor seeks to stop it. And I agree, that in that circumstance, because of "pre-scheduling" an employee's normal working hours is changed to a new starting time and presumably a different quitting time. But it appears that the Company has included that circumstance as well, in the past practice upon which it relies in this case. Obviously, a "pre-scheduled" call-in is different from what happened in the dispute before me, and provided no precedent for disposition of the present dispute.

Nor do I find that the contract negotiations of 1966 lead to a different conclusion. The Union's explanation of its Demand #9, for a clarification of the call-in benefit, or for its extension to all earlier hours worked, including those "pre-scheduled," is just as plausible as the Company's claim that the Demand was intended but failed to achieve what the Union seeks in this arbitration.

I also must reject the Company's claim that the grievant was paid properly because he received a total amount of money (six hours straight time pay) equal to the pay requirements of
the last sentence of Section 13. Merely because the grievant received a total of six hours pay for June 16, 1967 does not mean that the minimum requirement of four hours pay at time and a half has been met. It is obvious to me and I am satisfied that the premium pay entitlement set forth in the last sentence of Article VII Section 13 is for the period of the call-in only and confined to the time that the employee works outside of his normal working hours. Hence the minimum of four hours at time and a half is applicable only to the earlier hours that the grievant worked, namely 12 noon to 3 P.M. The pay he received for time worked thereafter may not be applied to meet the premium pay requirement for the call-in.

Accordingly the Company violated Article VII Section 13 when on June 16, 1967 it paid the grievant six hours pay at his base rate. The grievant should have been paid four hours pay at time and a half for the hours 12 noon to 3 P.M. and straight time for the hours 3 P.M. to 6 P.M. The Company shall adjust his pay accordingly.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

United Steelworkers of America

and

I. T. T. Nesbitt Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The two day disciplinary suspension of J.A. Clark was proper and is upheld.

Mr. Clark's claim for a day's pay for October 27, 1967 is denied.

DATED: June 24/1968
In the Matter of the Arbitration between
United Steelworkers of America
and
I. T. T. Nesbitt Company

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement between I. T. T. Nesbitt Company, hereinafter referred to as the "Company," and United Steelworkers of America, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide disputes concerning the propriety of a two day disciplinary suspension imposed on Mr. J. A. Clark, hereinafter referred to as the "grievant," and his claim for one day's pay for the failure of the Company to schedule him for inventory work on Friday, October 27, 1967 in accordance with his seniority.

A hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on June 12, 1968 at which time the grievant and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses.

The issues are inter-related. The Company contends that the grievant absented himself from his job from 3:45 P.M. through the end of the shift at 4:30 P.M. on Thursday, October 26, contrary to the instructions of his supervisor; warranting the two day disciplinary suspension. It also asserts that because of this absence he was not available to be asked to work the following day when a canvas of the employees was made that
afternoon by the Company supervisor of labor relations. Additionally it contends that on the morning of October 26, when the Company realized that too few employees had agreed to work the following day, October 27, the grievant failed to respond to pages over the public address system made by the labor relations supervisor, generally to all employees then working and to individual employees by name, including the grievant, though he was working in areas where the address system could be heard.

The grievant and the Union on his behalf deny his absence from his work place on the afternoon of October 26; and deny that he was paged during the morning for inventory work the following day. The contention is that the grievant was at work on his assignment in the parking lot doing clean-up and inventory work during the period from 3:45 to 4:30 on October 26; that the Company that afternoon should not have by-passed him in soliciting employees to work the following day; and that during the morning while he was at work in the plant maintenance area, he heard no public address pages for work the following day. He seeks a day's pay for the Company's failure to so schedule him.

I shall deal first with the events of the afternoon of October 26. The grievant together with employee William Chase were assigned clean-up and inventory work in the Company parking lot. There is no dispute that early in the afternoon, at about 2 P.M. the grievant absented himself for about 20 minutes "to go to the men's room." There is also no dispute that upon his return he was instructed by his supervisor, Mr. Vandegrift, not to again leave his work place without notification and permission.
The question is whether the grievant so absented himself again from 3:45 through the quitting time of 4:30 P.M. Based on a careful study of the facts and record I am persuaded that he did. I find the testimony of Mr. Heckroth, the Company labor relations supervisor, and that of Vandegrift to be more persuasive than that of Messrs. Chase, May and Burns, all employees. As a supervisor it is Vandegrift's duty and responsibility to observe employees under his supervision; to know where each was located and what each was doing during the working day. This is a normal function of a supervisor. And it is Vandegrift's unequivocal testimony that the grievant was away from his job without permission from 3:45 to 4:30. But such is not a normal function or responsibility of bargaining unit employees. Hence I do not think it realistic that Chase, May and Bruno would have given much attention to the grievant's whereabouts during the course of the afternoon. They were involved in their own work, and as distinguished from Vandegrift, had no particular interest in or authority regarding the grievant's whereabouts.

Indeed the specific testimony in support of the grievant's position is not entirely inconsistent with the Company's claim that the grievant was away from his work place from 3:45 to 4:30 P.M. Mr. Bruno who was also assigned work in the parking lot, but at a location well removed from where Chase and the grievant worked, testified not that he saw the grievant at work until the end of the shift at 4:30, but that he last saw him at work at 4 P.M. There is no evidence to show that Bruno knew the precise hour to be 4 P.M., and it is quite possible that
though he saw the grievant, the time was somewhat earlier - before 3:45. So there is no accounting for the grievant from at least 4 to 4:30 P.M., and, in my view, quite probably from 3:45 to 4:30 P.M.

Additionally the evidence shows that Chase, with whom the grievant worked, left at the end of the shift at 4:30 by himself unaccompanied by the grievant. This means, of course, that the grievant was not present at 4:30, and lends support to a conclusion that he was not around for some time earlier as well.

Conclusive, I believe, is the testimony of Heckroth that he neither saw nor was able to find the grievant at work. There is no doubt that Heckroth urgently sought volunteers to work on Friday, October 27. The planned work for Friday was of an undesirable type -- cleaning paint booths -- and through the morning despite pages in the public address system, he was unable to obtain a sufficient number of volunteers. Therefore, in the afternoon, he made a personal tour of the plant and the parking lot to ask each employee then at work to work the following day. So urgent was the need to obtain employees for work on Friday, October 27, that I have no doubt that had the grievant been at or near his work area that afternoon, Heckroth would have asked him to work the following day; Indeed the evidence indicates that all other employees at work were so solicited by Heckroth.

Accordingly I conclude that the grievant was the exception only because he was neither at or near his work station in the parking lot nor anywhere he could be seen when Heckroth by
personal canvas, sought volunteers between 3:45 and 4:30 on October 26.

If this not be enough, the conclusion is further supported by the grievant's past record. He was suspended in April, 1967 for 1/2 a day for absenting himself from his work station, and formally warned in June, 1967 for the same offense. Previously he had received a number of verbal warnings on the same subject. These disciplinary penalties were not carried through the grievance procedure by the Union and hence stand as part of the grievant's employment record. Nor do I find that they are of such old vintage as to have no bearing on the instant case. On the contrary I think that they show that the grievant is prone to conduct giving rise to a charge that he leaves his work area without permission or notification. And therefore, together with the other facts as I determined them, I find that the Company's version of what transpired on the afternoon of October 26 is accurate.

Considering this finding together with the grievant's prior disciplinary record, the two days suspension was not only warranted but modest, and is accordingly upheld.

It follows therefore that I can find no merit to the Union's charge that the grievant was suspended only after and in retaliation to his claim for pay for October 27.

There remains the question of whether the Company erred in failing to reach the grievant during the morning of October 26 to ascertain his willingness to work the following day. I find that it did not. The evidence shows that during that morning the grievant worked in or around the maintenance area
where the public address system is easily heard and understood. The testimony shows that other employees within the plant heard the page for volunteers to work the next day and also heard employees paged for that purpose. There is no refutation of Heckroth's testimony that, faced with an urgent need for more employees, he made regular and frequent pages for employees generally and individually, that morning. I conclude therefore that the grievant was paged; that he could or should have heard the page; and that his failure to respond is his failing not that of the Company.

Also, even if the grievant did not hear the public address system, I fail to see how the Company violated the seniority provisions of the contract with regard to scheduling men for inventory. In accordance with a fair and reasonable application of the contract, the Company made a diligent effort to reach every employee, by seniority sequence for work the following day. Heckroth paged individual employees based on their seniority as well as all employees generally. Volunteers who were willing to work were obtained and assigned in accordance with their seniority. Employees not at work in the plant that day were called at home. And of course, because the grievant was not at work in the plant, there was neither need nor obligation for the Company to place a call to his home.

So though I believe the grievant knew that the Company was seeking help for the following day, I find that even if he was not so informed, the Company made every reasonable
and diligent effort to do so; and that is all that I would re-
quire of it.

Accordingly, the grievant's claim for a day's pay for
October 27, 1967 is denied.

Eric J. Schmertz
Arbitrator
This proceeding, under the auspices of the Office of Collective Bargaining, is between the Uniformed Firemen's Association, AFL-CIO, hereinafter referred to as the "Union", and the New York City Office of Labor Relations on behalf of the City of New York, hereinafter referred to as "The City".

The Union and the City, hereinafter referred to jointly as the "parties", have been unable, through direct discussions, to reduce to writing certain negotiated provisions of their current Collective Bargaining Agreement. The difficulty stems from their disagreement, on certain matters, over what in fact was negotiated, or what contract language should be used to express what was negotiated.

The matter was referred by the parties to the Office of Collective Bargaining, and the Undersigned, as a public member of that Office, was appointed to conduct an investigation. During the investigation, and in order to resolve the disputed questions, the parties requested and authorized the Undersigned to make Findings of Fact and Determinations on each matter in dispute. The parties expressly agreed that the Findings and Determinations would be final and binding.

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Specifically, the contract provisions over which the parties are in disagreement relate to Adjusted Tours; Personal Leave Day; Vacations; Health & Hospitalization Plans; Out of Title Assignments; Right of Representation; Guarantee of Benefits; Grievance Procedure; Job Description; Ordered Overtime and the "Saving" Clause. All other provisions of the current contract between the parties are not in dispute, and either have been or can be reduced to writing without difficulty.

I see no useful purpose in reciting the adversary contentions of the parties regarding each matter in dispute. Rather, I will confine my Findings and Determinations to what, amongst the disputed items, was negotiated and hence part of the current contract; which items or parts thereof were not negotiated and hence not part of the present contract; and where applicable, what language expresses the substantive matters agreed upon.

Accordingly, having afforded the parties full opportunity to be heard, the Undersigned makes the following Findings of Fact and Determinations:

Adjusted Tours; Personal Leave Day; Vacation

There is no dispute between the parties over their agreement to grant each fireman time off with pay for an adjusted tour of 15 hours each calendar year. Nor is there any dispute over the agreement to grant each fireman one personal leave day of a day tour each fiscal year. Similarly there is no dispute over the agreement of the parties on the quantity of vacation entitlement for the employees involved. These agreements are and shall be part of the current contract.

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What is in dispute is what provision was agreed to in the event an employee is not granted or is unable to make use of these benefits during the calendar or fiscal year of his entitlement. I find no agreement that the employees were to receive a cash payment in lieu of the paid time off if they did not take or were not granted the adjusted tour, the personal leave day, or the vacation during the prescribed period. However, the parties did agree that though the employees are entitled to these times off with pay, to be taken normally within the calendar or fiscal years involved, where an employee has not, the end of the calendar or fiscal year is no automatic bar to his receipt of the benefits thereafter. It is recognized that, due to the needs and exigencies of the Department, a personal leave day off is subject to the approval of the Department. It is my Determination that if an employee does not receive, or because of illness or the needs of the Fire Department is unable to take, these benefits during the applicable calendar or fiscal year, the entitlement may be carried over into, and shall be taken during, the immediate succeeding year, but not beyond.

Out of Title Assignment

From time to time firemen are assigned duties as Acting Lieutenants. I find the parties did not negotiate an agreement to pay the employee involved at the Lieutenant's rate during the periods of that assignment. However, I find the parties reached an agreement regarding certain benefits to which the employee or his beneficiary would
be entitled if he became permanently disabled or was killed while serving as an Acting Lieutenant. It was my Determination that the parties agreed that a fireman permanently disabled while serving as an Acting Lieutenant would receive disability benefits based on the Lieutenant's rank; and if killed in the line of duty while serving as an Acting Lieutenant, his beneficiary would receive the death benefit of the Lieutenant rank.

Right of Representation

I find that in the negotiations on this question the parties mutually intended to implement the general principles of due process as expressed in the Miranda Decision of the United States Supreme Court. I find and Determine that the parties agreed that an employee who is a "suspect" in a Departmental investigation or trial has the right to be represented either by an attorney or the Union.

The parties further agreed that employees are obliged to answer questions put to them by the Fire Marshall, or his office, in the course of an investigation or interrogation. Employees so questioned and who are not accused are deemed "witnesses". I find and Determine that the parties agreed that though a witness is required to cooperate in the investigation of a complaint, statements he has made in the course thereof may not be used against him or used to incriminate him in a subsequent proceeding on that complaint in which he becomes a suspect.

Grievance Procedure

There is no dispute between the parties over their agreement in a three Step grievance procedure and arbitration of grievable and arbitrable disputes. That agreement is and shall be part of the current contract.
The parties also recognized that matters not grievable or not arbitrable could not be processed through the grievance procedure, but rather were appropriate subjects to be taken up with the Department in regular labor-management meetings.

The parties also recognized that certain grievable disputes might be Departmental in nature or of such wide scope as to make adjustment at Steps 1 or 2 of the Grievance Procedure impracticable. I find and Determine that the parties reached an agreement whereby such disputes, provided they are grievable and arbitrable, could be processed by the Union within the Grievance Procedure beginning at Step 3.

Ordered Overtime

I find and Determine that the parties did not negotiate any change in existing practices regarding the ordering of overtime at the scene of a fire or the manner in which employees would be compensated for working that overtime. Therefore it is my Determination that present practice shall continue to obtain during the life of the current contract.

Continuance of Benefits

I find and Determine that the parties did not negotiate a continuance of benefits clause, and therefore none is or shall be part of the current contract.

"Saving" Clause

I find and Determine that the parties agreed that if any provision(s) of the contract is declared illegal, invalid or unenforceable by a tribunal of competent jurisdiction, the remainder of the contract will remain in full force and effect.
I find and Determine that the parties did not agree to re-negotiate any provision which may be declared illegal, invalid or unenforceable.

**Health & Hospitalization Plans**

I find and Determine that the parties did not agree to or negotiate a provision guaranteeing no reduction in present health and hospitalization benefits, and hence no such guarantee is or shall be part of the current contract.

I do find and Determine, however, that the parties agreed that once during the year 1969, on a reopening date selected by the City, the employees would be entitled to choose, amongst the plans offered by the City, the Health & Hospitalization Plan under which they wish coverage.

**Job Description**

I find and Determine that the parties agreed that the City would provide a job description of the duties of a fireman consistent with the arbitration Award of Peter Seitz, Esq. Pursuant to that Award, the Union and the employees are entitled to a description, but the content thereof is an exclusive prerogative of the City. Consistent with the foregoing, I Determine that within ten days from this date the City shall provide a job description which shall be part of the current contract. I shall retain jurisdiction over this item for implementation thereof.

Dated: New York, N. Y.

April, 1968

STATE OF NEW YORK )

SS

COUNTY OF NEW YORK )

On this day of April, 1968, before me personally came and appeared,
ERIC J. SCHMERTZ, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Notary Public
This proceeding is between City Employees Union, Local 237, International Brotherhood of Teamsters, hereafter referred to as the Union and New York City Office of Labor Relations on behalf of the City of New York, hereinafter referred to as the City. It was initiated by letter dated April 25, 1968 from the Union to the Office of Collective Bargaining which reads in pertinent part:

Local 237, Teamsters respectfully requests the services of your office in a dispute between this union and the City of New York regarding the heavy-duty (C, D & E) Laborer's rate of pay.

It is this union's contention that the original agreement arrived at between the parties was not based on all the facts that have since become known to Local 237. The City's position is simply that an agreement has been reached and they are not willing to reopen discussions of any of the issues concerning rates of pay for Laborers.

As a Public Member of the Office of Collective Bargaining I was requested to conduct an investigation of the facts and make a determination. At my request representatives of the Union and City appeared at a hearing on April 29, 1968, at which time all concerned were afforded full opportunity to present their respective positions.

The Union charges that the City mislead it regarding the private prevailing rate for heavy duty laborers. It asserts that the City based its negotiations on the lesser rate of $5.05 an hour when a higher rate of $5.20 an hour
also obtained; and that the Union learned of the latter rate only after negotiations were concluded. For that reason the Union seeks rescission of its present agreement with the City on the wage rate and other terms and conditions for Laborers C, D and E.

The wage scale for the Laborers involved in this proceeding is subject to the provisions of Section 220 of the Labor Law, commonly referred to as the Prevailing Rate Law. The rates of pay and conditions of employment which are to compare with those received by similar employees in private industry are determined by order of the Comptroller, following hearings, or where possible by a consent agreement negotiated by the City, the Union and the employees involved. Historically, including the most recently reached agreement, the latter procedure was successfully followed. By practice, for a number of years, the City and the Union agreed that the prevailing rate in private industry was as set forth in the collective bargaining agreements of Locals 1010 and 731. Until the most recent negotiations the pay rates in the contracts of both these locals were identical. Also by practice, and in part at least because the fringe benefits and continuity of employment with the City have been more favorable than those in the private sector, the parties have not adopted the full private prevailing rate but rather negotiated a percentage thereof, as the wage scale for the City employed Laborers. In prior years 90% of this private prevailing rate was agreed to as the wage rate for Laborers C and D, with five cents an hour additional for Laborers E. In the most recent negotiations between the City and the Union, the 90% formula was again agreed to (after the Union demanded 100% and the City offered 83%), plus some improvements in fringes for the subject employees, especially regarding week-end work and pensions. The 90% formula is not now in dispute.

What is in dispute, however, is whether the "minds of the parties met" on the private prevailing rate, to which the undisputed 90% formula would apply. The difficulty centers on the fact that in 1967 the private industry con-
tract rates of Local 1010 and 731 were no longer the same. Local 1010 chose to apply some of its wage increase to fringe benefits, so that its direct wage rate was $5.05. Local 731 took all or most in direct wages, which pegged its rate at $5.20. The City, in its negotiations with the Union, used the $5.05 figure as the prevailing rate, and there is no dispute that the Union had full knowledge that it was dealing with that rate. The negotiations produced an agreement on the rate for Laborers C and D at 90% thereof, with five cents additional for Laborers E, plus the improved fringe conditions.

I do not find, as the Union claims, that the City mislead or improperly induced the Union into believing that $5.05 was the single and sole prevailing rate in private industry or that that rate obtained in both the Local 1010 and 731 contracts.

The Union, just as well as the City, had access to the contracts of both locals, which previously had been used as the standard for negotiations of a City laborers' rate. If the City knew of the discrepancy between the two, the Union could have known of it as well, just as readily and on its own initiative. The record contains no evidence that the City concealed the fact that the rates of the two locals were no longer identical, and despite a bare allegation by the Union, vigorously denied by the City, there is no evidence that the City stated that the rates in both contracts were the same, at $5.05. I am satisfied that the discussion between the parties included no reference either to the similarity or the difference between the current private industry contracts of Locals 1010 and 731, but dealt only with the private pay rate of $5.05 which the City deemed more appropriate and comparable to the work performed by City Laborers.

Indeed, in arms length, negotiations between the City and the Union,
it is for each to maintain its own research and its own reliance on the information obtained. So long as the City did not erroneously inform the Union or willfully conceal vital information accessible to it alone, or act to deceive the Union, I see no legal necessity for the City to have made overt reference to the difference in the two private contracts. In my view, provided its purpose in using the $5.05 figure was a reasonable and good faith attempt to comply with Section 220 of the Labor Law, the City had the right to assume that its knowledge of a higher rate in the Local 731 contract was also known to the Union. And further, if the Union considered the higher rate to be more applicable to the negotiations, it was reasonable for the City to believe and expect the Union had the burden to introduce that point.

The question then is, whether the City's bargaining position based on the $5.05 rate rather than $5.20, was reasonable and in good faith. If so, a charge that the City took unfair advantage of the Union would per force fail.

I am persuaded by the facts before me that the City met this test of propriety. Its selection of the $5.05 rate, I am satisfied, was based on its belief that that rate best reflected the purpose of Section 220 of the Labor Law. It will be remembered that the parties were not negotiating wages alone, but other terms and conditions of employment as well. A total package was to be arrived at. The facts indicate that the City weighed the value of its fringe benefits for the subject employees, both in effect and as improved (particularly week-end work and pensions) and concluded that the situation in private industry between Local 1010 and its employees, where that Local had decided to improve its fringe benefits at the expense of direct wages was more comparable to the negotiations with the Union. Without judging the accuracy of the City's calculations, I can understand and find justification in its judgment that the overall contract package obtained by Local 1010 squared more with the employment conditions of the City Laborers than that of Local 731. Indeed, significantly the record indicates that for just this reason the
City stated to the Union during negotiations that its point of reference was the rate paid "private highway laborers". And as both parties knew, highway laborers fall within the jurisdiction of Local 1010. The Local 731 contract covers excavation personnel. Hence, I do not find an absence of good faith in the City's use of the $5.05 rate.

So in short, if the Union believes its negotiations with the City on the basis of a private industry prevailing rate of $5.05 was premised in error, it was an error unilateral to the Union. It was neither induced nor taken advantage of by the City, and for it the Union cannot avoid sole responsibility.

Accordingly, it is my determination that the agreement reached between the City and the Union, on a wage rate of 90% of $5.05 an hour for Laborers C and D with five cents an hour additional for Laborers E plus the undisputed fringe benefits, is binding on both sides and is upheld. The Union's request for rescission is denied.

Eric J. Schmertz
Member

Dated: New York, New York
May 3, 1968
On July 3, 1968 the Undersigned, as Mediator and Fact-Finder, made certain recommendations which the above-named parties (and Local 461 Lifeguards Union) accepted as the settlement of their current contract dispute.

Among the items agreed to was the daily rates of pay for Lifeguards during the new two year Collective Bargaining Agreement effective May 1, 1968, as follows:

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Also, as part of the settlement the parties agreed to submit the determination of the rates of pay for Lieutenants and Chiefs to fact finding before the Undersigned as Fact Finder.

In accordance therewith a fact finding hearing was held on July 9, 1968 at which representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. Also the parties expressly authorized me to conduct an independent investigation of all matters I deemed relevant and in any manner I saw fit.
My determinations are based on a careful study of the following:

1. The respective positions of the parties regarding comparability with the Assistant Supervisor (boatswain); the Supervisor (Lieutenant); and the Senior Supervisor (Captain) at Jones Beach.

2. Where applicable the pay rates at other non-city beaches in the near geographical area.

3. The respective positions of the parties regarding comparability with seasonal park formen and seasonal general park foremen.

4. The bargaining history of the parties, including the rates agreed to effective May 1, 1968 for lifeguards; the agreement for the first time on a higher rate of pay for lifeguards with four consecutive seasons of experience on City beaches or pools; and the previous differentials between lifeguards and lieutenants and between lieutenants and chiefs.

5. The respective economic conditions of the parties.

6. My judgment of a fair, equitable and realistic rate of pay with which both sides can live.

In some respects I find comparability respectively between Lieutenants and Chiefs employed by the City, and Supervisors (Lieutenants) and Senior Supervisors (Captains) employed at Jones Beach. But there are significant differences as well. The similarities relate to supervision over stretches of beach and subordinate lifeguards. However, as an example of a difference, some of the responsibilities of a Lieutenant quarre with those of the Assistant Supervisor (Boatswain) at Jones each, especially because both, at their respective beaches, represent
the first promotional opportunity available to lifeguards. Also, the administrative responsibilities of the Jones Beach Captain exceed and significantly differ from what is required of the Chief employed by the City. Accordingly, in applying this test of comparability alone, it would appear that a Lieutenant employed by the City ought to receive a wage rate higher than that of a Jones Beach Boatswain (presently $25.20), but not quite as much as a Jones Beach Lieutenant (at $28.80). And, similarly, the pay of a City-employed Chief should approach, but not equal, the present pay of a Jones Beach Captain (averaging $33.00).

Also relevant to any determination of a proper rate of pay are the pay scales of other comparable but non-city beaches in the near geographical area, especially those on the ocean such as the Jersey shore. There is no dispute that the rates of pay on those beaches are less than what the City pays and less than what is being paid at Jones Beach. So, though the City concedes that its "principal competition" comes from Jones Beach, these other rates of pay may not be wholly discounted.

I am not able to reach any determinative finding from a comparison of the jobs of Lieutenants and Chiefs with those of the Seasonal Park Foremen and Seasonal General Park Foreman. The differences exceed the similarities. Though the park foreman, on a seasonal basis, works primarily at the beaches, his duties involve maintenance, and cleaning, and the supervision of personnel assigned to perform those tasks. He has no life-saving functions; nor does he handle life saving equipment; nor does he deal with personnel with those responsibilities. So, any comparison involves an attempt to equate wholly different duties, albeit at the same location. Therefore, I am not persuaded that any sound conclusions can be
reached one way or the other. Moreover, even though the Seasonal Park Foremen and the Seasonal General Park Foremen, like the Lieutenants and Chiefs, perform their duties at the beaches, the dissimilarities become all the more enlarged by the fact that the former two may be called up and required to perform duties elsewhere within the Park Department, the nature of which have no relation whatsoever to the beaches.

Of significance to my mind, however, is the bargaining history of the parties and the current settlement of the wage rates for lifeguards. In the expired contract a $4.00 differential existed between the top lifeguard pay and the pay for Lieutenants. But it must be noted that the top lifeguard pay then applied to all lifeguards with more than two seasons' experience. In the new contract, the City, based on my recommendation, granted the Union's demand for a "third tier" amongst lifeguards, by fixing a new and higher rate of pay for lifeguards with four or more seasons of consecutive experience. To grant this benefit represented not only an additional expense to the City, but a significant new benefit to the employees. It introduced into the new contract a factor that did not exist in the old. It accords to the 4 year men not only greater recognition but establishes a basis to expect of them greater responsibilities in the performance of their assignments. Hence, I deem it both proper and appropriate to take a new look at what had previously been a $4.00 differential between the lifeguards and Lieutenants. Under the new wage rate, lifeguards with two seasons of experience will receive $22.00 a day during the first year of the contract, and $1.00 additional during the second. If, as in the past, Lieutenants are to receive $4.00 more than the two year lifeguards, their pay would be pegged at $26.00 and $27.00 respectively in each year of the contract.
But this would provide them with a rate of pay very close to that which the City granted lifeguards with four or more seasons' experience. Indeed, only a $2.00 differential would exist. I consider this inadequate.

On the other hand, to require the City to maintain an immediate $4.00 differential between the new top lifeguard rate of $24.00 a day would be to impose an additional economic burden on the City as a direct consequence of its willingness to grant new wage rate for lifeguards with four or more seasons' seniority. In short, it would penalize the City for the benefit it extended to senior lifeguards. So, while a $2.00 differential is not enough for the Lieutenants, an immediate $4.00 differential between the new lifeguard rate and the pay for Lieutenants is not fair to the City.

Yet, because of the prior bargaining recognition of pay distinctions between lifeguards and Lieutenants, I am persuaded that there is justification for reestablishment of the $4.00 differential during the life of the contract. And, coupled with my finding that the Lieutenant's rate of pay and that of the Chiefs has some comparability with Lieutenants and Captains at Jones Beach, I think it logical, therefore, that this be realized at the beginning of the second year of the contract. But I see no reason why the existing differential between Lieutenants and Chiefs should not be continued throughout the new contract.

I believe this approach is fair, responsible and realistic, and consistent with the material facts. And though it is not what each side fully wished, it is what each side can and should be able to live with. Accordingly, based on all the facts before me, I find as follows:

Effective May 1, 1968, the daily rate of pay for Lieutenants should be $27.00

Effective May 1, 1969, the daily rate of pay for Lieutenants should be $29.00

Effective May 1, 1968, the daily rate of pay for Chiefs should be $31.00

Effective May 1, 1969, the daily rate of pay for Chiefs should be $33.00

Dated: July 15, 1968
New York, N. Y.

Eric J. Schmerz
REPORT OF SPECIAL PANEL

appointed by Mayor John V. Lindsay to assist in the contract negotiations between the City of New York, and the Patrolmen's Benevolent Association, the Uniformed Firefighters Association, and the Uniformed Sanitationmen's Association.

New York
October 13, 1968
REPORTS AND RECOMMENDATIONS 
OF SPECIAL NEW YORK CITY 
UNIFORMED FORCES PANELS

TWO WEEKS AGO Mayor Lindsay requested the Undersigned to constitute three special panels in order to assist in the critical negotiations between the City and the Patrolmen’s Benevolent Association, the Uniformed Firefighters Association and the Uniformed Sanitationmen’s Association. He asked Mr. Justice Arthur Goldberg to serve as Chairman of the three panels and Mr. Vincent McDonnell, Chairman of the State Mediation Board to serve on each panel as well. Rev. Philip Carey was named as the third member of the panel for the negotiations between the City of New York and the Patrolmen’s Benevolent Association; Dr. Walter Eisenberg for the negotiations between the City and the Uniformed Sanitationmen’s Association; and Eric J. Schmertz for the negotiations between the City and the Uniformed Firefighters.

The Fire Department has 10,500 union employees; the Sanitation Department, 10,000; and the Police Department, 30,000. These three departments and their employees provide the City with its most fundamental and essential services. It is well to recall the circumstances at the time of the appointment of the panels, including the protracted nature of the negotiations between the City and the above three unions, and the fact that the negotiations of the previous contracts took nine months or more after their effective dates, and were marred by a disastrous sanitation strike. When the Mayor asked the panel members to serve, the contracts of the three unions had passed their expiration date and the City was threatened with strikes or job actions. The outlook was not promising. The panel was not anxious to accept an obviously thankless task, but agreed to do so in view of the overriding public interest and the urgency of the Mayor’s request. In the face of the enormity of the crisis, the panel determined that though it was ready to respond to its public duty, it would not and could not undertake such a duty under a crisis atmosphere. Therefore the panels through their Chairman Ambassador Goldberg, established certain absolutely essential preconditions:
1. That all three unions and the City agree to the panel’s establishment and composition.

2. That all of the unions agree that there would be no strike, job action, or any disruption in the services during the period of the panel’s deliberations.

All unions agreed to these two conditions.

In the last ten days, during which around-the-clock negotiations were conducted, jointly, separately, formally and informally, the panel encouraged all of the parties to engage in direct collective bargaining across the table. The panel examined into the facts submitted; permitted opportunity for all unions and the City to explain fully their positions; and made suggestions to facilitate collective bargaining. We are satisfied that all concerned have had full opportunity to present their views. The parties have agreed that it will facilitate their collective bargaining agreement if the panels make recommendations of terms of settlement. With their agreement, we herewith submit our recommendations. In formulating our recommendations, the panels have taken note of the regrettable state of affairs of recent years, characterized by strikes of public employees against public employer.

Throughout our considerations we have tried, to the best of our ability, to keep in the forefront of our deliberations the public interest as our keystone both in reaching our conclusions and in assisting towards resolution of the issues. We have recognized the necessity of considering the economics of the settlement; what is fair and just to the employees, and to the administration of the City of New York; together with the need for continuity of essential services to the public. Our recommendations are what we have collectively considered to be a just balancing of these interrelated interests.

The Chairman would at this time like to thank the members of the panels for their hard work, diligence, untiring efforts; and their ability to make recommendations while maintaining the confidence of the parties during these past difficult days. All members of the panel wish to express appreciation to the representatives of the parties who have cooperated fully with the panels in the execution of this difficult assignment. Attached are recommendations pertaining to the various union
forces of the City of New York. Each panel member, signatories hereto, joins in and supports each attached report and recommendation.

Dated October 13, 1968

______________________________
Arthur J. Goldberg, Chairman

______________________________
Vincent D. McDonnell

______________________________
Eric J. Schmertz
for Fire Negotiations

______________________________
Rev. Philip A. Carey
for Police Negotiations

______________________________
Dr. Walter J. Eisenberg
for Sanitation Negotiations
SANITATIONMEN'S CONTRACT
RECOMMENDATIONS

THE DUTIES of the Sanitationmen employed by the City of New
York are of such scope and arduousness as to merit the most serious
consideration when appropriate wage adjustments for those fulfilling
these duties are under review in collective bargaining.

Clearly, the wide range of responsibility and skills entailed in the
New York City Sanitationman’s job is unusual, if not unique, for this
kind of employment in the major cities of the United States. Equally
clearly, official data indicate extraordinarily high exposure of Sanita-
tionmen to the hazards of job-connected injury and illness.

Furthermore, the requirements of Sanitation Department opera-
tions make necessary the scheduling of work for Sanitationmen on
Saturdays. For such work they have been paid straight-time despite
the generally prevailing and long-standing practice in private trucking
and other craft employments in this area for payment of time and
one-half for work on Saturdays as such.

Moreover, actuarial information and other pension program data
applicable to Sanitationmen indicate that equity would be served if
certain pension revisions and adjustments are made.

In addition to considering the needs and equities we have dis-
cerned in behalf of the Sanitationmen, we have taken into account the
present economic situation of their Employer, the City of New York.

Weighing all of these factors in the balance, we are of the unani-
mous view that the following recommendation for settlement of the
collective bargaining dispute between the Uniformed Sanitationmen’s
Association, Local 831, I.B.T. and the City of New York, as Employer,
constitutes an equitable and just resolution of all of the issues involved:

1. **Wages**—a 5% increase in their annual salary rates for the first
year, retroactive to October 1, 1968; and an additional 4%
increase in these increased annual salary rates for the second
year of a two-year contract, effective October, 1969 (by way of illustration: the new annual maximum salary for the first year would be $8,801, and the new annual maximum salary for the second year would be $9,181).

2. **Saturday Work**—effective October 1, 1968, work performed by Sanitationmen on Saturdays as such to be paid for at the applicable straight-time rates for the first 2 hours worked and at time and one-half the applicable rate for all hours worked after the first 2 hours.

3. **Pensions**—(1) Sanitationmen who failed to elect the 20-year benefit option should be given a second opportunity to make such a written election.

   (2) the ordinary disability benefit to be amended to provide a \( \frac{1}{3} \) pay benefit for those with service of 5 years and more, up to 10 years; and a \( \frac{1}{2} \) pay benefit for those with 10 years or more of service.

   (3) retirement allowances for ordinary disability, accidental disability, ordinary death, and accidental death benefits to be based on annual salary at the date of retirement as will be defined in a supplementary memorandum.

   (4) a mutually agreed upon medical appeals procedure to be established by the Union and the Employer for cases in which applications for retirement for ordinary disability or accidental disability are rejected.

   (5) the President of the Union is to become a member of the Board of the Retirement System, in accordance with mutually agreed upon enabling steps for the provision of such representation.

4. **Human Relations Committee**—To facilitate harmonious, efficient and effective dispute settlement within the term of the contract and whenever the parties are engaged in bargaining over the terms of a new contract, the Union and the Employer should establish immediately a Human Relations Committee, whose Chairman shall be Professor Walter L. Eisenberg, and whose functions shall include the arbitration of grievances and adoption and application of impasse pro-
5. **Non-Economic Issues**—the agreements previously reached by the parties on all non-economic issues should be reduced to writing and, where appropriate, incorporated into their collective bargaining contract.

6. **Term of Contract**—the new contract between the parties to be for the two-year period beginning October 1, 1968 and ending September 30, 1970.

7. **Excused Days**—Excused times as accorded to all other City Employees shall be equally granted to members of (Police Department, Fire Department, Sanitation) including the retroactive application of days off granted as a result of the 1966 Transit Strike, as well as days off granted in observance of the funerals of Dr. Martin L. King and Senator R. F. Kennedy.

The retroactive excused time, totalling seven (7) days which is due to each patrolman, fireman, sanitation-man) shall be taken during the term of the contract. All compensatory time covered under this section shall be taken subject to the exigencies of the Department.
There can be no doubt that the Police Department is in the forefront of emergency services that are so essential to the protection of life and property in a great metropolis like New York City. We must, therefore, pay rapt attention to the incessant demands made upon our police officers. A citizenry that desires law, order and justice must be prepared to fairly compensate those who are charged with the responsibility of enforcing these essential factors in our daily life. Accordingly, it is the unanimous feeling of the mediators that substantial wage and benefit adjustments are mandatory in order that the members of the New York City Police Department be counted among the highest paid officers in the nation.

In this vein, we have taken particular note of an American Bar Association committee report, following extensive study of the police function, which recommended a $10,000 national salary standard for police officers. Viewed in terms of this proposed national standard, the recommendation implies higher rates for major cities in the United States. Further support for a meaningful adjustment is found in the report by the President’s Commission on Law Enforcement and Administration of Justice which included a recommendation that the large cities should strive to match the FBI salary scale, a range that reaches a maximum of almost $17,000 per year. Clearly, the necessity to recruit and retain capable, dedicated policemen is unassailable and we must recognize that the turmoil and changing needs of our times requires unprecedented incentives to attract manpower that might otherwise be drawn to private industry. The performance of our Police Department has been outstanding in face of difficulties that would have strained lesser men to the breaking point. We feel that the panel’s recommendations are not only geared to a fair rate of compensation for this burden and responsibility, but represent an equitable assessment on the people of New York City who have demanded, and are entitled to maximum performance in the police function.
The collective bargaining agreement recommended for implementation between the City and the Patrolmen’s Benevolent Association gives grateful recognition to the calibre and performance of our police, not only by providing a higher economic status, but by instituting future benefits and improved working conditions that should insure high morale and guarantee an unprecedented level of devotion to duty.

LENGTH OF SERVICE INCENTIVE
A. Effective October 1, 1968 longevity increments shall be paid as follows:
   1. The salary rate for Patrolman, First Grade shall be adjusted to $10,425 upon the completion of five years of service.
   2. The salary rate for Patrolman, First Grade shall be adjusted to $10,525 upon the completion of ten years of service.
   3. The salary rate for Patrolman, First Grade shall be adjusted to $10,625 upon completion of fifteen years of service.
   4. The salary rate for Patrolman, First Grade shall be adjusted to $10,725 upon completion of twenty years of service.

B. Effective October 1, 1969 longevity increments shall be paid as follows:
   1. The salary rate for Patrolman, First Grade shall be adjusted to $10,850 upon the completion of five years of service.
   2. The salary rate for Patrolman, First Grade shall be adjusted to $10,950 upon the completion of ten years of service.
   3. The salary rate for Patrolman, First Grade shall be adjusted to $11,050 upon completion of fifteen years of service.
   4. The salary rate for Patrolman, First Grade shall be adjusted to $11,150 upon completion of twenty years of service.

The adjustments for service provided herein shall not be deemed to be part of salary for purposes of retirement allowances unless at the time of retirement a Patrolman, First Grade paid at the rate of $10,425 or $10,525 on October 1, 1968 and at the rate of $10,850 or $10,950 on October 1, 1969 shall have completed twenty years of service.
service, and a Patrolman, First Grade paid at the rate of $10,625 or $10,725 on October 1, 1968 and at the rate of $11,050 or $11,150 on October 1, 1969 shall have completed twenty-five years of service.

**TACTICAL PATROL FORCE AND SPECIAL EVENTS SQUAD**

The Tactical Patrol Force and the Special Events Squad shall both be units comprised entirely of volunteers. Accordingly, any member now assigned to either unit who desires transfer shall be accommodated upon request. Patrolmen assigned to the Tactical Patrol Force who perform steady eight hour tours of duty during the hours between 6:00 PM and 6:00 AM shall work a duty chart of four tours per week. Patrolmen assigned to the Special Events Squad shall be scheduled for eight hour tours of duty only during the daylight hours between 6:00 AM and 6:00 PM.

As a consequence of the volunteer status of these units; the incentive of four tours of duty provided to members of the Tactical Patrol Force; and the incentive assignment to steady day tours for members of the Special Events Squad, the contract terms pertaining to “flying” and re-scheduling as outlined elsewhere shall not be applicable to patrolmen covered by this section.

**MEDICAL PLAN**

There will be an annual reopening during the term of this agreement for active employees to exercise their choice among medical plans. Patrolmen who are retiring and will be off the payroll prior to the effective date of change of coverage shall be permitted to change their health insurance plan during the then current transfer period. Following the effective date of this agreement, patrolmen who retire before having the opportunity to elect a change of coverage shall be accorded such right during the next changeover period.

**SAFETY HELMETS**

The City agrees to furnish a safety helmet and equipment related thereto for each patrolman. Such headgear shall conform to Police Department specifications in effect at the time of this agreement.

**SEMI-PRIVATE HOSPITAL ACCOMMODATIONS FOR LINE-OF-DUTY INJURIES**

The City will prepare, submit, and support legislation to amend the present law so as to provide semi-private hospital accommodations for patrolmen injured in the line of duty.
PARKING FACILITIES
It is the intent of the Department to make available, without liability to the City, City-owned property and on-street locations adjacent to, near or part of police stations or other command locations, as parking facilities for the personal cars of patrolmen. Where such property is available for this purpose, and so designated, the City is not obligated to improve it, nor to maintain it for parking. City-owned property shall not continue to be made available for parking when a different use is to be made of it by the City.

SPECIAL TIME OFF
Time off accorded to other City employees under circumstances such as recognition of services rendered during the 1966 transit strike, observance of the funerals of Dr. Martin Luther King and Senator Robert F. Kennedy, and all other similar excusals shall be equally granted to patrolmen in the Police Department. In accordance here-with, it is agreed that retroactive time off, totalling 7 days, is due to each patrolman which shall be taken during the term of this contract. All compensatory time covered under this section shall be taken subject to the exigencies of the Department.

MAINTENANCE OF FACILITIES
All commands and other Departmental places of assignment shall have adequate heating, hot water, sanitary and sanitation facilities. If not, notice shall be given to the Department of this condition. If not corrected by the Department within a reasonable time, it may be the subject of a grievance at step 3 of the Grievance Procedure.

SENIORITY
The Department recognizes the importance of seniority in filling vacancies within a command and will make every effort to adhere to this policy providing the senior applicant has the ability and qualifications to perform the work involved. While consultation on such matters is permissible, the final decision of the Department shall not be subject to the grievance procedure.

ORDINARY DISABILITY PENSION
The City will prepare, submit, and support legislation, effective July 1, 1969, to amend the present law so as to provide an ordinary disability retirement allowance equal to one-third final pay for patrolmen.
with less than 10 years of service; and an ordinary disability retirement allowance equal to one-half of final pay for patrolmen with more than 10 but not more than 20 years of service.

If a member has more than 20 years of service and retires for ordinary disability he shall receive a retirement allowance equal to one-fourtieth times the annual salary on the date of retirement multiplied by the number of years of creditable police service.

SETTLEMENTS OF NON-ECONOMIC ITEMS
All clauses in this Memorandum of Agreement were consented to by the parties and shall be incorporated in the new collective bargaining agreement, or where noted, are binding understandings which are to be carried out without inclusion in the final contract.

CONTRACT TERM
The term of the contract shall be two years, October 1, 1968 through September 30, 1970.

SALARY
The following salary plan, effective on the dates indicated, is hereby agreed to by the parties:

<table>
<thead>
<tr>
<th>Patrolman:</th>
<th>Effective 10/1/68</th>
<th>Effective 10/1/69</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Grade</td>
<td>$10,325</td>
<td>$10,750</td>
</tr>
<tr>
<td>2nd Grade</td>
<td>9,646</td>
<td>10,071</td>
</tr>
<tr>
<td>3rd Grade</td>
<td>9,095</td>
<td>9,520</td>
</tr>
<tr>
<td>4th Grade</td>
<td>8,874</td>
<td>9,299</td>
</tr>
</tbody>
</table>

These adjustments represent a 5% wage increase in the first year, plus restoration of the differential between Patrolmen and Sergeants that existed prior to July 1, 1966, as well as a 4% wage increase in the second year. The total wage and benefit increases contained in this report thus raises Patrolmen in the New York City Police Department to a competitive level with law enforcement officers in San Francisco, Detroit and Los Angeles as well as those in nearby suburban communities whose recent gains have been substantial.

Accordingly, in the second year of this agreement we have modified police compensation so as to place New York City high among the nation’s leaders. In justice, we could do no less.
All rates shown on page 9 are exclusive of:

a. Longevity increments of $100 after 5 years of service; an additional $100 after 10 years of service; an additional $100 after 15 years of service; and an additional $100 after 20 years of service (specifically treated elsewhere in this memorandum).

b. $190 per annum per member contribution to the Health and Welfare Fund (specifically treated elsewhere in this memorandum).

The following benefits, granted under a prior agreement, shall be continued:

a. Eleven paid holidays annually.

b. $185 per annum uniform allowance.

c. Assumption by the City of New York of full payment for choice of health and hospital insurance.

d. 5% pension contribution to provide increased take-home pay.

e. Minimum recall as provided under the prior collective bargaining agreement.

f. Continuation of the $1.00 per day Annuity Fund contribution.

g. One personal leave day.

h. Right to legal representation at Departmental investigation, interrogations and hearings.

i. Grievance procedure with right of final appeal outside the Police Department.

PORTAL-TO-PORTAL PAY
Effective October 15, 1968, the assignment of patrolmen to posts other than those located within their permanent command (commonly known, and hereinafter referred to as "flying") shall be accomplished by such "flying" assignment originating and terminating at the permanent command within a regular eight hour tour of duty, except as otherwise hereinafter provided.

If, for any reason, the Department is unable to, or desires to avoid, fulfilling the foregoing condition, a patrolman notified of a
“flying” assignment before the commencement of his next regularly scheduled tour of duty, shall automatically receive a minimum overtime travel guarantee of one hour’s compensatory time off at the rate of time and one-half, except that should normal travel time from his permanent command to a designated “flying” assignment be less than fifteen minutes, no overtime obligation will accrue. In the event that normal travel time between his permanent command and the “flying” assignment shall exceed one hour after calculating travel time in both directions, the patrolman is to be credited with additional overtime compensation at the rate of time and one-half in compensatory time, computed in quarter hour segments, for all such travel time incurred.

SUPPLEMENTAL PENSION FUND
The City and the Association agree to cause to be paid over to a separate fund, established within the present Police Pension Fund, the proceeds of the annual yield and capital appreciation, realized or unrealized, earned by reason of an investment in equities in excess of the yield which would have resulted from investments such as bonds, mortgages and other fixed income securities. The purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis, for Articles I and II, as determined by the trustees. The fund shall be jointly administered by two trustees, who shall be the Mayor or his representative on the Police Pension Board and the Association designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by (arbitrator to be selected); or if he fails or is unable to serve, by the arbitration provisions of this Collective Bargaining agreement.

It is also agreed that the City and the Association shall jointly sponsor and support appropriate legislation to expand within a reasonable scope the present permissible limits on investments.

The calculation to determine the amount to be paid over to the separate fund shall be made annually, not later than 30 days after the close of the fiscal year for which payment is due, and payment shall be made within 30 days thereafter.

ANNUITY FUND
Payment of the $1.00 per day contribution to an Annuity Fund established by the Patrolmen’s Benevolent Association, the terms of which
were agreed upon in the prior collective bargaining agreement, are to be made each 28 days by the employer.

**WELFARE FUND**
For the term of this agreement, the City shall make an annual contribution of $190 per patrolman to the Health and Welfare Fund of the Patrolmen’s Benevolent Association. Payments of the contributions are to be made each 28 days by the City.

**VESTED PENSION**
The City will prepare, submit, and support legislation to amend the present law so as to provide a vested pension interest for all patrolmen after 15 years of service in the Police Department, to become payable on the anniversary date of what would have been the patrolman’s 20th year of service. Any patrolman desiring to avail himself of the retirement option under the terms of this section shall give 30 days notice of such intent.

**APPEALS BEFORE MEDICAL BOARD**
A patrolman shall have the right, at his own expense, to have his personal physician consult with the Departmental medical board after the examination and interview of the employee, but before the Departmental board completes its record and makes its recommendation. Present practice regarding filing of medical statements and documentation shall continue.

**OVERTIME PAY**
Ordered overtime of an emergency nature, authorized by the Police Commissioner or Chief Inspector shall be compensated by cash payment at the rate of time and one-half for each hour so worked in excess of 40 hours. For the period October 1, 1968 to December 31, 1969, ordered overtime of a non-emergency nature shall be compensated by compensatory time off at the rate of time and one-half for each hour so worked in excess of 40 hours.

On and after January 1, 1970, all ordered overtime after 40 hours in any week shall be compensated for either by cash payment or compensatory time off, at the rate of time and one-half, at the sole option of the employee.

In order to preserve the intent and spirit of this agreement on overtime compensation, there shall be no re-scheduling of days off
and/or tours of duty. This restriction shall apply not only to the retrospective crediting of time off against hours already worked but to the anticipatory re-assignment of personnel to different days off and/or tours of duty.

**INTEREST**

The Association’s demand for interest was dropped on the basis of the two following conditions:

1. The Association did not waive its right to sue or arbitrate for payments past due.

2. The OCB will conduct an intensive study of the problem city-wide, to correct or improve it, and will submit a report within a reasonable time, which may be made public. A memorandum detailing OCB investigation on this matter will be submitted by the chairman of that office to all parties herein concerned.

It is agreed that implementation of the supplemental pension provision shall be handled as follows:

Calculation of the proceeds of the separate fund shall be based on an assumption that the yield from investments such as bonds and mortgages is 6%. Thus the proceeds to the fund shall be the difference between 6% and the yield produced by the investment in equities. This shall obtain from the first year of the plan after it becomes effective. At the end of the first year and for each succeeding year, the formula for determining the proceeds to the fund shall be determined by the trustees. If they cannot agree, it shall be determined by arbitration as provided in the collective bargaining agreement. The arbitration shall be predicated upon the general principles set forth as applicable for the first effective years of the plan.

The following additional requests have been denied:


b. Unused vacation and terminal leave credited to beneficiary of deceased member.

c. Other changes in overall pension system.
LARGEST IN THE NATION, the New York City Fire Department exceeds in size the next three largest together. It spans the five boroughs; patrols the rivers and 650 miles of waterfront. It employs over ten thousand firefighters, and supporting administrative staff of almost 2,000. Fire house companies throughout the city number 390, with 740 pieces of fire fighting equipment, and 8 fire boats. Last year, the Department responded to 172,000 alarms; extinguished 100,000 fires; and engaged in a wide variety of other activities including fire education, fire prevention inspections, and related emergency and maintenance work.

Foremost, the job of the Department and the firefighters each day is to protect 8 million citizens and almost one million buildings and other structures, with a real estate valuation of $32.5 billion. In doing so, the fireman battles flame, smoke, heat and exposes himself to collapsing walls, crumbling beams, and avalanches of brick and concrete. Lately, in addition, he faces still another danger. It is a danger that arises from the city’s hard-core slum areas, where buildings deteriorate and are abandoned faster than they can be rehabilitated or torn down, and where frustrations, resentment and anger is bred among those living in poverty. The combination has produced a marked increase in fires and alarms; and an ominous rise in violence directed at the firemen. Thus far in 1968, 700 incidents of assaults on firemen have been reported, compared to 250 all last year. The rate of false alarms has risen startlingly too. 48,000 last year, compared to only 12,000 in 1957. In the same span the number of actual fires has almost doubled. With each alarm, equipment must move, men must be committed, and exposure to danger is probable.

Last year, 2,162 firemen were injured in the line of duty and six lost their lives.

But what confronts the fireman, confronts our city and our public officials as well. The Mayor, the Fire Commissioner and other agency heads are grappling with these symptoms of the “urban crisis”, as
they inaugurate the long range programs needed as root cures. And these cures, so vitally needed, become more expensive each year. The same is true for the needs of the employees. As living costs swirl upward, and as firemen see industrial wages rise and other benefits grow, they and other city employees demand to keep pace. In short, the increased occupational demands on the firefighters is nothing more than one part of the "crisis of our cities"; the unquestioned need for firefighting services is unquestionably more expensive; and the personal and family needs of the firemen are no different from those of their neighbors.

Of course, any consideration to improve the pay and benefits of firemen because of these circumstances must be balanced by due consideration of the ability of the City and the taxpayers to pay the bill. The blunt fact is that the demands of the employees for increased pay and benefits and the resistance of the taxpayers and the City to further costly expenditure, though apparently inconsistent, are equally meritorious. Both views are legitimate and understandable and must be reconciled as best we can, if a responsible determination is to be made.

In our view, an efficient, modern fire department manned by employees who are paid decent, honorable wages and who work under good conditions is essential to the public welfare. As an essential service, its essential cost must be met. And if, as we believe, the public wants the best in fire fighting service, it must assume its duty to bear the increased cost, provided the increase is responsible and directly related to the services rendered. We are confident that our recommendations meet this test.

The issues between the City and the Union, originally over 90 in number, were divided into the following three categories:

1. Wages, Pension, and Contract Term.
2. Economic Demands.

We are pleased to report that direct negotiations between the parties, with our assistance, produced successfully negotiated settlements or disposition of all the non-economic items, including in the case of those settled, the precise language to be included in new contract. The intensive negotiations and mediation also served to sharply
narrow the number of issues in the other two categories. On these, we have decided to exercise our authority to make recommendations for settlement and disposition.

**SETTLEMENT OF NON-ECONOMIC DEMANDS**

The following contract clauses, on the subjects noted, were agreed to by the parties and shall be incorporated in the new collective bargaining agreement; or where noted, are binding understandings, which are to be carried out without inclusion in the contract.

**ASSIGNMENTS TO SUPER PUMPER OPERATOR**
*(intra Departmental Procedure)*

The Department will establish an objective procedure for employees with the required qualifications,* using a departmental wide competitive written examination with a weight of fifty (50) per centum, a practical examination with a weight of twenty-five (25) per centum, and seniority with a weight of twenty-five (25) per centum, to fill vacancies in the job of super pumper Operator. The vacancy shall be filled by the most successful candidate determined by the above procedure only. The life of the list of successful candidates shall be four (4) years.

The foregoing procedure shall not commence until the end of the Diesel course given by the Board of Education (referred to in the “Required Qualifications”) which first begins after signing of this contract. Until then, vacancies shall be filled on a temporary basis, subject to the promulgation of the list.

**ADD AS LAST SENTENCE TO ANNUITY FUND**

"Payments of this contribution are to be made each twenty-eight days by the Employer".

**ADD TO MEDICAL PLAN**

"There will be an annual reopening during the term of this contract for active employees to exercise their choice among plans."

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*The “Required Qualifications” are as follows, and are to be set forth in a memorandum from the City to the Union:

1. Firemen First Grade.
2. Possess a Class I Chauffeur License.
3. Background, experience and education in the field of diesel engine operation, maintenance and repair, or Completed Diesel course for Marine personnel as given by Board of Education, Evening Trades Division, or One (1) year experience in the Super Pumper system."
ADD TO VACATION AND SICK LEAVE

"Employees annual leave shall be changed to sick leave during a period of verified hospitalization or if seriously disabled but not hospitalized while on annual leave. Procedurally, provided the employee is hospitalized or seriously disabled as set forth above, this plan shall be administered as is the present sick leave program for employees while on a tour of duty. The decision of the Department in such matters shall be final."

PARKING

Settled in basis of a memorandum from the Commissioner to the Union, endorsed by Mr. Haber, stating Department’s "intent to make available without liability to the City, city-owned property adjacent to, near or part of fire houses, as parking facilities for the personal cars of employees. Where such property is available for this purpose, and so designated, the City is not obligated to improve it nor to maintain it for parking. This property is to be no longer available for parking when a different use is to be made of it by the City."

MESSENGER DUTY

"Messenger duty to and from Department headquarters, known as division messenger duty, presently performed in the PM period by four limited service firemen using spare chief's cars shall be extended to include the AM messenger duty; and shall utilize limited service or light duty men."

TRANSPORTATION

"The Department recognizes its responsibility to provide transportation to and from fires and in emergencies. When transportation is not made available, and an employee is authorized to use, and uses his personal car, he shall be paid $1.75 for that use."

VACANCIES

"In filling vacancies, the Department recognizes the importance of seniority (measured by time in the Department) provided the senior applicant has the ability and qualifications to perform the work involved. However, the Department's decision is final."

FORM BP-84

The present use of form No. BP-84 is changed as follows:
The BP-84 shall be filed by those to whom it now applies upon an employees return to duty provided that the information required thereby is given to the officer on duty by telephone promptly, but not later than 24 hours following the onset of the employees’ disability. In the event that after one year from the date of this contract it is determined by the Department that this procedure has engendered abuses, the Department may return to the practice followed prior to the adoption of this procedure.”

VACATIONS
“‘All employees shall have the right with the approval of the Company Commander or Commanders involved to make mutual exchanges in full or in part of vacation time within a company or adjoining companies. Present single companies shall be paired by the Department and the foregoing procedures shall obtain between the paired companies.’”

INCLEMENT WEATHER
“‘When the THI reaches 78, or the chill factor reaches 15, regularly scheduled outdoor activities will be called off. In addition, on Saturdays and Sundays multi-unit drills will be called off when the temperature drops to 25° Fahrenheit. There shall be no change in present practice in regard to rain and snow. These limitations shall not apply in unusual conditions, as determined by the Fire Commissioner, the Chief of Department or Assistant Chief on duty.’”

WORK CREDIT
“‘Runs and workers shall be credited to the relocated working company.’”

HOSPITALIZATION—LINE OF DUTY INJURY
“‘The City will prepare, submit, and support legislation to amend the present law so as to provide semi-private hospital accommodations for employees injured in the line of duty.’”

ADD TO HEARINGS AND EXAMINATIONS
“‘The employee shall have the right, at his own expense, to have his physician consult with the Departmental Medical Board after the examination and interview of the employee, but before the Departmental Board completes its record and makes its recommendation.
Present practice regarding filing of medical statements and documentation shall continue."

**FACILITIES**

"All quarters shall have adequate heating, hot water, sanitary and sanitation facilities. If not, notice shall be given to the Department of this condition. If not corrected by the Department within a reasonable time, it may be the subject of a grievance at Step III of the grievance procedure."

**SAFETY STANDARDS**

"The Department shall establish minimum safety standards for vehicles, consistent with the standards of the State Motor Vehicle Bureau for comparable vehicles, and shall have annual inspections to insure the maintenance of these standards."

The MPO or chauffeur shall be able, in the presence of the house watchman, to notify the Company Officer of defects in the apparatus; so that an inspection of the apparatus may be undertaken and a recording of the officer's findings be made in the Company Journal, pursuant to Chapter 13.2.6 of the Regulations.

All other non-economic demands were dropped by the Union.

**RECOMMENDATIONS OF THE PANEL ON ECONOMIC DEMANDS**

**OVERTIME AND PREMIUM PAY**

Article III, of the former contract shall be continued in the new contract, with the following new sentence added to, and at the end of Section 3 (b) thereof:

"On and after January 1, 1970, all such overtime after 40 hours in any week shall be compensated for by cash payment at the rate of time and one-half."

**TEMPORARY ASSIGNMENTS**

Paragraphs (a) and (b) under this heading in the former contract shall be continued in the new contract. In addition, there shall be the following provision:

"Effective January 1, 1969, whenever a Fireman is assigned to the duties of a higher rank for more than two hours in any tour,
he shall be paid in cash for the entire period of such assignment at the rate of a Lieutenant. The intent is that the Department shall have 2 hours to obtain an officer qualified in the higher rank. If not, the Fireman assigned shall continue in the assignment of the higher rank and shall receive Lieutenant’s pay for that rank for all the time in it."

**LENGTH OF SERVICE INCENTIVE**

Paragraph III (2) is amended to read as follows:

"Effective October 1, 1968 Longevity pay shall be paid as follows:

First Grade Fireman
   who has completed 5 years ... $100.00

First Grade Fireman
   who has completed 10 years ... additional $100.00

First Grade Fireman
   who has completed 15 years ... additional $100.00

First Grade Fireman
   who has completed 20 years ... additional $100.00

The adjustment after the 5th and 10th years shall not be computed as salary for pension purposes until after completing 20 years of service.

The adjustment after the 15th and 20th year shall not be computed as salary for pension purposes until after completion of 25 years of service.

**SECURITY BENEFIT FUND**

The contract clause shall read:

"Effective October 1, 1968, and for the term of this agreement the Employer shall make an annual contribution of $190 per employee to the Security Benefit Fund. Payments of this contribution are to be made each twenty-eight days by the Employer."

**EMERGENCY SERVICES**

Excused time as accorded to all other city employees shall be equally granted to firemen, including the retroactive application of days off
granted as a result of the 1966 transit strike, as well as days off granted in observance of the funerals of Dr. Martin Luther King, Jr. and Senator Robert F. Kennedy.

The retroactive excused time, totalling seven days which is due to each Fireman, shall be taken during the term of this contract. All compensatory time covered under this section shall be taken subject to the exigencies of the Department.

All other economic demands, which were not dropped* during negotiations, are denied.

RECOMMENDATIONS ON CONTRACT TERM, WAGES, PENSION

CONTRACT TERM
The term of the contract shall be two years, October 1, 1968 through September 30, 1970.

PENSION

*Section 1—The City and the Union agree to sponsor mutually agreed-upon legislation in the 1969 session of the State Legislature to provide certain improvements in pension benefits as listed below.

Section 2—Notwithstanding the provisions of this Article the provisions of such legislation shall be deemed to have implemented and shall supersede the provisions of this Article, and no rights shall accrue under the provisions of this Article different from or in addition to the rights accruing under such legislation. If such legislation is adopted, any dispute concerning the interpretation and/or application of the provisions of this Article, shall not be subject to the disputes adjustment or grievance procedures set forth in this Contract.

Section 3—In the event of ordinary disability any member who retires for such cause shall be entitled to 1/40 of his final salary for each year of service in excess of twenty years or for the fractional part of any year thereof.

*The Union's demand for "Interest", under Article XXII of its Demands was dropped on the basis of the two following conditions:

1. The Union did not waive its right to sue or arbitrate for payments past due.
2. The OCB will conduct an intensive study of the problem city-wide, to correct or improve it, and will make a report within a reasonable time, which may be public. A memorandum on what the OCB will do will be sent by its Chairman to the parties.
Section 4—In the event of accidental disability, a member would be entitled to a pension of three quarters of his final salary plus a refund of his contributions without interest either in a lump sum or annuity form. Members contributions shall be exclusive of the increased take home pay.

Section 5—If a member has completed his minimum service requirement, his rate of contribution shall be discontinued. Such rate of contribution shall be determined after the increased take home pay rate has been deducted from the required rate.

Section 6—With respect to terminations after the effective date of this amendment, where the return of the members contributions in a lump sum or annuity form is made, interest from July 1, 1969 at the rate prescribed by the Pension Law shall be included provided the cost estimated by the City’s Actuary of granting interest shall not exceed $70,000 per year.

Section 7—The City and the Union agree to cause to be paid over to a separate fund, established within the present Fire Department Pension Fund, the firemen member portion of the proceeds of the annual yield and capital appreciation realized or unrealized by reason of investment in equities, in excess of the yield which would have resulted from investments such as bonds and mortgages which the Pension Fund is currently purchasing.

It is further agreed that the maximum permissible amount be so invested as equities without undue impairment for the Article IB Fund by conversion from Fixed Income to Equities. The purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis for Articles I and IB firemen, as determined by the trustees. The fund shall be jointly administered by two trustees, who shall be the Mayor or his representative on the Fire Department Pension Board and the Union designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by Eric J. Schmertz, or if he fails or is unable to serve, by the arbitration provisions of this Collective Bargaining agreement.

It is also agreed that the City and the Union shall jointly sponsor and support appropriate legislation to expand within a reasonable scope the present permissible limits on investments.

The calculation to determine the amount to be paid over to the separate fund shall be made annually, not later than 30 days after the
close of the fiscal year for which payment is due, and payment shall be made within 30 days thereafter.

**WAGES**

Parity in compensation between firemen and patrolmen has been a historic practice for 80 years. We find realistically that it should be maintained. Accordingly, effective October 1, 1968 and October 1, 1969 the Firemen shall receive the salaries as presented in the following schedule:

### ANNUAL SALARIES OF FIREMEN

<table>
<thead>
<tr>
<th>Grade</th>
<th>October 1, 1958</th>
<th>October 1, 1969</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fireman, First Grade</td>
<td>$10,325</td>
<td>$10,750</td>
</tr>
<tr>
<td>Second Grade</td>
<td>9,646</td>
<td>10,071</td>
</tr>
<tr>
<td>Third Grade</td>
<td>9,095</td>
<td>9,520</td>
</tr>
<tr>
<td>Fourth Grade and Probationary</td>
<td>8,874</td>
<td>9,299</td>
</tr>
</tbody>
</table>

This represents, in the first year, an increase of 5% plus the differential,* and 4% in the second year. It is thus relatively equivalent to current wage settlements elsewhere in the public and private sector. It brings the New York City firemen immediately up to virtually the level of similar employees in those surrounding suburban areas and in those other cities where wages have exceeded New York City. And after the start of the second year of the contract, the New York City firemen’s wages will rank with the highest in the nation. We believe this is as it should be. There can be little dispute with the conclusion that the largest City, with a fire department and firefighters of the first rank, should pay wages and benefits of the first rank as well.

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* See reference in the police negotiations recommendations.
ADDITIONAL RECOMMENDATIONS

The New York City negotiators have requested the “overall panel” consider one other matter—the question of granting the city Housing Authority patrolmen, Transit Authority patrolmen and Correction Officers the same salary increase as granted to Policemen and Firemen. We have been informed these three unions have also requested we do so. We have also been advised Housing Authority patrolmen now have three (3) days more vacation than do city police, and Correction Officers have some additional benefit.

The question of the maintenance of so-called parity between these three unions and police and fire has been a long time problem among all groups. We have been informed parity was established during the previous city administration between 1964 and 1966, and continued in the contracts negotiated by the present administration. The panel has not discussed the substance of negotiations with the Housing Authority Patrolmen, the Transit Authority Patrolmen, the Correction Officers, nor with the New York City negotiators. Time does not permit our checking into this matter. We do not have the basis of information to upset the present “parity” between the groups and thus we can not and will not make such a recommendation. This whole question would involve a complete “job classification survey” we neither have the time nor the facility to do so. We recommend this be done.

Since we do not have the information upon which to base a fair conclusion to upset the existing salary parity, we recommend it be maintained, however with this recommendation is coupled a recommendation that Housing Authority patrolmen give up the three (3) extra vacation days, and an adjustment be made of the difference in the Correction Officers’ benefits.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Transportation Checkers, Receivers & Clerical Workers, Local 161, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Philadelphia Transportation Company

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 31, 1967 and having duly heard the proofs and allegations of the Parties, Award, as follows:

1. With the installation of the computer, the Company had the right to abolish the job of Garage Clerk.

2. Under Section 407 of the contract the Company properly transferred certain duties previously performed by the Garage Clerk to the job of Storekeeper.

3. The addition of new duties to the job of Storekeeper constitutes a "material change in the content of an existing job classification" within the meaning of Section 407. Therefore, the Company is directed to re-evaluate the job of Storekeeper in accordance with the contractual job evaluation plan.

4. The Union's claim that TWU personnel are performing work which belongs to the Storekeepers, is denied.

5. The Union's claim that A-Payroll personnel are performing the bargaining unit work in violation of Section 1007 of the contract, is denied.
DATED: June 24, 1968

 Eric J. Schmertz
 Chairman

 K. M. Gore
 Concurring in 1,2,3,4,5
 Dissenting from 1,2,3,4,5

 James Wilson
 Concurring in 1,2,3,4,5
 Dissenting from 1,2,3,4,5

 Case No. 1430 0012-68
In the Matter of the Arbitration between
Transportation Checkers, Receivers & Clerical Workers, Local 161, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Philadelphia Transportation Company

In accordance with Section 202 of the Collective Bargaining Agreement dated January 31, 1967 between Philadelphia Transportation Company, hereinafter referred to as the "Company" and Transportation Checkers, Receivers & Clerical Workers, Local 161, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "Union," the Undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide a dispute relating to the abolition of the job of Garage Clerk.

Messrs. James Wilson and K. M. Gore served as the Union and Company arbitrators respectively on the Board of Arbitration.

A hearing was held in the offices of the American Arbitration Association in Philadelphia, Pennsylvania on April 17, 1968 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. The parties were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Board of Arbitration met in executive session on June 3, 1968 following which the hearings were declared closed.
The Company installed a computer which undisputedly took over certain significant duties performed by the Garage Clerk. The job of Garage Clerk was then eliminated. It is undisputed that remaining duties were assigned to bargaining unit Storekeepers. The Company contends that all the remaining duties were so assigned. The Union claims that certain Garage Clerk duties were also taken over by non-bargaining unit supervisory personnel (A-Payroll). And further, because of the additional duties imposed on the Storekeepers, some of the proper functions of the Storekeeper are being improperly handled by production employees of the Transport Workers Union.

The Union claims that all three results - the assignment and performance of Garage Clerk duties by Storekeepers and by A-Payroll personnel; and the alleged TWU encroachment - are violative of the contract. The Company denies that any Garage Clerk work was transferred to or is being performed by the A-Payroll. It asserts that the transfer of the residue of the Garage Clerks' work to the Storekeepers was in accordance with the contract, and that TWU members are not doing Storekeeper work.

I deny the Union's claim that the Company had no right to transfer duties from the classification of Garage Clerk to that of Storekeeper. Section 407 of the contract clearly permits the Company to do so. Among other things, its express language allows for the transfer of work within existing classifications. However, when such transfers are effectuated, they must comply with the requirements of that Section. So, though the
Union may not complain about a transfer of duties from one classification to another, it may complain if the transfer has resulted in the establishment of a new job, because of the addition of new duties. And by consequence the Union is entitled to a review of the wage rate of the job affected under the contractual job evaluation plan. In short, though the Company may transfer duties from one job classification to another, it may do it only if it also meets its full responsibilities under Section 407. Thus where, as here, one job is abolished and at least some of its duties transferred to another, the wage rate of the surviving classification is subject to a new job evaluation if the result of the addition of duties creates a new classification within the meaning of Section 407.

In the instant case I am persuaded that the transfer to the Storekeepers of certain work previously performed by the Garage Clerks, is significant enough to require a new evaluation, as mandated by Section 407 of the contract. This is so whether the transferred work amounts to no more than one hour each day, as contended by the Company; or three hours and possibly five at some locations, as alleged by the Union. Either way the transferred duties are of sufficient significance to constitute a "material change in the content of an existing job classification," warranting a re-examination and a re-evaluation of the Storekeeper wage. Accordingly, though the Company acted within its contractual rights in transferring work from the classification of Garage Clerk to that of Storekeeper, it must now evaluate the latter in accordance with the job evaluation plan.

There is not sufficient evidence in the record to support
a finding that work properly within the jurisdiction of the Storekeepers has been taken over by TWU personnel.

The practice has been for Storekeepers to issue tools and other equipment to the TWU production men. Also however, at times, and at many installations, the TWU men have direct access to the store room and have obtained tools and equipment on their own without going through the Storekeeper. This latter practice continues. Though the Union claims it is solely because the Storekeepers are too busy with their newly assigned work, I am not persuaded that it is not also a perpetuation of the dual practice which obtained even when the Garage Clerk classification existed. In short, I am not satisfied that the TWU personnel are doing anything now which they have not done previously. Also when the Storekeeper checked tools and equipment in and out for the TWU personnel, he maintained certain inventory records. There is no evidence nor indeed a claim by the Union that the TWU men are performing any such clerical duties. Rather the argument is that the tool rooms are being inefficiently managed because the Storekeeper is occupied with other duties. If the Company chooses to run its tool rooms that way, it is not for the Union to complain, unless the Storekeeper is held responsible for loss of tools and equipment. But the evidence clearly shows that he is not so responsible.

So the mere fact that there is direct access to the store room by TWU personnel, as disruptive to efficiency and conducive to loss as it may be, does not mean that TWU members are performing work that belongs to the Storekeeper.
However, so that misunderstandings and misinterpretations may be avoided I think every effort should be made to afford the Storekeepers sufficient time to issue and receive tools to and from the TWU men, especially at those large Company installations where several Storekeepers are on duty and where the traffic in and out of the store room is extensive. I would hope that the Company would give careful and positive consideration to this recommendation in the interest of reasonable application and recognition of duties traditional to Storekeepers.

The Company argues that supervisory A-Payroll personnel have performed no duties after the abolition of the Garage Clerk classification that they did not perform prior thereto. Based on the record I conclude that a distinction must be made between the nature of the work and its quantity. I agree with the Company's assertion that the supervisory employees are not now performing any type of work which they did not perform when the Garage Clerk job was in existence. The fact is that so far as the nature of the work is concerned, supervisory personnel are doing only what they did before, some of which was handled jointly by the Garage Clerk and the supervisors. Neither had exclusive jurisdiction; rather their work duties overlapped. So as far as the type of work is concerned, I do not find that the A-Payroll is performing work which previously was exclusively within the Garage Clerk's jurisdiction. Yet I am convinced that at certain installations at least, the quantity of such work performed by supervisory employees has increased as a
direct result of the abolition of the Garage Clerk job. A-Payroll personnel are doing more of the same type of work they previously performed, because there is no longer a Garage Clerk to do some of it as well.

The question that remains is whether the increase in quantity of work performed by the A-Payroll as a result of the abolition of the job of Garage Clerk, is violative of Section 1007 of the contract which reads:

The Company will not weaken the existing bargaining unit by transferring jobs or work presently performed within the bargaining unit to the "A" Payroll.

The parties disagree on the interpretation of this section. The Union interprets it as an absolute prohibition against the performance of any bargaining unit work by the A-Payroll. The Company argues that it means that bargaining unit work may not be assigned to the A-Payroll if the effect is to weaken the existing bargaining unit.

If I accepted the Union's interpretation I would hold that any transfer of work from the bargaining unit to the A-Payroll including an increase in quantity, would be proscribed and that phase of the Union's grievance in the instant case would be upheld. Under the Company's interpretation, the Union's grievance would be sustained only if the quantity of work transferred to A-Payroll constituted a weakening of the bargaining unit.

I find this contract section to be ambiguous. Logically it is subject to either of those two contrary interpretations. As worded it could well mean that bargaining unit work may be performed by the A-Payroll so long as the unit is not weakened
thereby. Contrarywise the performance of bargaining unit work by A-Payroll could be construed under this section as an irrebuttable example or agreed upon definition of an act that weakens the bargaining unit.

It seems to me that the Company's interpretation is more plausible. If the intent was to ban the performance of any bargaining unit work by the A-Payroll, Section 1007 could have easily said so. It could have simply provided that the Company will not transfer work from the bargaining unit to the A-Payroll. But Section 1007 is not so unequivocal. The phrase that "the Company will not weaken the existing bargaining unit" though inartfully written and positioned, must therefore have some meaning and intent. I believe it was intended to have a limiting effect on what otherwise would have been an absolute prohibition against the transfer of bargaining unit work to the A-Payroll. It contemplates, I think, those situations where some work may be done by the A-Payroll which would normally have been performed by the bargaining unit, but which is of such minor quantity or significance as to have no effect on the unit if handled by supervisory personnel. For example, if a small quantity of bargaining unit work, perhaps a few hours a week, could not fit into existing bargaining unit classifications, and did not itself constitute a full day's work for a bargaining unit employee, its performance by the A-Payroll would be non-prejudicial to the bargaining unit. To cover that circumstance at least, is I believe a purpose for Section 1007.

Such a circumstance is present in the instant case. The additional quantity of work taken over by the A-Payroll would
not approach enough to keep a Garage Clerk fully occupied if that classification was restored. And to add it to the existing and new duties of the Storekeeper, would only compound the Union's justifiable concern about the new duties required of those employees.

What is then to be done with this relatively small extra quantity of work which remained after the bulk had been properly transferred within the bargaining unit (and therefore not in a way to weaken it) from the Garage Clerk to the Storekeeper? Put another way the critical questions are: Is the bargaining unit weakened when this work is handled by the A-Payroll, and would the bargaining unit be strengthened if this work was returned to the unit? To ask the questions, I believe, is to answer them. Neither the handling of the work by the A-Payroll nor its return to the unit would, in my view, have any effect on the strength or weakness of the bargaining unit. The quantity of work taken over by the A-Payroll was so small in comparison to the portions transferred to the Storekeepers and taken over by the computer, that no material effect on the bargaining unit would be sustained whether the A-Payroll people did it or not. The fact is that the bargaining unit was not weakened by the transfer of that particular work to the A-Payroll but was weakened by the installation of the computer. The computer is the proximate cause of the elimination of the bargaining unit job of the Garage Clerk. But the installation of the computer was not violative of Section 1007. Nor was the unit weakened by the inta-unit transfer of most of the remaining work from one unit/to another. What remained, and what in the form of quan-
tity was taken over by the A-Payroll was de minimus at most in its effect on the bargaining unit. And if it was transferred back to the unit it could neither restore the Garage Clerk's job, nor cure the damage to the unit which resulted from the installation of the computer.

Accordingly, what additional quantity of work is now handled by the A-Payroll personnel as a result of the abolition of the job of Garage Clerk, is not a violation of Section 1007 of the contract.

Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Transport Workers Union of Philadelphia Local 234 AFL-CIO

and

Philadelphia Transportation Company

Award of Arbitrators

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 15, 1965, as extended, and having duly heard the proofs and allegations of the Parties, Award, as follows:

1. There was not just cause for the discharge of Ronald Brown. He shall be reinstated.

2. He shall receive no back pay from the date he began working for the Yellow Cab Company to the date of his reinstatement.

3. He shall receive back pay from the date of his discharge to the day he commenced work for Yellow Cab less any money he earned in gainful employment during that period.

DATED: September 6, 1968

Eric J. Schmertz
Chairman

DATED: September 1968

Joseph Donato
Concurring in 1,2,3
Dissenting from 1,2,3

DATED: September 1968

Arthur W. Wilkens
Concurring in 1,2,3
Dissenting from 1,2,3

Case No. 14 30 0303 68
In the Matter of the Arbitration between
Transport Workers Union of Philadelphia
Local 234 AFL-CIO

and

Philadelphia Transportation Company

Opinion
of
Chairman

In accordance with Article II of the Collective Bargaining Agreement dated January 15, 1965, as extended, between Philadelphia Transportation Company, hereinafter referred to as the "Company," and Transport Workers Union of Philadelphia, Local 234 AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide the following stipulated issue:

Was there just cause for the discharge of Ronald Brown and if not, to what remedy is he entitled?

Messrs. Joseph Donato and Arthur W. Wilkens served respectively as Union and Company designees to said Board of Arbitration. A hearing was held in the offices of the American Arbitration Association in Philadelphia, Pennsylvania on July 11, 1968 at which time Mr. Brown, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The Board of Arbitration met in executive session in New York City on August 28, 1968, following which the hearings were declared closed.

There is a threshold question concerning the reason or
reasons for the grievant's discharge. The Union contends that it is limited to the charge that the grievant was under the influence of intoxicants when and while on duty on March 16, 1968. The Company agrees that it so charged the grievant. But also, in the alternative, that if he was not under the influence of intoxicants, he had nonetheless been drinking and his condition was so unsatisfactory as to be violative of Rule 5 of the Rules for Employees, which, together with his prior disciplinary record (including several suspensions and a gratuitous reinstatement following a discharge) primarily for poor attendance, constitutes just cause for his discharge in accordance with the well recognized rule of progressive discipline.

The written notification of the Company's position regarding its termination of the grievant is set forth in a letter dated March 26, 1968 in reply to the Union's grievance. Its text, which I consider significant in resolving the threshold question, reads in its entirety as follows:

This grievance protests the discharge of operator R. Brown for being under the influence of intoxicants and unsatisfactory performance of duties.

While on duty Mr. Brown was contacted by two supervisory persons who adjudged him to be under the influence of intoxicants, immediately relieved him from duty and returned him to the depot. At the depot Mr. Brown was observed by his depot superintendent who also determined that he was unfit for work and therefore was discharged.

The discharge of Mr. Brown was proper and is hereby sustained.

The Company asserts that the first paragraph of that letter stating that the grievant was discharged "for being under the influence of intoxicants and unsatisfactory performance of duties"
(emphasis added), clearly establishes the alternative positions of the Company in justification of its action. Specifically the Company says that the phrase "unsatisfactory performance of duties" relates to the grievant's condition on March 16, 1968 if it was something less than "under the influence of intoxicants" plus his prior disciplinary penalties.

The Union advances a different interpretation. It contends that the phrase "unsatisfactory performance of duties" refers solely to the charge that the grievant was under the influence of intoxicants. Or in other words, because in the opinion of the Company the grievant was under the influence of intoxicants, the performance of his duties on March 16, 1968 was unsatisfactory. It is the Union's position that the Company's reliance on Rule 5 together with the grievant's prior disciplinary history is merely an after thought, upon which the Company now wishes to rely in the event that it cannot prove that the grievant was under the influence of intoxicants that day. There is no dispute that under Section 202(h) of the contract, the discharge is automatically sustained if it be found that the grievant was "under the influence of intoxicants."

For two reasons I conclude that the reason for the grievant's discharge relates solely and exclusively to his physical condition on March 16, 1968. I am not satisfied that the Company, at the time of and as a basis for the discharge, relied upon or incorporated the grievant's prior disciplinary record. Nor am I persuaded that the Company discharged him for any reason other than its belief that he was under the
influence of intoxicants that day and because, as a consequence thereof, he was unable to perform his duties satisfactorily.

My first reason is based on a well established rule of evidence. The burden of proof in a discharge case is on the Company. In my view not only must the Company prove its substantive case by clear and convincing evidence, but it must assume a similar burden in proving its procedural position, if that be in dispute as well. Here it is. The letter of March 26, 1968 is by no means clear on whether or not there was an additional reason for the grievant's discharge other than being under the influence of intoxicants. The first paragraph of that letter is ambiguous. The phrase "unsatisfactory performance of duties" can just as well relate to the effect of being under the influence of intoxicants as it can to a lesser condition from the use of alcohol, coupled with a prior disciplinary record. It seems to me that if the Company intended to rely upon the second reason as well as the first, it could and should have stated so, explicitly and unequivocally in the letter of March 26. By not doing so the Company has left the matter in considerable doubt, and therefore has not met its burden of showing that there was more than one reason for the grievant's termination.

Secondly, the balance of the March 26 letter supports the Union's interpretation of why the grievant was fired. It recites events that took place only on March 16, stating that representatives of the Company adjudged the grievant to be under the influence of intoxicants, and that a depot superintendent (also that night) determined the grievant to be "unfit
for work and therefore was discharged." (Emphasis added). Only one interpretation can be placed on this paragraph. It is that the grievant was discharged because he was unfit for work on March 16, 1968 resulting from his condition of being under the influence of intoxicants. In my view the second paragraph which attributes his unfitness for work to the influence of intoxicants, is a more detailed explanation of the first paragraph.

In short, the relation between his lack of fitness for work and being under the influence of intoxicants as set forth in paragraph 2, is the same as and is explanatory of the relationship between the phrase "under the influence of intoxicants" and "unsatisfactory performance of duties" in paragraph 1.

So, the Company could have relied on alternative reasons for the grievant's discharge, and might well have established just cause on the basis of the grievant's use of alcohol, but short of his "being under its influence," when weighed with his prior disciplinary record. But I am unable to conclude that it did so in this case.

The issue then is narrowed to whether on March 16, 1968 the grievant was under the influence of intoxicants. I am in full accord with the definition of that condition as advanced by the Company and as enunciated in several prior arbitration awards - namely "a sufficient use to impair the faculties, physical or mental reactions."

However, based on the evidence advanced by the Company, I am not satisfied that the grievant's condition on March 16, 1968 equalled this definition. No doubt he had been drinking.
His breath smelled of alcohol, though not overwhelmingly so. He admits to some extensive drinking on the day before which was his day off, and to some beer drinking up to but not beyond 12 noon on March 16, which was 12 hours before he was scheduled to report to work that day. He may have had some drinks closer to his starting hour. But there is no evidence in the record to prove that allegation. The Company speculates that because it took him about an hour to get from his home to work, a distance requiring usually only 15 minutes, he must have stopped off for some drinking. But this is mere surmise without any evidence of the fact, and hence fails to meet the standard of proof required of the Company in such cases. Moreover, no matter how intolerable and potentially damaging may be an alcoholic breath on a bus driver (which to my mind is clearly a disciplinary offense), it does not mean that the driver is "under the influence of intoxicants," because alcohol on the breath is not synonymous with "the impairment of the faculties, physical or mental reactions." Obviously it depends upon the quantity of alcohol consumed and its physiological effect on the consumer, not whether his breath smells from alcohol. Both a small and large amount of alcohol can produce an alcoholic breath, but the former may not necessarily result in the impairment of the faculties. So the issue is further narrowed to whether or not the Company has met its burden of showing that on March 16, 1968 the grievant's faculties, physical or mental reactions were impaired.

Based on the evidence I cannot conclude that they were. No blood test or breathometer test was taken to ascertain the
quantity of alcohol in the grievant's system. Though his
clothing was disheveled and his tie missing, his explanation
that it resulted from an altercation with a fellow employee
just prior to reporting for work, is plausible and acceptable.
It is substantially supported by other testimony and not re-
futed by the Company. The same is true as an explanation of
his loss of part of the money given him by the dispatcher.
The evidence that his eyes were "glassy" on March 16, as
testified to by supervisory personnel who were sent to observe
him, specially for signs of intoxication, after he drove his
bus from the depot to his starting point, is not determinative
because it was freely conceded that the grievant's eyes were
equally glassy at the arbitration hearing. And I am satisfied
that he was not under the influence of intoxicants that day.

Also under the careful observation of two supervisory
persons seeking evidence of his intoxication, the grievant
successfully passed certain fundamental tests. He negotiated
the aisle of the bus without any noticeable staggering or ab-
normal gait and did as well walking up and down the sidewalk
after he left the bus. That he was uncharacteristically bois-
terous to the two supervisors in complaining about the unclean
condition of the bus and that he dropped one of his change
coins and made no effort to recover it, is of course suspicious.
But these, to my mind, albeit suspicious, in the face of the
balance of the record are just not enough to prove that he
was under the influence of intoxicants within its established
meaning.

I have no quarrel with the Company's decision to remove
him from the bus that night. Certainly if there is any doubt about a driver's condition or his ability to perform his duties, the Company must act prudently and not run any risk which would endanger the riding public. Therefore if he had been relieved of his duties that night and deprived of that day's work and pay, I might well have adjudged the Company's action reasonable and have upheld that limited action. But that is not what the Company did. Rather, it decided he was under the influence of intoxicants, and discharged him for that specific reason. Though no doubt it was satisfied that such was the grievant's condition, the evidence upon which its conclusion was based is just not adequate as proof. Accordingly the grievant's discharge is reversed and he shall be reinstated.

However, I find reason to deny him full back pay. Sometimes after his discharge he took a job as a taxi driver with the Yellow Cab Company. Though he worked only part time, he said he could have, on his own initiative, worked full time in that capacity. Since cab driving is reasonably related to bus driving, I believe that the grievant, under the circumstances, had a duty to mitigate the damages to the fullest extent possible. I would not require him to take any job, but cab driving is appropriate for mitigation and I find no justification for his failure to work full time. Accordingly, the grievant shall receive no back pay from the time he began working for Yellow Cab to the day of his reinstatement. For the period from his discharge to the date he began work with Yellow Cab he shall receive back pay, less any money he earned
in gainful employment during that period.

Eric J. Schmertz
Chairman
In the Matter of the Arbitration Between
Local 815 International Brotherhood of
Teamsters
and
Polychrome Corporation

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated July 15, 1965, as extended, and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company erred when it applied the June 1st wage rate to the vacation pay of those employees who took vacations on and after July 1, 1968. The new and higher wage rate effective July 1, 1968 is the rate at which vacations taken on and after that date should be paid. Those employees affected shall be made whole for the difference.

Eric J. Schmertz
Arbitrator

DATED: September 1968
STATE OF New York
COUNTY OF

On this day of September, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with Paragraph Sixth of the Collective Bargaining Agreement dated July 15, 1965, as extended, between Polychrome Corporation, hereinafter referred to as the "Company," and Local 815 International Brotherhood of Teamsters, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Has the Company correctly paid employees for their vacations for 1968. If not, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on August 21, 1968 at which time representatives of Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath and filed certain post hearing data and statements.

On July 1, 1968 a wage increase went into effect. The Union claims that vacations taken on and after July 1 are to be paid for at the new and higher wage rate which went into effect on July 1. The Company claims that all vacations taken any time during the prescribed vacation period (between June 15 and November 15) are to be paid for at the wage rate that obtained as of June 1 of that year.
The disagreement of the parties stems from their divergent interpretations of Paragraph Seventh (Vacation) of the Collective Bargaining Agreement, the pertinent parts of which read:

Employees covered by this Agreement shall be granted vacations with pay subject to the following terms and conditions:

(A) Employees who have had continuous employment with the Company shall be granted a vacation with pay pro-rated in accordance with scheduled working hours per day as follows: If on June 1 of the contract year, an employee

Has been in the employ of the Company for a period of .... months, but less than .... year(s) will receive .... vacation with pay at the then established rate.

The parties disagree as to what the phrase "the then established rate" modifies or refers. In the Company's view that phrase, based on the entire reading of the aforesaid provision means the rate in existence on June 1. It concludes therefore that a wage increase effective July 1 would not be applicable to vacation pay for those vacations taken on or after July 1. Contrarywise, the Union interprets the phrase as referring to when the employee receives his vacation entitlement. And therefore though the Union concedes that vacations taken before July 1 would be paid at the rate then prevailing, those vacations taken on or after July 1 should be paid for at the rate which prevails when the vacation is received; which in 1968 would be at the higher rate effective on and after July 1.

Though there is no doubt that June 1st is at least a date
of eligibility for vacations; the balance of the critical wording of Paragraph Seventh is manifestly ambiguous. Logically and reasonably it is subject to either interpretation advanced by each party. Grammatically the phrase "the then established rate" could just as well mean the wage rate which coincides with the date on which an employee takes his vacation as it could to the date of June 1. Neither the remaining language of Paragraph Seventh nor any other clause in the contract serves to clarify or resolve this ambiguity.

In such event the classical approach is for the Arbitrator to look to practices of the parties under the ambiguous contract clause for evidence of intent or interpretation. In this case the evidence of practice, on the two previous occasions when a similar factual situation presented itself, supports the Union's position herein. The record indicates that in 1965 and in 1962, the only prior years in which wage increases went into effect on July 1, the Company paid for vacations taken on and after July 1 at the higher wage rate which went into effect on that date. The Company questions whether two instances constitute a past practice. Under the circumstances of this contractual relationship I am persuaded that they do. Ordinarily a past practice requires a consistent and unvaried condition for an extended period of time. Here the practice was unvaried because it obtained to the only possible instances in which the problem arose - namely in the only years in which the wage rates changed on July 1. There were no other occasions and hence no practice to the contrary. For the same reason, in my judgment, the years 1965 and 1962,
as the only times at which the similar application of Paragraph Seventh of the contract was required, must per force constitute a sufficiently extensive period of time to meet the definition of a past practice.

The Company argues that any practice in 1965 and 1962 contrary to its position in this arbitration was simply a mistake, and should not therefore be binding on or prejudicial to the Company's case in this arbitration. I must reject this argument on well settled grounds of contract interpretation. Where the contract language is clear, a contrary unilateral practice by one party may be halted by notice and adherence thereafter to the explicit contract terms. And any previous contrary practice, if by mistake, would not be prospectively binding. But that is not the rule where the contract language is unclear or ambiguous. In such event the manner in which the language has been applied will serve as a basis for its interpretation, and if the Company, as here, has applied that language consistently in one manner, it may not later totally avoid the consequence by the claim of mistake.

The Company also argues that the Union's interpretation of Paragraph Seventh would lead to a grossly inequitable application of vacation benefits. It points out that employees would receive two different rates of pay for their vacation depending upon whether the vacations were taken before or after July 1. It asserts that Paragraph Seventh should not be interpreted in a manner which would provide less vacation money for those taking their vacations in June and more vaca-
tion money for those receiving their vacations after July 1. There is no doubt about this result. But if it is inequitable it is merely the practice which the Company itself followed and undertook in 1965 and 1962, and as such is a reflection of the contract bargain which the parties negotiated in Paragraph Seventh of the contract. The Arbitrator's task is to interpret and apply the contract as intended and negotiated by the parties. If an inequity results, it is a product of what the parties themselves bargained. A change is for negotiation, not for arbitration.

But the Company's interpretation of Paragraph Seventh gives rise to inequities of similar magnitude. It would mean that an employee who took his vacation subsequent to July 1 would receive vacation pay in an amount less than what he would have earned had he remained at work. It would mean that he would not enjoy his basic rate of pay while on vacation. Consider also the following inequity under the Company's interpretation. Employees A and B work in the same job classification at the same wage rate for the same 12 month period. Employee A takes his vacation before July 1 and is paid at the June 1 prevailing rate. On and after July 1 he is at work earning the new and higher wage rate. Employee B takes his vacation after July 1, and is paid for it at the rate which obtained as of June 1. The mathematical result is obvious. Because Employee B earned less money during his vacation than Employee A earned while at work, and because while Employee A was on vacation, he and Employee B received the same amount of money, at the end of a full year's employment, Employee A will
have received gross wages greater than Employee B. Clearly therefore, it is just as inequitable for employees similarly classified at the same wage rate, who work for the same period of time, to receive different gross amounts of pay, as it is for employees to be paid for their vacations at the rate of pay obtaining when the vacation is taken.

The Company points out that it is not uncommon for contracts to provide for vacation pay at rates less than the wage rate prevailing when the vacation is taken. I agree. An example is a calculation based on a percentage or average earnings of the prior year, which of course may be significantly less than the wage or earnings of the year in which the vacation is taken. But in that instance the contract language is explicit on the point. It expressly provides for the method under which vacation pay is to be calculated. It makes clear that vacation pay is to be on a basis other than the wage rate which exists at the time that the vacation is taken. In other words, in my experience, when the rate of vacation pay differs from the rate prevailing at the time that the vacation occurs, it is so provided by precise and explicit contract language. But absent such language the presumption has been that employees shall enjoy the same basic wage rate while on vacation as they would earn had they been at work.

And in the case of an ambiguous vacation clause - as is present here - where a clear and explicit exception to the general presumption is not prescribed, that presumption must prevail.

Accordingly the Company erred when it applied the June 1 wage rate to the vacation pay of those employees who took
vacations on and after July 1, 1968. The new and higher wage rate effective July 1, 1968 is the rate at which vacations taken on and after that date should be paid. Those employees affected shall be made whole for the difference.

[Signature]

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
United Steelworkers of America,
Local 5398, AFL-CIO
and
Proctor & Schwartz, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated March 31, 1963 as extended, and having duly heard the proofs and allegations of the Parties, Awards, as follows:

1. Under the contract language in effect between the parties, especially Article 8 Section 8 and Article 4 Section 3, the Arbitrator has no alternative but to rule that the claims set forth in phases one and two of grievance #67-6 dated March 8, 1967, are not arbitrable.

2. In disposition of the claim in phase three of the grievance, the Arbitrator finds that the job scoring submitted by the Company, increasing the "Education" factor from the first degree to the second degree and reslotting the job of Grinder-Balancer in Labor Grade 5 is correct.

Eric J. Schmertz
Arbitrator

DATED: May 21, 1968
Case No. 14 30 0758 67
In the Matter of the Arbitration between
United Steelworkers of America,
Local 5398, AFL-CIO
and
Proctor & Schwartz, Inc.

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated March 31, 1963 as extended, between Proctor & Schwartz, Inc., hereinafter referred to as the "Company" and United Steelworkers of America, Local 5398, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute relating to the grievance of Thomas E. Gibson, #67-6 dated March 8, 1967.

A hearing was held at the Company plant in Philadelphia, Pennsylvania on April 24, 1968 at which time Mr. Gibson, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The issue, as stipulated by the parties is:

1. Is the grievance as set forth by the Union arbitrable under the terms of the Agreement between the Company and the Union?

2. If so what shall be the disposition of Grievance #67-6 on the merits?

Grievance #67-6 reads:
REQUEST FOR BACK PAY DUE TO IMPROPER CLASSIFICATION OF LABOR GRADE

Code #54-243 Grinder-Balancer

While reviewing my job description, I discovered that for the Education factor I have been given only one degree. The fact that my labor grade is 6 implies more than one degree in this area. Jobs throughout the plant in lesser grades have as many as 3 degrees for the Education factor. Given the proper rating in Education the job automatically falls into Labor Grade 5. Subsequently, my job has been improperly classified since the issuance of the original job description.

This is not a contract violation, but an error on the part of management, since management issued the original job description, before the initiation of the contract itself. Therefore, "the five days prior grievance procedure for retroactive moneys" does not apply in this case. The error should be corrected, the job placed in Labor Grade 5, and the difference in wages paid retroactive back to 4-6-56, when this error originated.

Over the past four years there has been a substantial change in job content, but no change in wage rate. I believe that this change in content places the job in Labor Grade 4.

Thomas E. Gibson

The foregoing grievance covers three distinct and separate allegations of contract violations by the Company. One part of the grievance, hereinafter referred to "phase one" contends that the Job Evaluation of Grinder-Balancer was improperly scored with respect to the "Education" factor, prior to the signing of the first Collective Bargaining Agreement between the parties. The grievant claims that, had the Education factor been scored in the second degree at that time, instead of the first degree, his job would have been slotted in Labor Grade 5. The Union contends that because of this error the
grievant is entitled to a retroactive pay adjustment from April 6, 1956 to the date of the grievance.

Another part of the grievance, hereinafter referred to as "phase two" concerns itself with general alleged errors in scoring and changes in job content which the Union claims occurred or continued after the parties entered a collective relationship and which the Union traces back to May, 1963. As a remedy the Union seeks, on behalf of the grievant, retroactive pay from the date of the alleged change in job content to the date of the grievance.

And thirdly, hereinafter referred to as "phase three" the grievance claims a change in job content of a substantial nature resulting specifically from the introduction of a Stewart-Warner Electronic Indicator during 1963, justifying rescoring the job to Labor Grade 4.

Material to the claims set forth in phases one and two of the grievance are Article 8, Section 8 and Article 4, Section 3 of the contract. The provisions of those contract clauses and the time limits set forth therein are clear and unequivocal. As part of the Collective Bargaining Agreement they are known to the parties and need not be recited herein.

With respect to phase one of the grievance, the Company, through the testimony of the grievant, established that through successive Collective Agreements, without exception from the first contract to the current Agreement, no issue was raised by the Union or the grievant concerning the alleged error in job scoring. Further, even though the grievant was a member
of the negotiating committee in 1960 and participated in negotiating changes in other jobs and their labor grades in his own department he did not call to the Company's attention the allegations contained in phase one of the instant grievance, nor did he make the scoring of his particular job an issue in any of the negotiation periods thereafter.

Procedurally, the same is true with regard to the claim in phase two of the grievance. The record shows that neither the grievant nor the shop committee in office at the time of the alleged change in job content, made any attempt to file a grievance claiming a substantial change in job content, though the right to do so was clearly a part of the contract then in effect between the parties. In short, neither the grievant nor the Union complied with the clear and explicit time limits set forth in the contract with regard to filing complaints over job evaluations and changes in job content. From the time that the grievant and the Union learned of the factor evaluations and the changes which they allege, there was full and adequate opportunity for a grievance to be filed within the time limits prescribed. Yet no grievance was initiated within those time limits; but rather long after those limitations had passed.

Therefore based on the contract language in effect between the parties, especially Article 8 Section 8 and Article 4 Section 3, the Company has established a *prima facie* case of the non-arbitrability of the claims set forth in phases one and two of the grievance. Based on the record, the Union and the grievant have not offered evidence which would rebut that
prima facie case. Therefore I have no alternative but to rule that the claims set forth in phases one and two of the grievance are not arbitrable.

In connection with the introduction of the Stewart-Warner Electronic Indicator, it is the position of the Company that no substantial change in the job content of the job Grinder-Balancer occurred within the meaning of the Collective Bargaining Agreement and therefore the Company was not obligated to initiate any action or remedy. Without determining whether a substantial change in job content took place with the introduction of that machine, I can find no fault with the Company's theory of its responsibility. If the Union or grievant, at that time, deemed that a substantial change in job content had taken place, either or both had the contractual right to grieve or request review of the job by the Company, without awaiting action on the Company's sole initiative. In view of the Company's position that no substantial change had occurred, it was for the Union, rather than for the Company, to raise the question and place the disagreement in issue. Therefore the Company cannot be blamed for any lapse of time in reviewing the job when the Union had the right during that time to demand a review or to grieve, but failed to so act.

The evidence demonstrates however, that when the Union finally asked for a review of the job, the Company complied. And as a result of that review the Company rescored the job of Grinder-Balancer from Grade 6 to Grade 5 by increasing the Education factor from the first degree to the second degree.
As a consequence the Company made a retroactive adjustment in the grievant's pay at that time in accordance with the requirements of the Collective Agreement. Considering that adjustment; the record presented by the parties in this case; my observation of the job, undertaken at the request and with representatives of the parties; and the contract provision that the Company is not required to make an award beyond five days after the date a grievance is filed; I am satisfied that the Company's evaluation of the Grinder-Balancer job was proper and in accordance with the administrative procedures of the job evaluation plan provided for by the terms of the Collective Agreement.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
American Federation of Television and
Radio Artists, AFL-CIO
and
Progress Broadcasting Corporation, Inc.
(Radio Station WHOM)

In accordance with Section 8 of the Collective Bargaining Agreement dated February 27, 1968, between Progress Broadcasting Corporation, Inc. (Radio Station WHOM), hereinafter referred to as the "Company," and American Federation of Television and Radio Artists, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the sole Arbitrator to hear and decide a dispute concerning the propriety of the suspensions of three employees, Hipolito Vega, Freddie Baez and Rafael Diaz Gutierrez.

A hearing was held at the offices of the American Arbitration Association on August 23, 1968, at which time Messrs. Vega, Baez and Gutierrez, hereinafter referred to as the "grievants," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs and the hearings were declared closed as of September 4, 1968.

The grievants have been indicted by a Federal Grand Jury on two counts of alleged violations of the "Payola" provisions of the Federal Communications Act. At the time of the indictment they held various positions as announcers with the Company.
There is no dispute over the fact that the indictments relate to allegations of illegal acts committed by the grievants in their employment capacity.

The Company suspended them without pay, pending the outcome of their trials on the criminal charges. The propriety of those suspensions is the issue in this arbitration.

I find no violation of the contract. The grievants were not discharged, so Section 15 of the contract is not applicable. Nor am I persuaded that Section 15 ousts the Company from authority to impose suspensions. Clearly, that section limits the circumstances under which the penalty of discharge would lie, but I do not find in it any limitation on the Company's right to impose lesser penalties, provided, of course, such lesser action is supported by just cause.

Nor is a suspension improper because it is not disciplinary. It is well recognized that a suspension may be imposed where no misconduct is involved or alleged; such as where an employee for reasons beyond his control loses his competence; is too ill or disabled to work regularly; or fails to maintain professional credentials for a job which requires them. So in this case, the suspension of the grievants cannot be overturned either under the limitations of Section 15 or merely because the Company deems them non-disciplinary. What is crucial is whether the suspensions were for just cause.

I am persuaded that they were. In so ruling it should be crystal clear that the grievants' guilt or innocence of the criminal charges is not part of this arbitration and no judgment on that question is either made or to be inferred.
Also, it should be clear that the question of just cause for discharge under Section 15 of the contract, or the propriety of the suspensions based on the truth of the criminal charges are also outside the scope of this case, simply because only the discharge of the grievants or reliance by the Company on their criminal culpability as justification for the suspension, would place those questions in issue. Neither circumstance is present here.

Rather I find that faced with criminal charges against three of its employees for alleged acts interwoven with their jobs as announcers, the Company acted reasonably and realistically when it sought to protect its reputation and advertising business without prematurely judging the grievants or prejudicing their cases in the criminal proceeding.

Only by suspending the grievants could this be accomplished. For if they were discharged, the substantive aspects of the indictment would have to be relied upon to justify it. To do so would require the Company to make a determination of culpability, possibly prejudicial to the grievants' defense in the criminal case, and contrary to the Company's expressed hope that they be found innocent.

To retain the grievants in active employment would have been manifestly difficult at that time. The indictments for alleged payola violations arising not from outside activities, but from the very jobs on which the grievants would continue to work, created a demonstrably precarious situation for the Company. Though the grievants may be innocent, and are entitled to that presumption in the criminal proceeding, it
would be naive to conclude that their effectiveness or usefulness as announcers was not impaired, at least temporarily. Unfavorable publicity, and a loss of confidence by those who place commercials with the Company would have assuredly followed as a logical and probable consequence if the grievants were then retained in their jobs. Indeed the evidence reveals one piece of adverse publicity - an elaborate news article reporting the accusations, in the Spanish language press. (The Company broadcasts primarily to the Spanish speaking community). And I do not think that the Company needed to wait for more unfavorable reactions or a definitive loss of business before it acted. I am persuaded therefore that at the time it was both manifestly risky to the Company's image and business and patently inconsistent with normal employment practices to permit the grievants to continue working at the very tasks out of which the payola charges arose. The weight of arbitration decisions under similar and relevant circumstances, support this view. And I am in agreement.

Imposition of the suspension as a protection was not only appropriate, but prudent, because it preserved the grievants' re-employment rights; obviated prejudice which might result from a discharge on the merits, thereby upholding the presumption of innocence; while at the same time allowing the Company to protect its legitimate interests and status. Nor technically, were the suspensions necessarily of permanent damage to the grievants either professionally or economically. If convicted and discharged, and if practicable, or if discharged under Section 15 of the contract irrespective of the outcome of the
trials, the grievants could challenge the discharges under the grievance and arbitration provisions of the contract. If acquitted, the Company stated they would be reinstated, and the same I think would have been true if the prosecution was dropped. And if upon reinstatement the Company refused to grant back pay for the time lost, as was its position at the time of the hearing, the grievants through the Union, would have the right to seek back pay by grievance and arbitration, placing in issue at that time the question of whether the loss of backpay is a proper consequence of the Company's preroga-
tive to suspend.

All the foregoing relates to the propriety of the Com-
pany's action at the time it was taken. However, one most com-
pelling factor arose thereafter, of which I do not think the Company was aware when it imposed the suspensions, but which all parties fully recognized at the time of the arbitration hearing. It is that because of the congestion of the court calendar, many months and possibly years will elapse before the criminal charges against the grievants come to trial. This factor, albeit beyond the control of the parties, has the realistic effect of transforming what began as ordinary suspen-
sions into suspensions of such length and magnitude as to border on constructive discharges. For during the extended, and unreasonable period of time while the grievants await their trial, they will receive no pay; will not practice their skills; and because of the circumstances will have great diffi-
culty in achieving comparable employment elsewhere. And all this without having been adjudged guilty or innocent. Be-
cause of this factor I have decided to make the strongest possible recommendation, which if I had the authority to do so, would be in the form of a directive to the Company. But I trust that the Company will respond affirmatively to this recommendation, because I am confident it has a sense of fair play; and recognizes that my recommendation is based on fundamental concepts of due process. My recommendation is also based on my judgment that much of the heat of the circumstances, present when the suspensions were imposed, has now dissipated with the passage of time. The adverse publicity and potential loss of business which were then present, should, in my view, be minimized or totally obviated if the grievants are now quietly returned to their jobs, and if the parties handle the reinstatements with responsibility and good sense.

Accordingly, with all the persuasive power at my command, I ask that the Company now reinstate the three grievants to their former positions. In fairness to the Company, and in consideration for its willingness to accept the recommendation, the reinstatements shall not include back pay. Clearly, this recommendation is without prejudice to the right of the Company to terminate the grievants if they are convicted of the criminal charge.

Unless this recommendation is followed, I am fearful that the Company's ordinary right to suspend, which I upheld as proper at the time it was exercised, will be so distorted by the gross delays in bringing the criminal cases to trial, that the fundamental concepts of due process and the presumption
of innocence to which the Company itself subscribes, would be dealt a grievous blow.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Truck Drivers, Chauffeurs and Helpers
Union, Local 42, International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America

and

Quincy Market Cold Storage and Warehouse
Company - Gloucester Division

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated June 6, 1966 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Union's complaint about the rule referred to in the notice to all warehouse employees dated August 4, 1964 is denied.

Eric J. Schmertz
Arbitrator

DATED: October 1967
STATE OF New York ) ss.:
COUNTY OF

On this day of October, 1967, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1130 0153 67
In the Matter of the Arbitration between

Truck Drivers, Chauffeurs and Helpers
Union, Local 42, International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America

and

Quincy Market Cold Storage and Warehouse
Company - Gloucester Division

In accordance with Article XVIII of the Collective Bargaining Agreement dated June 6, 1966 between Quincy Market Cold Storage and Warehouse Company, hereinafter referred to as the "Company," and Truck Drivers, Chauffeurs and Helpers Union, Local 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

What should be the disposition, under the contract dated June 6, 1966 between the Company and the Union, of the dispute with respect to the rule referred to in the attached notice to all warehouse employees dated August 4, 1964?

A hearing was held at the Company office in Gloucester, Massachusetts on September 7, 1967, at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The parties filed post hearing briefs and the hearings were declared closed on October 13, 1967.

The disputed rule referred to in the foregoing issue
was promulgated by the Company on August 4, 1964 and posted as a notice to all warehouse employees. It read:

August 4, 1964

TO ALL WAREHOUSE EMPLOYEES:

EFFECTIVE IMMEDIATELY - No warehouse employee of Quincy Market Cold Storage & Warehouse Company will be allowed to work on their own time (Saturdays, Sundays, Vacations, etc.) on Quincy Market property servicing trucks either inbound or outbound, NOR will they be allowed to have any direct contact with any merchandise as to count that arrives or leaves these properties by boat.

Rowe Sq. Bulletin Board
Rogers St. Bulletin Board
E. Glou. Bulletin Board

This rule placed a limitation on certain work which Company employees had been performing in their spare time for private trucking and stevedoring companies.

The Company is engaged in the operation of four cold storage warehouses in Gloucester. Merchandise, primarily fish and other sea food products, arrives at or leaves these facilities by trucks owned and operated by private trucking companies. Additionally two Company installations, the warehouses at Rowe Square and East Gloucester have dock side facilities owned by the Company at which ships arrive to load and unload merchandise, and the warehouse at Railroad Avenue adjoins rail facilities.

Except for palletized loads, which account for only a small portion of truck shipments to and from the warehouse, the loading and unloading of trucks at the Company's loading
platforms, is the responsibility of the private trucking company, and is performed by the truck driver. In unloading, he counts merchandise and brings it to the tail gate of his truck. There it is picked up by Company employees who again count it on behalf of the Company and take it into the warehouse for storage. In loading the truck the reverse procedure is followed. The Company employees count out the merchandise and deliver it from storage to the tail gate of the truck. The driver then counts it on behalf of the trucking company and loads it into the truck.

To assist him in performing his work on behalf of his trucking company, the driver often hires a helper known as a "lumper" or "city man." Prior to the promulgation of the rule, Company employees, outside of their hours of regular employment with the Company, on week-ends, holidays and while on vacation, often worked as lumpers for and on behalf of the truck driver. The rule now prohibits such work.

The merchandise that arrives and departs by ship to and from the Company docks at the Rowe Square and East Gloucester facilities is unloaded or loaded by three stevedoring companies. Lumpers are also employed by the stevedoring companies. They help move this merchandise from dock side to trucks and visa versa. Prior to the promulgation of the rule, Company employees were permitted to work as lumpers for this type of work, again during their off hours, on week-ends and holidays, and during vacations. The rule permits them to continue to perform this type of work so long as the mer-
chandise involved is neither delivered to nor unloaded from any of the Company's installations. For example, a ship may arrive with merchandise to be unloaded and placed in a truck; and then transported to some location other than any of the Company installations. In other words, that merchandise is neither destined for nor taken out of storage from the Company. The Company has no objection if its employees are hired as lumpers on that work during their own hours. Additionally the rule does not prohibit Company employees, again on their own time, from driving fork lift trucks on behalf of a stevedoring company to transport merchandise that is delivered to or removed from a Company installation, so long as the employee does not count or check the merchandise on behalf of the stevedoring company.

In short, the rule permits employees to continue as lumpers where counting or checking on behalf of the truck driver or stevedoring employer is not involved, even if the merchandise may come from or be destined to a Company installation; and they may work as lumpers on merchandise not destined for or removed from the Company's storage. What they may not do, as the rule states, is to "servic(e) trucks inbound or outbound (which requires counting of merchandise) nor ....have any direct contact with any merchandise as to count that arrives or leaves ..... by boat." (Emphasis and parenthetical statement added).

The Company justifies the rule on several grounds. Primarily it claims that the rule is designed to prevent a conflict of interest. It points out that a Company employee working
regularly for the Company, and then during his off hours for a truck driver or stevedore, will in both capacities count merchandise for both employers. In the Company's view this may open the door to collusion between the employee and his casual employer which may result in a deliberate erroneous count favorable to the trucking or stevedoring company. Additionally, the Company asserts, its employees, anxious to obtain lumping work, may, in their primary employment with the Company, give preferential and favorable service to those truck drivers and stevedores who do or will employ them as lumpers. This, suggests the Company, leads to customer dissatisfaction among the trucking and stevedoring companies which service the Company installations. Also the Company alleges that its employees were reluctant to work overtime for the Company because they preferred to use those hours working instead as lumpers, for which they gained greater compensation. And therefore, prior to the promulgation of the rule, the Company faced some difficulties in obtaining overtime work from its own employees. Procedurally, the Company advances the argument that the Union, through its representatives, accepted the rule when originally discussed and promulgated; and by waiting over three years to file a grievance (during which time, in 1966, a new contract was negotiated), accepted or acquiesced in the rule while it was in effect. The Company concludes that because the Union failed to complain "promptly," as required by the grievance provisions of the contract, it is now too late.
The Union contends that the rule is unreasonable. It asserts that the Company's reasons for putting it into effect are purely speculative because not a single instance of conflict of interest or an erroneous count can be pointed to in the nine years before the rule was inaugurated. It denies any favorable treatment to or coercion of truck drivers who offer or fail to offer employment as lumpers. It argues that the Company has no right to legislate the manner in which employees spend their own time, and that to deprive them of the opportunity to work as lumpers during hours and days when they are not working for the Company, unfairly encroaches on their right to supplement their incomes.

I am persuaded that both from the standpoint of the reasonableness of the rule and the Union's right to object, the principle of laches is applicable.

The rule was discussed with the then Union stewards in July 1964, and posted on August 4 of that year. It is clear that the rule was discussed by the Union representatives with the employees, and that the posted notice came to the attention of the employees. It is equally clear that the employees worked under and in accordance with the restrictions set forth in the rule from the time it was promulgated to the present. Indeed, on at least two occasions, the work of an employee inconsistent with the rule, ceased or was stopped forthwith. So it is manifest that the Union and the employees knew of and understood the rule and worked in accordance with it without formal objection until the instant grievance was filed in
April of 1967. Though some employees complained, neither they nor the then stewards, nor the Business Agent, filed a grievance during the almost three years from the inception of the rule. And in 1966 a new Collective Bargaining Agreement was negotiated between the parties and still no complaint or objection to the rule was raised by the Union. To my mind this is a pattern of acceptance or at least acquiescence.

I cannot accept the Union’s assertion that its stewards lacked the authority to file a grievance. The contract clearly vests the stewards with the power to settle disputes. Obviously, in order to settle a dispute a steward must first object to an existing condition. His right to object means the right to grieve. That they did not in the instant case leads to only one conclusion, and the evidence presented supports that conclusion. It is that though a few employees grumbled about the rule, the majority did not, and the Union officials found nothing unreasonable or onerous about it. And even on the assumption that the stewards lacked the authority to grieve, they certainly could and should have made known any substantial complaints to the Union’s Business Agent, who undisputedly had the authority to grieve formally. It appears that this was done, but that the Business Agent chose not to contest the Company’s action. Either way however, whether the Business Agent was so apprised or whether the stewards and the employees neglected to so notify him, the result is the same - an acceptance or tolerance by the employees and the Union representatives, without formal objection, of the rule for almost three years. Certainly if the
rule represented a serious problem to the employees and the Union it would have become an issue in the 1966 contract negotiations. That it did not, and indeed was never raised during those negotiations, suggests that the rule and its effect was at most of minor significance or consequence.

It is well settled in industrial relations that disputes should be resolved expeditiously. Indeed the grievance procedure of this contract directs the prompt settlement of disputes. The purpose is obvious; matters should be disposed of while they are fresh, before they fester and become exaggerated out of proper proportion, and before memories and evidence fade. When a complaining party delays his complaint for an extended period of time he lulls the other side into believing that the situation is acceptable. For him to delay too long is to estop his right to complain. Such is the case here. The Union should have complained promptly, or at least by no later than the 1966 contract negotiation. When it did not, especially after the execution of the 1966 contract, the Company had every right to believe that the rule was accepted if not totally acceptable. And because of the inordinate delay of almost three years, it would be unfair to the Company to permit the Union to now object.

To my mind, the delay by the Union is also indicative of the reasonableness of the rule. For if the rule was grossly unfair, or a serious burden to the employees, or an onerous encroachment on their rights as individuals outside of their employment by this Company, I am sure that a strenuous objection by the employees and the Union would have been formally
entered soon after the rule was inaugurated.

Based on the evidence before me I am persuaded that the rule is neither arbitrary nor unreasonable. It does not abolish all lumping work. It permits the employees to continue working as lumpers on merchandise where counting and checking are not involved. So it only cuts into a portion of the lumping work performed prior to August 1964. Based on the evidence presented by the Union it has not been established that those employees who did the lumping work have suffered any real diminution in outside earnings. In fact the evidence indicates that they are earning as much now as lumpers as they did before the restrictions were imposed. Moreover, it is well settled that an employer may promulgate a rule designed to avoid a conflict of interest even before an act of conflict of interest has been committed. For example, an employer need not wait until a theft, a disclosure of a trade secret, or a sale of a competitor's product has been engaged in by one of his employees before he can promulgate a rule prohibiting such conduct. Rather, he may do so on a preventive basis, if the circumstances suggest the realistic possibility of such a problem.

I find the instant set of circumstances analogous. Clearly a conflict of interest between the trucking concern and the Company could arise in connection with the quantity or type of merchandise delivered to or taken from the warehouse. For an employee to serve in a dual capacity, first checking the goods for the Company and then later in the day checking the goods out for a trucking concern, may well open the door
to temptation and a conflict of interest. That this has not yet occurred is immaterial; because the possibility of its occurrence is not far fetched. And I find nothing unreasonable about the Company acting to protect itself. The same is true in connection with Company employees favoring or ignoring truck drivers who, respectively, hire or fail to hire Company employees as lumpers. And the Company's position with regard to overtime, sustained by one evidentiary example that stands unrebuted by the Union, is equally logical and justified.

But what about the right of an individual to engage in any work of his choosing during his own free hours? The answer to this question is also well settled. So long as the outside work does not conflict with, or directly or adversely affect the primary employer, an employee is generally permitted to use his free time as he wishes. But this case involves the exceptions. The disputed rule restricts the employee's free time only when he uses it in a manner which may reasonably conflict with the security or interest of the Company. Indeed the direct connection between the proscribed work and the Company's business could not be more obvious. The work proscribed by the rule takes place on the Company's properties, and involves merchandise going into and coming out of the Company's warehouses. Hence the rule conforms to those well settled circumstances under which an employer may restrict the outside activities of his employees.

For all the foregoing reasons the Union's complaint about the rule referred to in the notice to all warehouse
employees dated August 4, 1964 is denied.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union of Electrical, Radio and Machine Workers, Local 103, AFL-CIO

and

Radio Corporation of America

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated June 19, 1964 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company, which has the burden of doing so, has not established to my satisfaction that the grievant committed the offense charged. Therefore it is immaterial whether the grievant has convinced me of his innocense. Accordingly, I am unable to conclude that the grievant engaged in gambling on Company premises in violation of a Company rule. Therefore, Mr. Mealo shall be reinstated with full seniority and back pay less his earnings in gainful employment, if any, during the period since his discharge.

Eric J. Schmertz

Arbitrator

DATED: March 1968

STATE OF New York ss.

COUNTY OF New York

On this day of March, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 14 30 0281 67
In the Matter of the Arbitration between

International Union of Electrical, Radio and Machine Workers, Local 103, AFL-CIO

and

Radio Corporation of America

Opinion

In accordance with Article 8 of the Collective Bargaining Agreement dated June 19, 1964 between Radio Corporation of America, hereinafter referred to as the "Company," and International Union of Electrical, Radio and Machine Workers, Local 103, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the discharge of John Mealo for just cause? If not, what shall be the remedy?

A hearing was held at the office of the American Arbitration Association in Philadelphia, Pennsylvania on Wednesday, January 10, 1968 at which time Mr. Mealo, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The Company filed a post hearing brief and the hearings were declared closed on February 12, 1968.

To ferret out suspected gambling on numbers within the plant, the Company placed a New Jersey State police officer, Investigator Thomas B. Gallagher, as an undercover agent within the plant, posing as an employee. As a result the grievant was arrested and charged with the crime of conducting a lottery
in violation of the laws of New Jersey and discharged by the
Company for violation of a Company rule prohibiting gambling
on the premises. A trial on the criminal charge resulted in
the grievant's acquittal. The propriety of his discharge is
the subject of this arbitration.

There is no dispute between the parties about the need
or reasonableness of the Company's rule against gambling with-
in the plant. Indeed it is well settled that because of ob-
vious damaging effects, this Company, as any, has the right
to protect itself against such practices on its property. What
is in dispute is whether the grievant committed the offense
charged, and if so whether the extreme penalty of discharge
was warranted. Of course the latter question need not be
answered unless the grievant's guilt is established.

In my view the nature of the issue in this case necessarily
involves the standards of proof in the arbitration of dis-
ciplinary disputes. The parties recognize, I am sure, that
this arbitration is not a criminal proceeding. Hence the
grievant's acquittal of the criminal charge is not res adju-
dicata to this proceeding. And because the outcome of this
arbitration may involve the grievant's job, but not his liber-
ty, it cannot be argued that the arbitration places him in
technical double jeopardy. In this, and in other similar cases
before me, I have studied the standards of proof required by
arbitrators and I am satisfied that there is no universally
accepted rule. Some arbitrators, who view the penalty of dis-
charge as "industrial capital punishment" require the employer
to establish the employee's culpability, for which he was dis-
charged, "beyond a reasonable doubt," the standard required in criminal matters. Others, making a distinction between prosecution for a crime and just cause for discharge, make their determination on a less demanding standard, such as "a preponderance of credible evidence." Others, and this Arbitrator is among them, are more pragmatic. If discharge is a proper penalty for the offense, they will uphold that penalty if they have been persuaded, by clear and convincing evidence that the employee committed that offense. However, in reaching a judgment on an employee's culpability, this Arbitrator, quite frankly, considers the nature of the offense. Clearly, certain acts, for which discharge is proper, are less serious than others, for which the same penalty may be imposed. For example, a discharge for inability to perform satisfactory work; or for excessive absenteeism and tardiness; or even for insubordination, fighting or intoxication is not as socially condemning as a discharge for an offense that parallels a crime, such as theft or gambling. While in the latter situation the discharge, if upheld, does not result in a criminal penalty to the employee, it does stigmatize him in a manner seriously prejudicial to his future employability.

Therefore, though this Arbitrator does not require that an employer meet his burden of proof in discharge cases "beyond a reasonable doubt," he thinks that the evidence advanced in cases where the charge, if upheld, may be construed by the public and especially by other potential employers, as criminal in nature, ought to approximate that result. It should be manifestly clear and convincing, leaving no plausible room for
a different conclusion.

It seems to me that this requirement is especially fair in cases where, as here, the Company has employed police officers as undercover agents to gather evidence against employees to be used for both purposes - a criminal charge and discharge. I do not quarrel with the Company's right to use undercover agents in this manner. But the exercise of that right, especially because it is unknown to the employees under surveillance, requires that the employees be protected by the traditional safeguards of due process. In other words if the undercover police officer is collecting evidence of a crime, and that evidence is also made available to the Company for purposes of disciplining an employee, the standard to be met in deciding whether an employee committed the act for which discipline was imposed should come very close to the standard which the state must meet in proving his guilt of the crime.

It is in this regard that I consider the Company's case against the grievant to be faulty. Its case is based on the observations and testimony of Investigator Gallagher. As a police officer, serving as an undercover agent and working in the classification of stock boy, Gallagher stated that he saw the grievant accept money from three employees and make written notations on a card which he carried in his shirt pocket. He testified that he overheard one of the employees tell the grievant to play a certain number. Thereafter Gallagher, together with other police officers and a Company security officer, armed with a search warrant, conducted a "raid" and found certain cards and slips with number notations thereon, in the
grievant's tool box. This is the extent of the evidence obtained by Gallagher and the police against the grievant.

Considering that either in a criminal prosecution or in a disciplinary case it is not for the accused or the grievant to go forward to show his innocence, but rather that the burden is on the accuser to prove the guilt, I am surprised at the inconclusive nature of the evidence obtained.

There is nothing in the record to show that unless the authorities moved quickly, the evidence of the alleged misconduct would have disappeared. Indeed, because of the type of offense with which the grievant was to be charged, I see no reason why a more thorough, more conclusive, and less questionable investigation could not have been maintained. Mr. Gallagher conceded that he did not see what the grievant wrote on the card after receiving money from the three employees. He did not attempt to place a bet himself. So far as the record in this case is concerned, he neither interrogated nor obtained a statement from those three employees or any other employee which would incriminate the grievant. He offered no evidence which would connect the bet cards found in the grievant's tool box with the money handed to the grievant by the three employees. His statement that one employee asked that the money be placed on a specific number, is denied by the grievant, and not corroborated by any other testimony or evidence.

This is not to say that the grievant's explanations are believed. Rather it is to say that the evidence obtained by Gallagher, and his testimony, are not sufficiently conclusive.
as to render the grievant's story impossible or even improbable.

The Company suggests that if the grievant is to be believed, he or the Union on his behalf, should have offered testimony by other employees in support of the grievant's claim that the money he received from them was repayment of loans or as contributions to various plant-wide collections. And that he should have produced the cards on which he kept those records. No doubt if the grievant or the Union on his behalf had done so, it would have added considerable support to the grievant's defense. The point however, is that the grievant need not meet the burden of attempting to establish his innocence, unless the Company has first met its burden of showing his guilt. It seems to me that rather than require the grievant to prove all the elements of his defense with testimony by employees that they did not place bets with him, it was for the Company to introduce evidence showing not just that other employees gave the grievant money, but that they did so for that proscribed purpose.

I believe that Mr. Gallagher's investigation, upon which the Company relies, should have included a good deal more information or evidence from or about those employees which would implicate the grievant in a betting scheme.

The inclusiveness of the Company's case obtains also to the betting cards or slips found in the grievant's tool box. He concedes they are records of bets but asserts that they are bets that he alone made outside the plant over an extended period of time and not a record of bets placed with him by other employees.
Again though I am by no means convinced of the veracity of his story, I cannot conclude, based on what has been presented by the Company, that it is wholly implausible or improbable. Again, though the grievant has not convinced me of his innocence - it is not his burden to do so -, the Company has not convinced me of his guilt.

The Company suggests that because the grievant admittedly lied at the third Step of the grievance procedure when he first claimed that the bet cards found in his tool box were planted there as a frame-up - only to admit later that they were his, I should not believe his testimony in this arbitration. It seems to me the Company asks again that the case turn on whether the grievant has established his innocence by telling the truth, rather than on whether the Company has proved its case against him. I have indicated that the grievant's defense does not convince me of his innocence. He may well be guilty. But his guilt cannot be determined by any failure on his part to prove his innocence. Rather it must be shown by the evidence offered by the Company in support of its assertion that he engaged in gambling within the plant. The Company's case could and should have been better, especially with its use of a trained undercover agent. Based on the standard of proof previously referred to, which I consider warranted in cases where the offense charged parallels a crime, the Company's case falls short of resolving significant doubts in my mind about the grievant's guilt, even if his own explanation has not convinced me of his innocence. In that circumstance, absent a clear and convincing case in support
of the Company's position, I am unable to uphold the grievant's discharge no matter what might be my personal predilections regarding his defense. And if the discharge cannot be upheld, the grievant's return to work must be ordered. Also even if, based on those predilections, I felt that substantial justice would be better served if the grievant's reinstatement was directed without making him whole for the time lost, there is neither basis in the record, nor in the contract, nor in the general law of arbitration for me to so act.

Accordingly, Mr. Mealo shall be reinstated with full seniority and back pay less his earnings in gainful employment since the period of his discharge.

Eric A. Schmertz
Arbitrator
In the Matter of the Arbitration between
Local 8-190, Oil, Chemical & Atomic
Workers International Union, AFL-CIO

and

Reichhold Chemicals, Incorporated

The Undersigned Arbitrator, having been designated in
accordance with the Arbitration Agreement entered into by the
above-named Parties and dated May 1, 1967 and having duly
heard the proofs and allegations of the Parties, Awards as
follows:

The discharge of Robert Foreman is reduced to a
disciplinary suspension to run from the date of
his discharge to the date of his reinstatement.
Therefore, he shall be reinstated with full sen-
iority but without back pay.

Eric J. Schmertz
Arbitrator

DATED: November 1968
STATE OF New York )
COUNTY OF New York )

On this day of November, 1968, before me personally
came and appeared Eric J. Schmertz to me known and known to
me to be the individual described in and who executed the
foregoing instrument and he acknowledged to me that he execu-
ted the same.

Case #68-88
In the Matter of the Arbitration between
Local 8-190, Oil, Chemical & Atomic
Workers International Union, AFL-CIO

and

Reichhold Chemicals, Incorporated

In accordance with Article IV of the Collective Bargaining Agreement dated May 1, 1967 between Reichhold Chemicals, Incorporated, hereinafter referred to as the "Company," and Local 8-190, Oil, Chemical & Atomic Workers International Union, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was there just cause for the discharge of Robert Foreman? If not what shall be the remedy?

A hearing was held at the offices of the New Jersey State Board of Mediation on November 12, 1968, at which time Mr. Foreman, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The grievant was discharged for leaving the plant during scheduled working hours without approval of his supervisor. The Company charges that this was in violation of Plant Rules 3, 4, 5 and 12 and certain posted bulletins reiterating one or more of those rules. Also the Company contends that the grievant's act followed at least one oral warning to him on the subject.
Specifically, on Friday, August 23, 1968, the grievant, who was working as a Utility Man in the back of the plant, went across the street to a tavern and had a sandwich and a beer. The supervisor, unable to find him in the plant at that time, sent the Union Shop Steward to look for him, and he was found in the tavern. Upon his return to the plant he was discharged forthwith.

I find that the grievant violated Plant Rule 3 which reads:

"No employee shall leave the plant without punching out his time card"

and the pertinent part of Rule 4 which provides:

"No employee shall leave the plant during his scheduled working hours without approval of his supervisor...."

There is no factual dispute that the grievant went to the bar during regular working hours and did so without punching his time card or obtaining the approval of his supervisor.

I am not convinced, however, that he violated Rule 5 or Rule 12 within their meaning and intent. I do not find that the action was a "deliberate falsification of his time card," or any other record, within the meaning of Rule 5. Nor was he "inattentive to the duties and responsibilities of his job," again within the scope of that language in Rule 12, simply because the period of time involved was during the regular coffee break, when he would ordinarily be allowed to relax and turn his attention away from his job duties for a few minutes.

I am persuaded that violations of Rules 3 and 4 may be grounds for summary discharge. Clearly, employees should not
be led to believe that they can violate Rules 3 and 4, once or perhaps twice with only a penalty of a warning or suspension, before they would be subject to discharge. Such violations involve deliberate misconduct and need not be tolerated once and then possibly again before the discharge penalty can be imposed. This is true of course, where such rules are reasonably related to the nature of the jobs involved; are disseminated to the employees or posted so that they come to the employee's attention; are uniformly and even-handedly applied to all the employees similarly situated. In the instant case, these tests appear to have been met.

However, though I find that the grievant not only breached Rules 3 and 4, and that by his own admission knew he did so, there are certain extenuating or mitigating circumstances, peculiar to this situation which lead me to conclude that a disciplinary penalty less than discharge is appropriate in this case.

The grievant did not leave the plant during a period of time when he would be actively at work. He left during a coffee break. I have no doubt that he went to the tavern because there he could obtain an alcoholic drink. But the Company discharged him not for drinking beer during working hours, but only because he left the plant without authorization. There is no evidence that his departure to or period of time in the tavern substantially exceeded the normal coffee break. Also there is evidence, unrefuted by the Company, that the grievant did this on a fairly regular basis, and with the approval or knowledge of an employee with some apparent supervisory author-
ity, albeit not his supervisor. The grievant worked with a Mr. Alfano who generally instructed the grievant on the work to be performed. At times Alfano telephoned the grievant at home and referred to himself as the grievant's "boss," in leaving messages with the grievant's wife. The grievant testified that Alfano knew and approved of his visits to the tavern on prior occasions for the purpose of obtaining food and coffee for both of them. The Company did not offer the testimony of Mr. Alfano in refutation.

For these reasons, together with the fact that the grievant's personnel record is completely devoid of any written warnings or prior disciplinary actions, I have decided to reduce the discharge to a disciplinary suspension to run from the date of the discharge to the date of his reinstatement.

Let it be clear, however, to the grievant and to all other employees, that future violations of Plant Rules 3 and 4 (without necessarily excluding violations of any other plant rules) may subject them to summary dismissal. And the grievant is especially warned that any further misconduct on his part, of whatever type, may well constitute grounds for his discharge.

Signature

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
United Steelworkers of America
Local 4559, AFL-CIO

and

Rex Chainbelt, Inc., Worcester Plant of
The Roller Chain Division

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated May 1, 1965 and having duly heard the proofs and allegations of the Parties, Awards as follows:

1. The Company did not violate the contract when it agreed with the postal department and implemented that agreement that the postal department would pick up parcel post and mail each day at the Company plant.

2. The Company did not violate the contract when it assigned inner or intra-plant trucking of parcel post and mail to John Olson.

DATED: February 7, 1968
STATE OF New York ) ss. :
COUNTY OF New York )

On this 7 day of February, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1130-0214-67
In the Matter of the Arbitration between

United Steelworkers of America
Local 4559, AFL-CIO

and

Rex Chainbelt, Inc., Worcester Plant of
The Roller Chain Division

In accordance with Article III of the Collective Bargaining Agreement dated May 1, 1965 between Rex Chainbelt, Inc., Worcester Plant of the Roller Chain Division, hereinafter referred to as the "Company," and United Steelworkers of America, Local 4559, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

1. Did the Company violate the contract when it agreed with the postal department and implemented that agreement, that the postal department would pick up the parcel post and the mail each day at the Company's plant? If so, what should be the remedy?

2. Did the Company violate the contract when it assigned certain inner or intra-plant trucking activities to employee John Olson, these activities being the moving of certain parcel post from the shipping room in the shipping department and certain mail from the mail room in the office to an area in the office vestibule? If so, what should be the remedy?

A hearing was held in Worcester, Massachusetts on November 15, 1967 at which time representatives of the Union and Company, hereinafter referred to collectively as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.
I am satisfied that the Company's arrangement with the United States Post Office is "sub-contracting" within the meaning and intent of Article I Section 6(b) of the contract. In my judgment that section relates to the performance of work normally assigned to the bargaining unit, by persons, groups or organizations outside of the bargaining unit. I am not persuaded that a sub-contracting arrangement need necessarily be evidenced or supported by a written sub-contract and/or a consideration flowing from the Company to the party performing the work. Hence, because the pick up of the mail by the Post Office at the Company plant, (instead, as had been the practice, of having a bargaining unit employee truck the mail and parcel post from the plant to the Post Office) is the assignment to a non-bargaining unit organization of work previously within the bargaining unit's jurisdiction, I equate it with a "sub-contract" as that word is used in Article I Section 6(b) of the contract.

In my prior decision, Case L 41595 BOS L-35-64, I interpreted the manner in which I thought Article I Section 6(b) should be applied. So I need not repeat that analysis here. In that case I sustained the Company's right to sub-contract even though certain bargaining unit employees were not working a full week. In the instant case and for the same reasons, I sustain the Company's discretionary right to arrange with the postal department the delivery of mail from the plant to the Post Office. In this present matter, so far as the record shows, all bargaining unit employees were working a full week,
and the arrangements with the Post Office did not reduce anyone's employment to less than a full week. I stated in the prior case that I would overturn a sub-contract arrange-
ment if it was an abuse of the Company's authority. I did not find an abuse in that case nor do I find an abuse in the instant case.

The Company's reason for entering into the arrangement with the postal service was bona fide. It was designed to and in fact did, reduce the Company's overtime cost by $1600. It did not adversely affect the regular work week of any of the bargaining unit employees. No one suffered a diminution in regular hours; nor was anyone laid off; nor was any em-
ployee's recall from layoff impeded as a result. Accordingly, I am satisfied that the Company had a legitimate reason for making an arrangement with the postal service and that it had good reason to deem the arrangement advisable. And I find nothing in the record which would support a view that the Company took the action to punish bargaining unit employees or that its action was an abuse of its managerial prerogative.

Having sustained the arrangement with the Post Office, I find no reason not to sustain the natural consequences of that arrangement. When the grievant, Richard E. Hutchinson, together with his regular duties as a truck driver delivered the mail and parcel post to the Post Office, he did so on an overtime basis. The agreement with the Post Office made the overtime work by the grievant unnecessary, because the postal service picked up the mail at the plant. As there is no contractual guarantee of overtime work, I find no violation
of the grievant's rights by the elimination of that work, despite the fact that he had worked the overtime for several years.

The Company's arrangement with the Post Office had another normal consequence. Because the mail was picked up by the postal service at the plant between 5 and 5:15 each afternoon, the collection of the mail and parcel post within the plant and its assemblage at one location for pick up by the postal service could be achieved on the shift during which that pick up time fell. In other words, because there was no longer a need to transport the mail to the Post Office, the intra-plant collection of the mail could be put off until between 4:30 and 5 P.M. (There is no dispute that it took about 15 minutes to complete.) Consequently, the Company shifted the task of collecting the mail and parcel post from the grievant who worked the first shift to Mr. Olson who worked the second. Neither the grievant's job classification as a truck driver-outside, nor that of Olson as a welder, with intra-plant trucking duties, makes mention of the collection of mail and parcel post within the plant. Though the grievant did it for a number of years, I find that the natural result of the Company's right to arrange pick up of the mail by the postal service, which divested the grievant of his overtime work, makes also proper a re-arrangement of the 15 minute assignment of mail collection within the plant.

As a practical matter, having upheld the Company's right to arrange pick up of the mail by the Post Office, and its

right to terminate the overtime work of the grievant, the balance of the grievant's previous assignment to collect mail within the plant, on a straight time basis, becomes essentially de minimus. And since the grievant continued in full employment, without loss of straight time hours or wages, the transfer of the remaining task to collect the mail and parcel post within the plant to Mr. Olson on the second shift was not only a logical consequence of the new arrangement with the Post Office, but in no way prejudiced the grievant.

In short, absent a specific reference in the grievant's job description to the collection of mail within the plant, his practice of having done so is overturned by the consequences which flowed from the Company's proper arrangement with the Post Office and by the proper elimination of the grievant's overtime work of delivering mail from the plant to the Post Office.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Building Service Employees International
Union, Local 32B, AFL-CIO
and
Rockefeller Center, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 1, 1966, as extended, and having duly heard the proofs and allegations of the Parties, Awards as follows:

Retroactive to January 1, 1968, the weekly wage of Tour Guides shall be increased by $7.00 and the weekly wage of the Ticket Sales Clerks shall be increased by $12.00. The minimum wages for these classifications shall be increased by the same amount.

The Union's demands for a uniform allowance; a regular work week Monday through Friday; and premium pay for work performed on Saturdays and Sundays, are denied.

Eric J. Schmertz
Arbitrator

DATED: April 1968
STATE OF New York )ss.:
COUNTY OF New York

On this day of April, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
Building Service Employees International
Union, Local 32B, AFL-CIO

and

Rockefeller Center, Inc.

In accordance with Paragraph 23 of the Collective Bargaining Agreement dated January 1, 1966, as extended, between Rockefeller Center, Inc., hereinafter referred to as the "Employer," and Building Service Employees International Union, Local 32B, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide certain disputes between the Employer and Union, arising out of Paragraph 24 (Reopenings) of the contract.

A hearing was held at the office of the American Arbitration Association on April 11, 1968 at which time representatives of the Union and Employer, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The demands of the Union, which the parties were unable to resolve in direct negotiations under the Reopening provision of the contract, relate to wages, uniform allowance and premium pay. These demands are on behalf of the Tour Guides and the Ticket Sales Clerks (Cashiers) employed on a full time basis by the Employer. Specifically the Union seeks an $18.00 a
week wage increase for the Ticket Sales Clerks and $12.00 a week wage increase for the Tour Guides. No matter what wage increase is ultimately granted, the Union asks that the wage scale for the two classifications be equalized. The Union also seeks a monetary uniform allowance to compensate the employees in both classifications for certain apparel which they purchase at their own expense. And finally, the Union seeks a regular work week of Monday through Friday with pay at the rate of time and one half for work performed on Saturdays and Sundays.

There is no dispute between the parties, and Paragraph 24 of the contract so provides, that any changes in wages and terms and conditions negotiated under Paragraph 24 or determined by arbitration shall be effective retroactive to January 1, 1968.

Wages

I am in agreement with the Union's argument that the wage scale paid by this Employer to the employees involved should be comparable with that paid similar employees at Lincoln Center. Though the Employer and Lincoln Center are separate entities, the similarities between the two and the mutuality of identity cannot be overlooked. Both are leading institutions of entertainment and culture; directed and supported, in part at least, by those with a community of interest; and both have maintained commendable conditions of employment for their employees for which, quite justifiably, both have enjoyed a highly favorable reputation.
In short, though there are some significant differences between the two institutions, the similarities and the identification of one with the other are such as to make wholly incongruous marked differences in pay rates between employees of one as compared to those similarly situated at the other. I am persuaded that a comparison between the Tour Guides and Sales Clerks at the Employer with those performing similar work at Lincoln Center is much more relevant to this proceeding than a comparison between the former and other institutions cited at the arbitration hearing by the Employer.

Recently the management of Lincoln Center increased the weekly pay of its Tour Guides to an average of $100.00 and those selling tickets to $120.00. The Guides and Sales Clerks at the Employer receive $93.00 and $88.00 a week respectively.

Critical, however, is the question of whether the Tour Guides and those selling tour tickets at both institutions perform similar work justifying equal pay. Based on the record I am persuaded that there is a similarity of job duties between the Tour Guides but not between the Sales Clerks. The Guides at both institutions carry out essentially the same service. They guide visitors through the buildings on informational tours. Therefore, I think it fair and proper that the weekly wage of the Tour Guides of the Employer be increased by $7.00 to bring it to the level of what is being paid, on the average, to the Tour Guides at Lincoln Center.

However, the work performed by the Sales Clerks at Lincoln Center goes significantly beyond that performed by those at the Employer. Whereas at Lincoln Center those employees are
qualified, by former experience, as Tour Guides, and can fill in in that classification when needed, such is not the case at the Employer. Sales Clerks at the latter institution are neither experienced nor qualified as Tour Guides and hence do not possess the flexibility and interchangeability of those at Lincoln Center. Moreover, and most significant, the personnel at Lincoln Center perform, as an important and integral part of their job, certain duties as dispatchers - a task not at all performed by the Sales Clerks at the Employer.

For these reasons I do not find a similarity of work between the Sales Clerks at the Employer and those who, among other duties, sell tour tickets at Lincoln Center. And there is no basis, therefore, for an equal weekly wage.

However, I am impressed with the Union's argument that the wage of the Ticket Sales Clerks at the Employer should be equalized with what the Employer will be paying the Tour Guides. While the duties of the two classifications differ, it appears to me that both have an equal degree of responsibility. The Sales Clerk sells a variety of tour tickets; handles money; and meets and deals with the general public with the same frequency as does the Tour Guide. Moreover the record indicates that the Sales Clerks' duties and responsibilities have grown over the years. It seems to me that each plays a comparable, albeit different, role in servicing the large volume of visitors who tour the Employer's buildings. These factors, in my judgment, weigh conclusively in favor of equalizing the pay between these two classifications. Accordingly, I deem it fair and equitable that the weekly pay of the Ticket Sales Clerks
be increased by $12.00 to accomplish this end.

Therefore, retroactive to January 1, 1968, the weekly wage of Tour Guides shall be increased by $7.00 and the weekly wage of the Ticket Sales Clerks shall be increased by $12.00. The minimum wages for these classifications shall be increased by the same amount.

Uniform Allowance

I conclude that the Union's demands for a monetary uniform allowance is moot. The additional blouse(s) purchased by the Employee at her own expense will shortly be replaced by a new type uniform paid for by the Employer. So this expense will be discontinued and a monetary allowance to cover it is therefore unwarranted. Also the type of shoes which the employees will wear while on the job will be identical with a regular lady's shoe, commonly found in any lady's wardrobe. Hence it may be used by the employees both off and on the job, and I do not find it either unreasonable or unduly burdensome to require, during the life of this contract, that the employees continue to buy those shoes. Accordingly, the Union's demand for a monetary uniform allowance is denied.

Premium Pay and Work Week

I cannot find merit to the Union's assertion that the Tour Guides and Ticket Sales Clerks should work a regular work week of Monday through Friday. Manifestly, the nature of the work performed, namely guiding visitors through the buildings and selling tickets for that and for other types of tours, is a seven day a week undertaking. Clearly, as much if not more
of this work must be performed on week-ends as on week-days. The service relates to an entertainment attraction, and the general public looks forward to it as much on week-ends as on week-days. Therefore, though the employees are entitled to a work week of five consecutive days those days cannot be confined to the period Monday through Friday. Premium pay for work on Saturdays and Sundays is granted when the normal operations of an employer are generally closed down on those days. So that week-end work is unusual and generally unexpected. That is not the case here. It is both usual, expected and indeed necessary that tickets be sold and tours undertaken on Saturdays and Sundays as on any other day. Consequently I consider it both unrealistic, economically unsound and an unwarranted variation from a condition of employment known and made known to the employees when hired, to limit the regular work week to Monday through Friday with premium pay for Saturdays and Sundays. Accordingly, the Union's demands in this regard are denied.

Eric J. Schmertz
Arbitrator
NEW YORK STATE BOARD OF MEDIATION

In the Matter of
Arbitration Proceedings
Between
ROOSEVELT HOSPITAL
And
LOCAL 1199, DRUG and
HOSPITALS EMPLOYEES UNION
pursuant to Section 716 of
New York Labor Law

REPORT OF
ARBITRATORS

and

AWARD

A67-1563
APPEARANCES:

For the Union:

SIPSER, WEINSTOCK & WEINMANN

by

(HARRY WEINSTOCK, of Counsel)

For the Hospital:

POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER

by

(ERIC ROSENFIELD, of Counsel)

WITNESSES - For the Union:

LEON DAVIS - President of the Union

GEORGE GLATZER - Vice-President of Union and Director of Drug Division of Local 1199

WITNESSES - For the Hospital:

UGO CARUSO - Director of Patient Supply Services

JOSEPH TOOMEY - Assistant Vice-President of Roosevelt Hospital
EXHIBITS MARKED IN EVIDENCE

Employer's Exhibits:


2A - Chart 1, Wages and Conditions of Employment At The Roosevelt Hospital and Non-Profit Hospitals Under Contract with Local 1199

2B - Chart 2, Wages and Conditions of Employment at The Roosevelt Hospital and Non-Profit ("Big 6") Hospitals Not Under Union Contract.

3 - List of Roosevelt Hospital Pharmacists - name, wage and date of hire

4 - Chart 3, Comparison of Wage and Benefit Provisions in Local 1199's Association Contracts with Roosevelt Hospital Practice, Showing Whether Gain (or Loss) to Employee

5 - Chart 4, Annual Cost of Differentials Between 1199 and Roosevelt Hospital Wages and Benefits, Showing Whether Gain (or Loss) to Employee

6 - Chart 5, Pay History of Roosevelt Hospital Pharmacists

7 - Cover Page and Pages 6 - 9 as marked of Report of City Bar Association Committee re Local 1199 Strikes in 1966 at 5 Voluntary Hospitals

Union's Exhibits:

A - Demands of Local 1199 for Terms and Conditions of Employment of Roosevelt Hospital Pharmacists

B - Preliminary Memorandum of Local 1199, dated September 27, 1967

Bl - Additional Memorandum of Local 1199, dated October 17, 1967, as corrected by letter, Sipser, Weinstock, to Arbitrators, dated November 17, 1967

C - Chart, Civil Service Pharmacists Negotiations, dated March 20, 1967
D - Agreement, Local 1199 and Nassau-Suffolk Pharm. Society, for October 1, 1966 through September 30, 1968

E - Agreement, Local 1199 and 3 N.Y.C. Drug Store Association, same duration as Un. Ex. D.

F. - Supplemental Agreement, Local 1199 and Non-Associating Drug Stores, same duration as Un. Ex. D

G - List of Roosevelt Hospital Wages and Working Conditions, dated September 28, 1967

H - List of Mt. Sinai Hospital Pharmacists

I - N.Y.C. Salary Increment Scales, dated 3-65

J - N.Y.C. Pay Plan for Pharmacists, for July 1, 1966 through June 30, 1969, with undated cover memorandum from Deputy Mayor

K - Chart, Wages to which Roosevelt Hospital Employees Would Be Entitled If Employed by N.Y.C.

L - Letter, Roosevelt Hospital Executive Vice President to All Employees, dated December 29, 1966.

M - N.Y.C. Civil Service Pharmacists Fringes

N - N.Y.C. Leave Regulations

O - Summary of Benefits Provided by Local 1199 Benefit Plan

P1 - Booklet, Local 1199 Pension Plan

P2 - Amendments to Un. Ex. P1

Q - Booklet, A Choice of Health Plans for N.Y.C. Employees

R - List of Union Shop Agreements covering Pharmacists.
On August 30, 1967, the Industrial Commissioner of New York State, Martin P. Catherwood, made and issued an Order pursuant to Section 716 of the New York Labor Law directing that the dispute concerning the negotiation of a Collective Bargaining Contract between Roosevelt Hospital and Local 1199, Drug and Hospital Employees Union A.F.L.-C.I.O., be submitted to Arbitration by the New York State Board of Mediation in accordance with its Rules and Regulations. His Order stated that Local 1199 had been certified as the Collective Bargaining representative for an appropriate unit of licensed Pharmacists, by the Order of the New York State Labor Relations Board dated June 15, 1967, employed at the Hospital.

Subsequent thereto, and pursuant to this Order, and on September 6, 1967, the Chairman of the New York State Board of Mediation, Vincent D. McDonnell, appointed as Arbitrators to hear and determine, on behalf of the full Mediation Board, the negotiation of a Collective Bargaining Contract between the parties, the following:

Thomas E. Fitzgerald
Francis E. Rivers
Eric J. Schmertz

Prior to attending the Arbitration Hearings the Counsel for the Hospital wrote to the Industrial Commissioner that although he would participate in the proceedings he reserved the right to contest the propriety of this Order to arbitrate, contending as he did, that the only dispute possible between the Union and the Hospital was whether the Union was the duly designated bargaining agent of a majority of the Pharmacists, and contending further that such dispute was not arbitrable under Section
716 of the New York Labor Law. This legal question, as advanced by the Hospital, has been the subject of litigation in the courts and is not a matter before or within the jurisdiction or authority of this Board of Arbitration.

The parties, by the testimony of witnesses and by exhibits submitted and received, presented evidence before this panel of Arbitrators on September 28, October 18 and 31st, and November 17, 1967, following which they exchanged and submitted Briefs and reply briefs. Subsequent thereto the Arbitrators met in a number of executive sessions to consider the evidence and make an award.

Article 75 of the New York Civil Practices Law and Rules, and the Rules and Procedures of the New York State Board of Mediation together with the standards for the arbitration of disputes under Section 716 of the Labor Law have governed the Arbitrators as to their procedural and substantive decisions in the Hearings and in the Award.

Apart from the Hospital's legal position, referred to above, and not before this Board, the dispute concerning the negotiation of a Collective Bargaining Contract between the parties involves a number of Demands and answers which constitute the issues for determination by the Arbitrators. These demands for the various subjects desired to be covered in the terms of the Contract awarded, together with the respective answers of the Union and of the Hospital, were presented by counsel for each of them either orally at the Hearings, or in exhibits marked for evidence, or in the briefs submitted.
These demands and corresponding answers are as follows:

1. RECOGNITION: Demanded by Union -
   Opposed by Hospital

2. EFFECTIVE DATE OF CONTRACT,
   REFROACTIVITY, AND DURATION:
   Dispute as to dates and periods.

3. UNION SECURITY: Demanded by Union
   Opposed by Hospital

4. CHECKOFF: Dispute as to text of provision

5. NO STRIKE, NO LOCKOUT: Dispute as to
   text of provision

6. PROBATIONARY PERIOD: Dispute as to length

7. SENIORITY RIGHTS; Demanded by Union
   Opposed by Hospital

8. HOURS OF WORK: Agreed

9. WAGES: Dispute as to amount

10. OVERTIME: Dispute as to condition
    precedent

11. HOLIDAYS: Dispute as to details

12. VACATION: Dispute as to details

13. COFFEE BREAK: Dispute as to length

13a. TIME OFF FOR CASHING CHECKS:
    Demanded by Union -
    Opposed by Hospital

14. SICK LEAVE: Dispute as to details

15. BEREAVEMENT: Dispute as to details

16. MATERNITY: Agreed

17. WELFARE AND INSURANCE PLAN:
    Each wants its own plan.

18. PENSION PLAN: Each wants its own plan

19. PROFESSIONAL CLAUSE: Dispute as to
details

20. PAST PRACTICES: Dispute as to wording

21. MANAGEMENT RIGHTS: Demanded by Hospital
    Not answered by Union
22. GRIEVANCE PROCEDURES: Dispute as to details
23. ARBITRATION: Dispute as to details
24. HIRING HALL: Demanded by Union
   Opposed by Hospital
25. SUPPER MONEY: Demanded by Union
   Opposed by Hospital
26. SEVERANCE PAY: Demanded by Union
   Opposed by Hospital.

The decision made by the Arbitrators upon each of the issues hereby created, have been embodied in the terms of the Award which appears below.

The process followed by the Arbitrators to reach these decisions has been to make a finding of the facts upon all the oral testimony and arguments, exhibits and briefs presented, and then to resolve them in accordance with the Standards adopted by the New York State Board of Mediation to govern any Arbitration Proceedings under Section 716 of the New York Labor Law. A copy of the resolution adopted by the New York State Board of Mediation, which created these standards, is as follows:

Standards to be Considered by Arbitrators in Determining Matters Arbitrated under Section 716 of the Labor Law of New York State, as duly adopted by the State Board of Mediation of New York.

The arbitrator or arbitrators shall be guided by the following standards in their reception of evidence and in arriving at a final arbitration decision in matters referred to them pursuant to this Section 716 of the Labor Law:
1. The interest and welfare of the public.
2. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings, and the wages, hours and conditions of employment of employees doing the same, similar or comparable work or work requiring the same, similar or comparable skills and expenditures of energy and effort, giving consideration to such factors as are peculiar to the industry involved.
3. Comparison of wages, hours and conditions of employment as reflected in non-profitmaking hospitals and residential care centers in other comparable areas.
4. The security and tenure of employment with due regard for the effect of technological changes thereon as well as the effect of any unique skills, required training and other attributes developed in the industry and required for the job.
5. Economic factors of the respective parties which are relevant to the arbitration decision.
6. Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining arbitration or otherwise between the parties or in the industry.

The work done by the Counsel for the parties in presenting evidence and arguments in support of their respective positions deserves high commendation for its thoroughness and competence as well as for its relevance to these controlling Standards. The conclusions reached
by the Arbitrators were greatly aided thereby.

The factual situation as shown in the record, to which these Standards had to be applied included relevant data about the employment and working conditions of Pharmacists in comparable private and public institutions and in business as follows: voluntary and proprietary hospitals, municipal hospitals and other city agencies, and Association and non-Association Drug Store proprietors, a majority of which units had contracts covering the Pharmacists with Local 1199.

We think it would be of dubious usefulness to articulate precisely all of the reasons impelling the Arbitrators in each instance to decide that the particular result reached was merited by weighing the facts on the scale of the Standards.

In reaching these results, however, our decision-making process, to find and accept a result which constituted the balance of the equities as well as of the realities, was not only fact-finding in nature, but also took into account a theory advanced in substance by the Union. It was that because the role of these Arbitrators is the statutory substitute for the strike weapon in negotiations, the award should reflect our best judgement on what terms the parties themselves would have negotiated.

In view of these premises the statement of the Award will be confined to a presentation of the text of the awarded provisions of the Contract, without an accompanying expression of the rationale underlying any of the decisions.

The specific terms of the Award follow.
THE AWARD

The undersigned Arbitrators, having been duly sworn, and having heard and considered all the proofs and allegations of the parties, and after having duly deliberated, make the following Award in the dispute concerning the negotiation of a Collective Bargaining Contract between Roosevelt Hospital and Local 1199 Drug and Hospital Employees Union, A.F.L.-C.I.O.:

A. The following Clauses, designated Article I to Article XXIII inclusive, shall constitute the Collective Bargaining Contract between the Hospital and the Union:

ARTICLE I: RECOGNITION

The Hospital hereby recognizes the Union as the sole and exclusive representative of all full-time and regular part-time licensed Pharmacists (excluding the Director of patient supply services and the assistant chief Pharmacist), employed now or hereafter by the Hospital.

ARTICLE II: EFFECTIVE DATE OF CONTRACT, RETROACTIVITY, AND DURATION

1. The effective date of this Contract shall be the date of the making of this Award; but as to Wages only the obligations of the Contract shall be retroactive to August 30, 1967, (the date of the Order of the Industrial Commissioner submitting this dispute to Arbitration by the New York State Board of Mediation).
2. This Contract shall be in full force and effect and shall be and remain operative and binding upon the parties hereunto and their successors and assigns from the effective date as above fixed, up to and including the 30th day of September 1970, with the provision however, that it may be reopened for purposes of wage negotiations only on January 1, 1969, and with the further provision that such wage negotiations shall commence sixty (60) days before January 1, 1969.

ARTICLE III: UNION SECURITY

1. All employees of the Hospital covered by this Contract who, on the effective date of this Contract, are members of the Union in good standing shall during the terms of this Contract as a condition of continued employment maintain their membership in the Union in good standing by tendering the periodic dues uniformly required as a condition of retaining membership in the Union.

2. All employees covered by this Contract on its effective date who are not members of the Union shall become members of the Union thirty (30) days after the effective date of this Award, and shall thereafter and until the termination of this Contract, as a condition of continued employment, maintain their membership in the Union in good standing by tendering the periodic dues uniformly required as a condition of maintaining membership in the Union.
3. All new employees who are hereafter hired by the Hospital as Pharmacists shall become members of the Union thirty (30) days after the beginning of their employment and shall thereafter and until the termination of this Contract, as a condition of continued employment maintain their membership in the Union in good standing by tendering the periodic dues uniformly required as a condition of maintaining membership in the Union.

**ARTICLE IV: CHECKOFF:**

Upon receipt of a voluntary written assignment, which shall be irrevocable for a period of not more than one (1) year, the Hospital shall deduct from the compensation due said employee each month, the regular monthly dues as fixed by the Union; and such deduction shall be made on the nearest pay-day of the employee after the fifteenth (15th) day of the month for the preceding month, and shall thereafter be remitted to the Union.

**ARTICLE V: NO STRIKE NO LOCKOUT**

1. The Union and the employees shall strictly adhere to every provision of Section 713 of the New York Labor Law. Therefore, neither the employees covered by this award nor the Union nor any other persons shall engage in or induce or encourage any strike, work stoppage,
slowdown or withholding of goods or services by such employees or other persons at the Hospital, provided, however, that nothing therein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute as defined in Section 716 of the Labor Law exists at the Hospital, as long as such publicity does not have the effect of inducing any persons to withhold goods or services at the Hospital.

2. The Hospital shall not institute, declare or cause any lock-out of employees covered by this AWARD.

3. Any dispute arising from the interpretation, application, and/or meaning of this Article shall be directly subject to the Arbitration Article appearing hereinafter in this Contract.

ARTICLE VI: PROBATIONARY PERIOD

Newly hired employees shall be considered probationary for a period of ninety (90) days from the date of hiring exclusive of absences for any cause, and may be discharged at will by the Hospital during the probationary period.

ARTICLE VII: SENIORITY RIGHTS

1. The Hospital will recognize and apply to all employees covered by this Contract the principle of seniority in all matters pertaining to the job.
2. Seniority shall be based upon the total length of employment with the Hospital. In the event an employee is duly laid off such lay-off shall be in inverse order of an employee's seniority. Employees laid off shall be placed on a preferential list from which vacancies or new openings shall be filled and in filling of vacancies or new openings, employees shall be re-hired in the inverse order of their lay-off at a salary which shall not be less than that received by them at the time of lay-off.

**ARTICLE VIII: HOURS OF WORK**

The work week for all employees shall be forty (40) hours per week spread over five (5) eight (8) hour days.

**ARTICLE IV: WAGES**

1. The minimum salary which the Hospital agrees to pay for a forty (40) hour five (5) day work week to the employees covered in this Contract, with one (1) year or more experience as a registered Pharmacist in a Drug Store or Hospital, shall be One Hundred and Eighty dollars ($180.00). This rate of pay shall commence from the date of retroactivity as above provided and shall continue for the duration of this Contract unless revised pursuant to the provision for re-opening and modification of wages contained herein.
2. The present practice observed by the Hospital of paying an extra Two dollars ($2.00) per day, Ten dollars ($10.00) per week, to those registered Pharmacists working a shift ending between 8:00 p.m. and the following 6:00 a.m. shall be continued; commencing the effective date of this Contract and continuing until its expiration, unless modified in accordance with the provisions contained herein.

ARTICLE X: OVERTIME

All work by such employees, including a part-time employee, over and above eight (8) hours in one (1) day and forty (40) hours in any week shall be deemed overtime and shall be paid for at time and one half the regular rate of pay.

ARTICLE XI: HOLIDAYS

1. Regular full-time employees covered by this Contract shall be granted time off with pay for the following recognized Holidays each year during the term of this Agreement:

   Washington's Birthday
   Memorial Day
   Independence Day
   Labor Day
   Election Day
   Thanksgiving Day
   Christmas
   New Year's Day
2. In addition to the above specified Holidays employees are entitled to two (2) additional days, to be called 'personal days', but they may not accumulate beyond a calendar year and all employees shall be entitled to these personal days off only when he has completed one (1) continuous year of employment.

3. Should any of the aforenamed Holidays to which an employee is entitled fall on a day during his vacation, such employee shall, in addition to his regular pay, be paid for such holiday. Should any employee be called in to work on any Holiday to which he is entitled, he shall, in addition to his regular day’s pay, be paid for such Holiday at the rate of time and one-half his regular rate.

ARTICLE XII: VACATION

1. Regular full-time employees embraced in this Contract shall be entitled to paid vacation each year during the term of this Agreement as follows:

   - those who have had more than six (6) months but less than one (1) year employment: 2 calendar weeks vacation;
   - those who have had more than one (1) year of employment: four (4) calendar weeks vacation.

2. Part-time employees shall be entitled to vacation with pay on the same basis as above set forth, but pro-rata in the proportion that their work hours bear to the full work week of regular full-time employees.
3. In April of each year, the Hospital in conference with the employees and the Union, shall work out a vacation schedule for these employees which shall be posted in an appropriate place not later than April 30th each year.

4. Any employee who resigns shall give the Hospital two (2) weeks notice to entitle him to pro rata vacation pay.

ARTICLE XIII: COFFEE BREAK

1. Except as provided in the next paragraph there shall be two rest periods or coffee breaks in each working day, not exceeding fifteen (15) minutes on each occasion as assigned by the Hospital to each of the employees performing a full day's work.

2. On regular pay-days the coffee break immediately following the employee's receipt of his pay check shall be extended to twenty-five (25) minutes (rather than fifteen (15) minutes), during normal banking hours to enable employees to cash checks.

ARTICLE XIV: SICK LEAVE

The Hospital has stated that its present practice is to give ten (10) paid days of Sick leave to each regular full-time employee embraced in this Contract and having less than five (5) years employment; and twenty (20) days of paid Sick Leave to each such employee after
five (5) years of employment; with each such employee having the right to accumulate paid leave for sick days up to ninety (90) days.

Continuance of this practice of the Hospital in regard to payment of sick leave to these employees is embodied in this AWARD and made an obligation of the Hospital under this Contract.

ARTICLE XV: BEREAVEMENT

In the event such employee is kept from work because of death in the immediate family, (which includes a parent, spouse, child, sister or brother of such employee), the employee shall receive a bereavement leave with pay for the three (3) working days following the day of death.

ARTICLE XVI: MATERNITY

In the event the wife of such employee gives birth on a regular working day, the husband with a minimum of six (6) months on the job shall have one (1) day off with pay.

ARTICLE XVII: WELFARE AND INSURANCE PLAN

The Hospital having stated that it has in existence at present, and covering all of its professional type employees, a Welfare and Insurance Plan, continuance of the present Welfare and Insurance Plan as to the employees embraced in this Contract is hereby made an
obligation of the Hospital under this AWARD
and embodied as a term of this Contract.

ARTICLE XVIII: PENSION PLAN

The Hospital having stated that there is
existing a Pension Plan by which it covers all
of its professional type employees including
the registered Pharmacists, continuance of
this present Pension Plan as to the employees
embraced in this Contract is hereby made an
obligation of the Hospital under this AWARD
and embodied as a term of the Contract.

ARTICLE XIX: PROFESSIONAL CLAUSE

The Hospital agrees to continue to provide
to the Pharmacists all new technical information,
literature, periodicals and other matters related
to the professional conduct of the Pharmacy
Department of the Hospital and make same freely
available to the Pharmacists.

ARTICLE XX: PAST PRACTICES

The Hospital, only for good cause and where
not inconsistent with the terms of this AWARD
or a Contract between the parties, may discontinue
or change past practices covering these Pharmacists,
and the Union shall have the right to grieve and
Arbitrate whether there was good cause for the
discontinuance or change of the particular past
practice.
ARTICLE XXI: MANAGEMENT RIGHTS

1. The management of the Hospital and the direction of the working forces are vested exclusively with the Hospital. The Hospital retains the sole right to hire, discipline, discharge, lay off, assign, and promote, and to determine or change the starting and quitting time and the number of hours to be worked; to promulgate rules and regulations; to assign duties to the work force; to recognize, discontinue or enlarge any department or division; to transfer employees within departments, to other departments, to other classifications and to other shifts; to introduce new or improved methods or facilities; to re-classify positions and carry out the ordinary and customary functions of management whether or not possessed or exercised by the Hospital prior to the issuance of this award, subject only to the restrictions and regulations governing the exercise of these rights as are provided in this AWARD.

2. The Union recognizes that the Hospital may introduce a revision in the method or methods of operation, which will produce a revision in job duties and a reduction in personnel in any department. The Union agrees that nothing contained in this Award shall prevent the implementation of any program and of the work force reductions of any program to be hereafter undertaken by the Hospital.
3. The Union, on behalf of the employees, agrees to cooperate with the Hospital to attain and maintain full efficiency and maximum patient care and the Hospital agrees to receive and consider written constructive suggestions submitted by the Union toward that objective.

ARTICLE XXII: GRIEVANCE PROCEDURES

Section A

Step 1: In the first instance and within a reasonable time from the occurrence of a dispute, grievance or complaint, the same shall be taken up for disposition between the grievant and/or his Union representative and his immediate supervisor.

Step 2: If the dispute, grievance or complaint is not settled in step 1, as described above, then within five (5) working days from the date of the presentation by the grievant, the same shall be put in writing and taken up for disposition between the grievant, a representative of the Union and the Administrator of the Hospital or his designee.

Step 3: If said dispute, grievance, or complaints, are not settled within five (5) working days after completing this Step 2 meeting, the matter may be submitted to Arbitration under the Arbitration procedure provided herein.
Section B:
All time limitations herein specified shall be deemed to be exclusive of Saturdays, Sundays, and Holidays, and all time limitations above provided may be extended by mutual agreement.

ARTICLE XXIII: ARBITRATION

1. Such unresolved dispute, grievance, and complaints may be referred by the Union or the Hospital for Arbitration to an Arbitrator designated by the American Arbitration Association. Such reference to Arbitration must be prompt and timely. The Arbitration shall be subject to Article 75 of the New York Civil Practice Law and Rules and to the Rules and Procedures of the American Arbitration Association.

2. The AWARD of the Arbitrators hereunder shall be final and binding on all the parties hereto.

3. The fees and expenses of the American Arbitration Association and of the Arbitrator in connection with such Arbitration shall be borne equally by the Union and the Hospital.
B. DEMANDS REJECTED FOR INCLUSION AMONG TERMS OF THE CONTRACT

It is FURTHER AND FINALLY AWARDED as follows:

The demands made herein that the Contract include provisions which require the Hospital:

(1) To hire new and/or additional employees through the Union Hiring Hall (Demand 21, Union Ex. A).

(2) To pay Supper Money (Demand 20, Union Ex. A)

(3) To provide Severance Pay (Demand 18, Union Ex. A)

are each and every one DENIED.

Thomas E. Fitzgerald, ARBITRATOR

Francis E. Rivers, ARBITRATOR

Eric J. Schmertz, ARBITRATOR

STATE OF NEW YORK )
COUNTY OF NEW YORK)

On this 11 day of March, 1968 before me personally came and appeared Thomas E.
Fitzgerald, Francis E. Rivers and Eric J. Schmertz, to me known and known to me to be the individuals
described herein and who executed the foregoing instrument, and each of whom duly acknowledged to
me that he executed the same.

[Signature]
Notary Public
GENEVIEVE ROBERTSON
Notary Public State of New York
No. 41-3305400
Qualified in Queens County
Commission Expires March 30, 1969
In the Matter of the Arbitration between
Lodge 186 International Association of Machinists

and

F & M Schaefer Brewing Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and having duly heard the proofs and allegations of the Parties, Awards, as follows:

There was not just cause for the suspensions of Richard Judge and John Winner for the three days of March 7, 8, and 11, 1968. The Company shall make them whole for the time lost and the suspensions shall be expunged from their records.

Eric J. Schmertz
Arbitrator

DATED: November 1968
STATE OF New York ) ss.: COUNTY OF New York

On this day of November, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case #68A/7260
In the Matter of the Arbitration between
Lodge 186 International Association of Machinists

and

F & M Schaefer Brewing Company

Opinion

In accordance with Article XXIV of the Collective Bargaining Agreement between the F & M Schaefer Brewing Company, hereinafter referred to as the "Company," and Lodge 186 International Association of Machinists, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company have just cause to suspend Richard Judge and John Winner for the three days of March 7, 8 and 11, 1968?

A hearing was held in Baltimore, Maryland on October 17, 1968 at which time Messrs. Judge and Winner, hereinafter referred to as the "grievants," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. Post hearing briefs were filed and the hearings were declared closed as of October 31, 1968.

The Company charges that the grievants took an unauthorized relief break on Saturday, March 2, 1968 during the third shift on which they worked as machinists. Their respective three day disciplinary suspensions were for this alleged misconduct.
The third shift runs from 11 P.M. to 7 A.M. The grievants are the only machinists assigned to that shift, and they work without a machinist supervisor. Indeed the shift is largely unsupervised - the only supervisor in the plant during that time is the foreman of the clean-up crew. During the shift, normal relief periods are taken for 15 minutes between 1 and 1:15 A.M. and between 5 and 5:15 A.M. The lunch period is for 1/2 hour, normally between 3 and 3:30 A.M. It is undisputed that these periods of time may be delayed in the event of machine break-down during production or for emergencies. In addition, the uncontradicted evidence indicates that it is not uncommon for employees on the third shift to delay these periods in order to work through or complete a job assignment. And in such event, it has not been uncommon for the employees to "tack" the first 15 minutes relief period on to the half hour lunch period.

The grievants were found by the Maintenance Foreman, who unexpectedly visited the plant, lounging in the Machine Shop at about 4:05 A.M. On the ground that this was not a regular relief period, the grievants were deemed to have been improperly away from their work assignments, and were disciplined with suspensions of three days.

The grievants' defense and that of the Union on their behalf, is quite simple. It is that the grievants worked through the first 15 minute relief period; that also because of a work assignment they continued at work until 3:30 and did not begin their lunch period until that time; and merely tacked the half hour for lunch and the first 15 minute
break together for a 45 minute break between 3:30 and 4:15 A.M. And thus it was proper for them to be on a relief break at 4:05 A.M. when found in the Machine Shop by the machinist foreman.

The evidence is contradictory. But despite the Company's view otherwise, I am disposed to find the grievants' story to be plausible. Or at least its plausibility is not overturned by the evidence and testimony offered by the Company; in a case where, because discipline is involved, the Company has the burden of proving the charges against the grievants by evidence that is clear and convincing.

The work sheets disclose that the grievants did not start their lunch break until 3:30 A.M. The evidence also indicates that the 15 minute relief breaks are not normally entered on the work sheets. Therefore the work sheets would not disclose whether the grievants had either taken or worked through the first 15 minute break or whether, if they had worked through it, it was tacked on to the lunch period, extending that break to 4:15 A.M. But at least the record of the lunch period coincides with the testimony of the grievants, and is contrary to the Company's assertion that the grievants, or at least Winner was at lunch at 3 A.M. when he was allegedly contacted by the clean-up foreman to perform some work on a No. 2 Soaker. And it contradicts the Company's assertion, based also on information from the clean-up foreman, that Winner interrupted his lunch period for only about 5 minutes (from 3 A.M. to 3:05) for this work and immediately returned to resume his lunch. But the clean-up foreman did not testify
at the arbitration hearing, and accordingly, his information, upon which the Company so strongly relies, is in the record only on a secondary basis. And as between it on one hand and the official work sheets and direct testimony of the grievants on the other, the latter must be given more weight.

Moreover, the grievants testified that an electrician who was in the plant on an overtime basis, worked with them when the first relief break between 1 and 1:15 A.M. was worked through. Yet the record discloses that the Company decided to discipline the grievants without any inquiry made of this electrician. Though the electrician could have been produced as a witness by the Union in support of the grievants' explanations, he also could have been asked to testify by the Company in connection with its case. With the burden on the Company, the absence of his testimony in no way diminishes the direct testimony of the grievants. But by its absence, the Company's case on that point remains inconclusive at best.

So, it is not whether I believe the grievants' explanation, but whether the Company's case to the contrary has been established clearly and convincingly to my satisfaction. It has not, and therefore the Company has failed to meet the traditional burden in disciplinary cases.

Of course if there is laxity with regard to what relief and lunch breaks are taken on the third shift, it is due in part at least to the absence of supervision. Unless supervision is provided or unless the third shift of employees are notified explicitly and unequivocally that they are to take their breaks
at regular stated intervals except in unusual circumstances such as break-down and emergencies, variations can be expected. And unless the Company expressly proscribes those variations, it cannot discipline employees for making changes, especially when there has been a practice to do so. If the Company wishes to tighten up, it may, with appropriate notice and instructions. Thereafter, discipline would be justified for unauthorized variations. But the Company has not yet done so on the third shift. Specific times for breaks have been posted for other shifts. But a similar posting for the third shift was long ago removed and disregarded.

For all the foregoing reasons I am not persuaded that the grievants misconducted themselves when they were found on a relief break at or about 4:05 A.M. on March 2, 1968.

Accordingly, the three day suspensions imposed on each of them is reversed, and they shall be made whole for the time lost.

Eric J. Schmerz
Arbitrator
In the Matter of the Arbitration Between

Local Lodge #1680 of District Lodge #64
International Association of Machinists
and Aerospace Workers

and

G. T. Schjeldahl Company, Packaging
Machinery Division

In accordance with Article 8 of the Collective Bargaining Agreement dated May 1, 1966 to May 1, 1968 between G. T. Schjeldahl Company, Packaging Machinery Division, hereinafter referred to as the "Company," and Local Lodge #1680 of District Lodge #64 of the International Association of Machinists and Aerospace Workers, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide disputes between the Union and Company relating to grievances #67-19, #66-28 and #67-11.

A hearing was held in Seekonk, Massachusetts on January 12, 1968 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

Having duly heard and considered the proofs and allegations of the parties, I render the following AWARD:

**Grievance #67-19**

Grievance #67-19 was withdrawn by the Union without prejudice.

**Grievance #66-28**

Grievance #66-28 was settled by and between the parties as follows:
Without establishing a precedent and without prejudice to the positions of either party, the Company shall pay J. Marques, A. Mikulis, P. Eve, E. Benjamin and A. Crombie for five hours at the rate of time and one half, for Saturday, October 15, 1966.

Grievance #67-11

The parties stipulated the issue for determination as:

1. Is Grievance #67-11 arbitrable?
2. Is the Company entitled to assign machine wiring to Assemblers, Maintenance men and Maintenance Electricians? If so, is the Company obligated to grant the financial remedy sought in the grievance by the grievants, i.e. the overtime pay lost?

The grievance is not arbitrable. Precisely the same substantive dispute was the subject of a grievance in late 1964. Under the grievance procedure of the contract, a Third Step answer by the Company is "accepted as final" unless the grievance is withdrawn or submitted to arbitration by the Union. In November 1964 the Company's Third Step answer stated, in significant part, that machine wiring was "assembly work (to be) done by Assemblers."

Thereafter the Union neither withdrew the grievance nor submitted it to arbitration. Because that grievance in 1964 involved the identical issue as grievance #67-11, and similarly, was posed in a manner requiring an interpretation of the same sections of the contract, I find that the Company's answer then not only disposed of the 1964 grievance, but is equally dispositive of the instant grievance #67-11. The effect of my ruling is not only that grievance #67-11 is non-arbitrable, but that the Company's position in 1964, namely that the work of machine wiring belongs to the Assembler classification, is binding now on both the Union and the Company.

Eric J. Schmertz
Arbitrator
DATED: January 1968
STATE OF New York ) ss:
COUNTY OF New York )

On this day of January, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1130 0301 67
In the Matter of the Arbitration between

Local 1604 U. A. W.

and

Scovill Manufacturing Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated October 16, 1966 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Grievance #1274 is granted only to the extent of one half an hour's pay. The Company did not violate the contract or the rights of maintenance men when it did not assign to them work performed on the Loback and Rod machines by a lineman and a temporary lineman or production employee on November 19, 1966. However the work performed by the lineman in bolting the billet mold in place, as a replacement for the graphite mold, should have been assigned to a maintenance man. Since that work took one half an hour the Company shall compensate the maintenance man who would have been assigned that work, one half an hour's pay at his appropriate rate. All other aspects of grievance #1274 are denied.

Grievance #1276 is denied in its entirety.

Eric J. Schmertz
Arbitrator

DATED: November 1, 1968
STATE OF New York )
COUNTY OF New York ) ss.: On this 1st day of November, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case # 1230 0129 67
In accordance with Article X of the Collective Bargaining Agreement effective October 16, 1966 between Scovill Manufacturing Company, hereinafter referred to as the "Company," and Local 1604 U. A. W., hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide disputes which are the subjects of Union grievances #1274 and #1276.

Hearings were held at the Company plant in Waterbury, Connecticut on February 15 and June 6, 1968 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived and the parties filed post hearing briefs.

Grievance #1274 claims that certain work performed on the Lobeck and Rod machines on November 19, 1966, respectively by a non-bargaining unit lineman and a "temporary lineman" (or production employee) should have been assigned to bargaining unit maintenance personnel.

Grievance #1276 is substantively similar. It claims that bargaining unit maintenance employees, rather than a lineman, should have been assigned certain work on the Lobeck machine on November 21, 1966.
More specifically, the work involved in grievance #1274 was the removal, dismantling, cleaning, and checking the face plates and alignment of a graphite mold on the Lobeck machine, and the installation, as a replacement, of a billet mold; and the placing and positioning of a mold and dies on the Rod Machine preparatory for its use the next Monday.

The specific work with which grievance #1276 is concerned was the disassembling, cleaning and readjusting of the container on the Lobeck machine.

With regard to grievance #1274 the parties expressly stipulated that the issue before this Arbitrator is whether the disputed work falls within the category of production/maintenance or experimental/development. If the former, there is no dispute that it properly falls within the maintenance man classification. If the latter there is similarly no dispute that it may and was properly assigned to linemen or others outside of the maintenance crew. This stipulation was not expressly applied to or withheld from grievance #1276, but it is obvious to me, and I am sure apparent to the parties, that because of the similarities between the two grievances, this stipulation applies to that grievance as well.

The stipulation is quite logical. It is consistent with Article II Section 4 of the contract which reads:

Working supervisors and linemen regularly perform as part of their whole job, tasks which are similar in nature to work performed by bargaining unit employees,

and the manner in which this section has been applied with regard to development or experimental work on one hand and
regular maintenance and production work on the other. The parties recognize that both linemen and maintenance men possess the mechanical skills to install, remove, dismantle and clean various molds used on the Lobeck and Rod machines. When those machines, together with the molds thereon, are "on production," the maintenance work, including work on the molds themselves, has been performed by the bargaining unit maintenance employees. On the other hand if the machines and the molds are engaged in experimental or development work, the maintenance duties, especially any work regarding the molds, has been assigned to and performed by linemen and working supervisors. The difference seems to be that when on production, the maintenance work is of a routine nature, requiring for the most part, mechanical skills. But when the operation is experimental or development, work on the molds is only in part mechanical. More important is the need for the employee to appraise the manner in which the mold is functioning; diagnose any difficulties which arise; analyze the product which is being produced; and in the course of dismantling, cleaning or assembling the mold, to evaluate its condition with regard to the product which it is designed to produce.

This latter work, more of a subjective nature, albeit mechanical, has been assigned to linemen and working supervisors in accordance with Article II Section 4 of the contract. Hence it is manifest that certain work performed by a lineman may, as that section provides, be similar in nature to work performed by bargaining unit maintenance men. The difference turns more on its purpose than on its actual detail, distinguish-
ed by whether it is experimental/development or routine main-
tenance/production.

Of course it is quite clear that this also gives rise
to problems. The nature of the Company's productivity is
such that machines and molds may be switched from production
to experimental, back and forth, several times over a relative-
ly short span. And though there is provision to adjust the
pay of the operators involved, so that they at least know
when an operation is experimental as distinguished from pro-
duction, it is not so apparent to the maintenance men. On
a given day the maintenance men may see work performed by
linemen which appears identical with work that they previous-
ly performed. And they may not know, or more realistically
so far as the instant grievance is concerned, may dispute the
Company's determination that the work involved is experiment-
al/development.

So while the theory of delineation between work assigned
to linemen if experimental, and to maintenance men if on pro-
duction, is well understood and accepted, the basic distinction
of what constitutes production as distinguished from experi-
mentation, is not at all clear and very much in dispute.

During the course of the hearings I stated the obvious
to the parties - namely that they should be the best judges
of into which category the various highly technical operations
fell. And that disagreement would continue on a chronic
basis unless some understanding was reached on standards of
delineation. Nevertheless, until and unless that is done,
disputes of the instant type must be decided by arbitrators,
no matter how less familiar we may be than the parties, with the esoteric nature of the work involved.

After careful study of the entire record before me, it is my best judgment that the overwhelming bulk of the disputed work in the instant case was experimental or development rather than routine production or maintenance. Therefore with one small exception, the Company's failure to assign it to bargaining unit maintenance men was not violative of the contract. Rather it was consistent with the language and practice of Article II Section 4.

The Lobeck and Rod machines are not in and of themselves experimental. But the molds used on those machines and the alloy produced therefore; together with the purpose of that product, may make the operation experimental or development. On November 19, the Lobeck machine was using a graphite mold which was different in size from previous graphite molds used in routine production. Moreover, and more significant in my judgment, it was producing cupro-nickel, a new alloy. The evidence indicates that the operation experienced difficulties; the product varied from acceptable standards and in general there were "bugs" to be overcome. By pointed example, the removal of the mold (which in part, is the disputed work involved herein) was made necessary by a leak in the operation of the machine and mold.

In short, because the mold and alloy were new; the product unpredictable and more trouble-laden than normal; and because the unstable nature of the operation resulted in leakage, I am satisfied that the Company's classification of the
work as experimental coincides with the actual facts of the situation. The question, however, is whether the removal, cleaning and readjustment of the mold from the discontinued experimental operation, constituted maintenance work of an experimental nature, warranting its assignment to linemen. I am satisfied that it is.

I do not think that the experimental or development work ends merely because the operation is shut down and the experimental mold removed. It is true that the maintenance men could have removed the mold and probably cleaned it and possibly even adjusted it, as did the lineman. But they would not be responsible, as was the lineman, to analyze, evaluate, and make certain subjective judgments about the mold in the course of that work. And because the mold was being used in experimental work, those judgments were per force an integral part of the mechanical work of removal, cleaning and readjustment. Or in other words, the disputed work was a logical extension of or sufficiently closely related to the actual experimental runs, as to be considered experimental or development also.

So I find nothing improper by the assignment or performance of that work on November 19 by a lineman.

There is less dispute between the parties in connection with the Rod machine. The evidence establishes that that machine was to commence an experimental run on Monday, November 21. It follows then, that the preparatory work necessary to ready the machine for that run - establishing the installations of the molds, dies, rolls and tubes were themselves ex-
perimental. It is undisputed that the individual assigned, and technically classified and paid by the Company as a "temporary lineman" had had previous experience with that machine and that type of work. Contrarywise the maintenance men had not. So I am satisfied that the disputed work on the Rod machine was not denied the maintenance men in violation of the contract.

However, one portion of work performed by the lineman on November 19, I deem to be purely mechanical and properly part of a maintenance man's job. Indeed it was so conceded by Company witnesses at the arbitration hearing. It was the one half an hour spent by the lineman in bolting the billet mold in place as a replacement for the graphite mold on the Lobeck machine. This is maintenance man work; and easily could have been assigned to one of the maintenance men who were handling other maintenance duties on the Lobeck machine at the same time. And though of not great duration I am not prepared to hold that one half hour of work is so de minimus as to be overlooked. Therefore the Company is directed to pay whichever maintenance man would have been assigned that work, one half an hour of pay at the appropriate rate for the work performed by the lineman in bolting the billet mold into place on the Lobeck machine. Grievance #1274 is granted to that limited extent, and all other aspects of grievance #1274 are denied.

I conclude that the work on the container on the Lobeck machine performed by a lineman on November 21, 1966 was also experimental or development. Again a graphite mold was in-
volved as part of the container. The operation was marred by casting problems and excessive downtime resulting from "bugs" in the equipment. Also an alloy new to the Company was being cast - a 75% copper - 25% nickel composition which proved troublesome in connection with temperature control and slagging in the furnace. Also there were design problems which required attention and appraisal. So again, while I have no doubt that the maintenance men could remove, dismantle, and perform the other mechanical work attendant to this mold and alloy, the nature of the actual work required subjective observations, appraisals and modifications; so that the difficulties in the runs could be eliminated, towards the end that this alloy could be manufactured on a normal productivity basis. Therefore I do not find fault with the Company's decision to assign this work to a lineman and not to the maintenance men. And again, this is consistent with the express contract provision of Article II Section 4, which allows linemen to perform work similar to that performed by the maintenance men.

The circumstances in both grievances before me are, in my view, distinguishable from Union's grievance #10997 dated August 2, 1965 upon which the Union relies in an effort to show that work with a graphite mold on the Lobeck machine was not experimental or development. In the instant grievances the graphite molds were of different size. The metal alloys used were also different. And per force the type of product to be produced and the properties desired were different in the instant cases from what was involved in August of 1965.
Accordingly grievance #1276 is denied.

It should be abundantly clear that my decisions on the grievances before me relate solely to those cases and to the circumstances of the work involved. I cannot see how my determination can have any precedential effect on work involving other machines or molds, at different points of time. What is needed is not just an understanding that linemen may do experimental and development work, but rather some clarity as to what constitutes experimental or development work as distinguished from normal production and maintenance; together with some defined procedure for switching from one to the other.

It is not the role of this Arbitrator nor indeed do the specific grievances before me lend themselves to it, to attempt that clarification. Rather it is a matter for direct bargaining between the parties. Until and unless some clarification and procedure are bargained, the general language of Article II Section 4 which the parties have jointly placed in their Collective Bargaining Agreement, may well continue to generate circumstances of dispute.

Eric J. Schmertz
Arbitrator
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration between
Local 282 International Brotherhood of
Teamsters
and
John Sexton & Co.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated September 1, 1967 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Robert Brown was not wrongfully discharged under the terms of the contract.

Awards

DATED: November 1968
STATE OF New York
COUNTY OF New York

On this day of November, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. A68 - 1465

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Local 282 International Brotherhood of Teamsters

and

John Sexton & Co.

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated September 1, 1967 between John Sexton & Co., hereinafter referred to as the "Company," and Local 282 International Brotherhood of Teamsters, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was Robert Brown wrongfully discharged under the terms of the contract? If so, to what remedy is he entitled?

A hearing was held at the offices of the New York State Board of Mediation on October 24, 1968 at which time Mr. Brown, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The Company discharged the grievant for excessive absenteeism in violation of the Company rules. The evidence confirms the excessive and chronic nature of the grievant's absentee record both before and after a medical leave of absence. In addition, this record failed to improve after he was formally warned of its unsatisfactory nature.
It is clear that the grievant's absences were due principally to ill health. He absented himself either because of manifestations of illness or the need to visit the Veterans Hospital for treatment. It is equally clear that though he presented a medical statement attesting to his ability to re-assume his job following his medical leave of absence, he was not fully recovered from his ailments. He was still obliged to return to the hospital for out-patient treatment on regular working days, albeit with less frequency; and by his own admission he absented himself several days in August, 1968, just prior to his discharge, because "he felt he needed a rest."

Unfortunate as it may be, it appears to me that the grievant's record of excessive absenteeism, which covers a period from 1964 to the date of his discharge (excluding his medical leave of absence), will not improve if he is returned to work simply because he is not physically capable of reporting to or performing his job on a consistent basis.

It is well settled that excessive absenteeism, for whatever reason, including reasons of health beyond the employee's control, is nonetheless grounds for termination. An employer must be able to rely upon the regular attendance of his employees. If not, the absenteeing employee, following a warning, and a reasonable opportunity to correct the circumstances giving rise to his absenteeism, may be discharged, even though his record of absenteeism is not a matter of misconduct. Such is the circumstance in the instant case, and there is no basis upon which I can deny the Company its right to invoke that well settled principle. Moreover, I find it
makes no difference which set of Company rules were in effect at the time of the grievant's termination, because I am satisfied that the discharge was not only consistent with the foregoing general principle, but also in express or substantial compliance with the absentee provisions of both sets of rules.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Simmons Elizabeth Employees' Union,
Local #420, Upholsterers' International
Union of North America

and

Simmons Company

Award of
Arbitrators

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated October 13, 1967 and having duly heard the proofs and allegations of the Parties, Award as follows:

Grievances #2115, #2117 and #2137

1. The Company's action in disqualifying James Harris from his job as sweeper and from any other available jobs to which his seniority might entitle him, was proper. Grievances #2115 and #2117 are denied.

2. The Company erred when it suspended James Harris for two weeks. Because he was physically unable to perform any available work within the plant, he should have been disqualified and placed on the Surplus Labor List. Accordingly, the suspension is expunged, and the Company's subsequent action in disqualifying him and placing him on the Surplus Labor List shall be made retroactive to cover the full period of the suspension. Because he would have been and still is in an inactive employment status, even though the suspension is expunged, he is not entitled to back pay.

Eric J. Schmertz
Chairman

Chester J. Micek
Concurring in 1, 2

Edward T. Tomalagave
Concurring in 1, 2

Dissenting from 1, 2

Dissenting from 1, 2
Grievance #2088

The termination of Gloria Thompson is upheld. Grievance #2088 is denied.

Eric J. Schmertz

DATED: October 31, 1968
STATE OF New York
COUNTY OF New York

On this 31st day of October, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: November 1968
STATE OF New York
COUNTY OF New York

On this day of November, 1968, before me personally came and appeared Chester J. Micek to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: November 1968
STATE OF New York
COUNTY OF New York

On this day of November, 1968, before me personally came and appeared Edward T. Tomalagave to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330-0655-68
In accordance with Article III of the Collective Bargaining Agreement effective October 13, 1967, between Simmons Company, hereinafter referred to as the "Company," and Simmons Elizabeth Employees' Union, Local #420, Upholsterers' International Union of North America, AFL-CIO, hereinafter referred to as the "Union," the undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide disputes relating to the Union's grievances #2115, #2117 and #2137. Messrs. Chester J. Micek and Edward T. Tomalavage respectively served as the Company and Union designees to said Board of Arbitration. The Union and Company, hereinafter referred to jointly as the "parties," also submitted for determination by the Undersigned as sole arbitrator, the dispute involved in Union grievance #2088.

A hearing was held in Elizabeth, New Jersey on all four issues, on October 25, 1968, at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The oath of the Arbitrators was expressly waived. Following the oral hearing the Board of Arbitration on grievances #2115, #2117 and #2137 met in Executive Session.
Grievances #2115, #2117 and #2137

These three grievances are interrelated and can be dealt with in the same discussion. Each relates to Employee James Harris, hereinafter referred to as the "grievant." Grievance #2137 challenges the propriety of a two week disciplinary suspension imposed on the grievant for excessive absenteeism. Grievances #2115 and #2117 challenge the Company's act of disqualifying the grievant from both his regular job and any other job in the plant which by seniority he might have claimed, upon his return from the disciplinary suspension.

Based on the evidence it is clear that the Company's determination that the grievant was physically unable to perform either his regular job as a sweeper or any other job based on his seniority, was proper. The grievant claims that he suffers from a back condition, related to an injury sustained in 1966, for which he received a Workmen's Compensation settlement. His record of absenteeism is attributed, in part at least, and by his own admission, to that ailment. His inability to perform all the duties of his sweeper job or any other assignment which he could claim based on his seniority, is evidenced by his own admission to that fact, together with a written statement from his personal physician.

When he reported for work, on or about June 16, following the completion of a two week suspension, he stated to the Company physician, who was prepared to examine him as required by the contract, that his back continued to bother him and that he was unable to perform the lifting duties attendant to the sweeper job. A review by the Company of other jobs in
the plant, occupied by less senior employees, for which the grievant might exercise his seniority, disclosed, without dispute, that all required more physical effort than the duties of a sweeper. Also subsequently, the grievant produced a medical statement from his own physician indicating that he was able to return to work, but only for "light duty." Based on the grievant's own statement to the Company doctor; the unavailability of less strenuous work; and the written statement of his personal physician, the Company determined that he was physically unable to perform his regular job or any other available work, and disqualified him on physical grounds in accordance with Article II Section 2.14 (m) of the contract. As a consequence the grievant was placed on inactive status as part of the Surplus Labor List in accordance with Article VII Section 7.08 of the contract.

The evidence, especially the grievant's own statement, and the medical report from his own physician, fully support the action taken by the Company. Accordingly the Company's action is upheld and grievances #2115 and #2117 are denied.

Having accepted as factual the grievant's claim regarding his back condition, the Company should also have accepted that reason for the grievant's absences from work following a three day disciplinary suspension which ended on May 17, 1968. The record shows that he reported his difficulty with his back to the Company nurse and personnel manager and that his absences either coincided with or immediately followed those reports. At the hearing the Company personnel manager stated
that the grievant was suspended for two weeks because the Company did not believe that his absences were due to the alleged back condition.

But, as already indicated, the Company relied on that condition in support of its action, only two weeks later, in disqualifying the grievant from employment on physical grounds, and I have held that that determination by the Company was proper. It is both logical and reasonable to me, that two weeks earlier, when the grievant also complained about his back and stayed out of work his condition was no different than the Company found it to be two weeks later, when it disqualified him from active employment. Accordingly, I am constrained to hold that the Company erred when it disbelieved the grievant's story about his back - only to believe it, and act proper on that belief, two weeks later.

So rather than to impose a suspension, I believe the proper action should have been to find him physically unable to work at that time rather than to await his return from the suspension to do so. He should have been placed on the Surplus Labor List as of the date his suspension began. Therefore the suspension shall be expunged from his record and his disqualification shall be made retroactive to cover as well, the entire period of the suspension. Obviously, however, because he would have been, and still is, in an inactive employment status, he is not entitled to back pay even though the suspension is expunged.
The Company terminated Gloria Thompson for failure to return certain medical forms as required, despite repeated notices and requests and extensions of time to do so.

The evidence supports the Company's position. Mrs. Thompson was supplied with medical forms and instructed to return them by a specific date. She failed to do so. Thereafter, on February 15, 1968, she was notified by telegram to complete and return the medical forms. There is no dispute that the telegram was delivered. She failed to comply and after claiming that the forms were in possession of her physician, was given an extension of time to file them. Again she failed to do so. Thereafter she reported that the medical forms had been lost. Her husband, also an employee, was provided with a duplicate set and she was afforded a further extension of time to complete them. Again they were neither completed nor filed. Her husband then reported that the duplicate set of papers were also lost and he was given a third set for his wife together with a further extension of time within which she was to complete and file them.

After the passage of a reasonable period of time thereafter, when the forms were still not returned, the Company terminated the grievant from its employ.

I find that the Company's action was proper. Clearly Mrs. Thompson was afforded every opportunity to comply with the requirements that the medical forms be completed and filed. Indeed the Company extended itself well beyond what it was required to do in order to accommodate her. For her to ignore
the obligation to complete and file the medical forms; to disregar
d the several notices and requests by the Company; and furth
er, to fail to comply with these requests after the Compa
ny twice, supplied duplicate forms, can only be construed
as gross indifference to her minimal responsibilities as an
employee. Indeed I find that Mrs. Thompson's failure to
meet the reasonable requests of the Company after those re-
quests were repeated several times and after extensions of
time were granted, constitutes a complete abandonment of her
interest in or claim to any employment status with the Compa
ny.

In short, by her own acts of omission she relinquished
her job. Therefore her termination from the Company's employ
was proper and is upheld. The Union's grievance #2088 is de-
nied.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Oil, Chemical & Atomic Workers Inter-
national Union Local 8-438, AFL-CIO

and

E. R. Squibb & Sons, Inc.

In accordance with Article VIII of the Collective Bargain-
ing Agreement dated December 17, 1966 as extended, between
E. R. Squibb & Sons, Inc., hereinafter referred to as the
"Company," and Oil, Chemical & Atomic Workers International
Union Local 8-438, AFL-CIO, hereinafter referred to as the
"Union," the Undersigned was designated as the Arbitrator to
hear and decide a dispute between the Union and Company, here-
inafter referred to jointly as the "parties," relating to
Union Grievance #NP-766-67.

Hearings were held in New Brunswick, New Jersey on July 7,
1967 and May 3, 1968, at which time representatives of the
parties appeared and were afforded full opportunity to offer
evidence and argument and to examine and cross examine witnesses,
The Arbitrator's oath was expressly waived.

Union Grievance #NP-766-67 reads:

We B. Pavick Casey Sarnicki F.C. Spataro
protest the unfair action of the company (E.R. Squibb and Sons) for creating what we feel is an
unsafe condition. This unsafe condition is creat-
ed when an electrician who is working shifts in
area maintenance is unable to report for work.
When this happens, the area maintenance foreman
does not cover this opening by holding over or
calling in another electrician to complete the
shift of two men. We feel that in many cases the hazards of our work make it a necessity to have two electricians present. This is especially true when working in many areas which have little or no personnel in them. We are aware of our rights under the contract concerning safety, however, we feel it would be more practical to discuss and try to settle this problem before an incident arises in which we will be forced to invoke these rights.

Signed:

L. Fortenboher Harry Ericksen J. P. Baldesweiler
Richard Buck T. Yanushefski A. Hodokowski
Robert Cherrington A. Bogush A. Holz
Richard Pich P. Wanson

Basically the Union's claim is that certain electrical assignments, to be performed safely, require two qualified electricians. The Union contends that the Company has used and may in the future use, a single electrician to perform those assignments. And rather than resist carrying out such duties when or if directed to do so, thereby creating a potential disciplinary problem, the Union seeks an Award directing the Company to use two electricians whenever such job assignments are made. From the Union's standpoint, the problem seems to arise, either actually or potentially, when the normal complement of two electricians on the second and third shift is reduced to one by the absence of the other, usually because of illness. The Union claims that the Company has required the single remaining electrician to perform work which may only be performed safely by two, and is fearful of future similar assignments. As one remedy the Union demands that at least two electricians be made available at all times on all shifts, holding over or calling in unscheduled electricians if absences reduce the complement below two.
The Company denies that it has made any unsafe assignments of work to the electricians. It concedes that it has an obligation under the contract to take all reasonable steps to insure safe conditions of employment, and asserts that that obligation has at all times been met. It argues that the Arbitrator has no authority to rule prospectively on future work assignments which may be unsafe, because there is no evidence that the Company will or intends to order the electricians to work under any such conditions. And so far as past and present assignments are concerned, the Company denies that the Union has proved any of them to have been unsafe. Therefore the Company concludes that the Arbitrator should neither direct that two electricians be assigned at all times to certain specific tasks, nor that the Company be required to fill as well as schedule each shift with at least two electricians.

There is not enough evidence in the record for me to judge, as alleged by the Union, that actual assignments previously made by the Company in connection with the "feeder," elevators; fans on building roofs; lamps in explosion proof areas; work in tunnels and areas of isolation; lights located in the air, above fermenters, on towers, and in the ether pit; high voltage equipment; mechanical work with starter covers; pumps underground in manholes; brushes and other parts on moving machinery; and others expressly referred to by the Union in this proceeding, are at all times unsafe unless performed by two electricians. I can conceive of instances where the work performed by a single electrician might well be unsafe and other times where he could do it singly without un-
reasonable danger. It seems to me that the circumstances of each assignment when made, must be weighed, and a judgment then made on the question of safety. And while in many instances at least two electricians might be necessary, I do not think that a hard and fast rule can be promulgated requiring two electricians at all times. Nor am I able to judge from the record whether certain jobs actually require two qualified electricians, or in the alternative, might not be safely performed by a single electrician together with some other classified employee assisting. For that reason as well, I am unable to conclude that a directive ordering the Company to make two electricians available at all times, is warranted.

Nor do I think that the remedy requested by the Union - that each shift be manned at all times by at least two electricians - meets the need. Clearly, the Company has the right to defer to a later time or shift certain electrical assignments which would require two electricians, when only one is present on the job. And so long as the Company makes no unsafe assignments to a single electrician, the absence of a second electrician from the second or third shift, is immaterial.

The determination of this case, in my judgment, should be based on both the Working Conditions and Past Practices clauses of the contract. Under the former the Company concedes its obligation to use its best efforts to maintain safe conditions of employment. And under the latter the practices followed shall continue unless contravened by the contract. Manifestly past practices in compliance with the Company's obligation to maintain safe conditions of employment are not
so contravened, but rather must continue to be followed. Therefore, in that connection, it is my determination that the Company shall continue to use two or more electricians on any electrical assignment which would be unsafe if performed by a single electrician. And if on the second and third shift, only one electrician is present, he shall not be assigned tasks which would be unsafe unless performed by at least two electricians. The Company shall defer those assignments until additional electricians are available, or if they must be performed as a normal assignment on a shift where a single electrician is in attendance, the Company shall hold over or call in an additional electrician to participate.

Obviously the foregoing determinations in no way pass judgment on whether certain specific assignments previously and presently made, or possible in the future, are or will be safe if assigned to a single electrician. The Company has stated that it intends to make no unsafe assignments. If it does, or if the parties are in dispute over a specific assignment, the Union may of course grieve. It should also be clear to the Company that the well recognized exception to the well settled rule that an employee must carry out a work assignment, is where that assignment is dangerous. So, put bluntly, an employee who refused to perform a task which because of its unsafe nature has been improperly assigned to him, would be immune to disciplinary action. Also because dealing with electricity involves some normal hazards, an unsafe condition within the meaning of this Opinion and
Award is one which exceeds what an employee is reasonably expected to encounter and undertake as part of his job.

Eric J. Schmertz
Arbitrator

DATED: May 1968

STATE OF New York )
COUNTY OF ) ss.: 

On this day of May, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0349 67
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 8-138 OCAW, AFL-CIO

and

E. R. Squibb & Sons

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The five day disciplinary suspension of James Metcalf is reduced to a formal written reprimand or warning. He shall be made whole for his loss of wages.

Eric J. Schmertz
Arbitrator

DATED: August 1968
STATE OF New York
COUNTY OF

On this day of August, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0189 68
In accordance with the Arbitration Provisions of the Collective Bargaining Agreement between E. R. Squibb & Sons, hereinafter referred to as the "Company," and Local 8-138 OCAW, AFL-CIO, hereinafter referred to as the "Union," the Under-signed was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the suspension of James Metcalf for just cause? If not, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on June 11, 1968 at which time Mr. Metcalf, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post hearing briefs.

But for one factor I would uphold the Company's action as a proper application of the well settled rule of "progressive discipline." The grievant was suspended for five working days because he committed certain admitted work errors. In part at least, these errors resulted from his failure to follow prescribed procedures and methods relating to the manufacture and labelling of drug products. Though the specific mistakes were detected before the products left the plant and hence were not of substantial severity, it is obvious that neglect of pre-
scribed methods and procedures could, in any other instance, lead to mistakes of great magnitude and danger to the consuming public. Also unlike other employees who made the same or similar mistakes on or around the same time, and who received only warnings, the grievant had been previously disciplined both by a warning and a three day disciplinary suspension for previous work errors of a similar type.

That these prior disciplinary penalties date back about 2-1/2 years does not, in my view, make them inapplicable to the instant case. There is nothing in the contract which liquidates prior disciplinary penalties after a specific period of time. I agree with the Union that after an extended period of time, a disciplinary penalty should be disregarded when an employee's record has been otherwise maintained unblemished. But I am not prepared to find that to be the case here. Because the warnings and suspension of 1965 were in part at least for the same reason as the five day suspension involved in this arbitration -- for work errors arising from a failure to follow prescribed methods and procedures -- the intervening period of 2-1/2 years is not so extensive as to render the prior record inapplicable to the penalty presently imposed. In short, there being no dispute over the fact that the grievant made mistakes resulting, in part, from a failure to follow prescribed procedures; and having been warned and suspended in 1965 for the same reasons, the imposition of a five day disciplinary suspension would be both a logical and reasonable application of the principle of progressive discipline.

The altering factor however is my agreement with the Union
that once an employee has been notified of the disciplinary penalty he is to receive, the Company thereafter, consistent with due process, should not be permitted to impose a greater penalty even if it be substantively appropriate. I am convinced that this is what happened in this case. The grievant was told by a supervisor with authority that he would receive a "reprimand" for his work errors. Thereafter he was actually penalized with a five day disciplinary suspension. I do not accept the Company's assertion that "reprimand" includes or encompasses a suspension. One of the reasons that the theory of progressive discipline is so well settled and accepted not only by unions and management but also by employees, is because a distinction is made between the penalties to be imposed and the terminology used in describing these penalties. The whole basis of the theory of progressive discipline is that for certain offenses an employee shall be disciplined on a progressively severe basis leading ultimately to the final penalty of discharge, if the earlier or lesser penalties did not prove to be rehabilitative. In its application an employee receives a warning or a reprimand before a disciplinary suspension. And the latter before the penalty of discharge, except in cases where discharge may be summarily imposed. In other words, in the classical application of the rule, a "reprimand" is different from a suspension. In my experience it has consistently meant a formal warning, usually in writing but without time off from work. Therefore, in the instant case I think it inconsistent for the Company to argue that it merely applied the well settled rule of progressive discipline (which provides for a distinct
sequential and quantitative difference between a reprimand and a suspension) while asserting at the same time that a "reprimand" in this situation was synonymous with a disciplinary suspension.

Nor is there enough evidence to show that in this particular industrial relationship the parties have come to use or accept the word reprimand to include the greater penalty of suspension. In my judgment the mere fact that notice of the grievant's five day disciplinary suspension was printed on a form headed or entitled "Reprimand" is not enough to bring the former penalty within the umbrella of the latter. There must be more convincing evidence showing that the parties herein, by practice and understanding have placed a special meaning on the word "reprimand," thereby subjecting it to an interpretation different from the manner in which it is classically applied. That evidence is not present in the record before me in this case.

Accordingly, because the Company notified the grievant that his penalty would be a reprimand, I find that the Company erred when it actually penalized the grievant with a five day disciplinary suspension. If the Company had not notified the grievant that his penalty was to be a reprimand I would have upheld the suspension as appropriate. Therefore, the suspension is reversed and changed to a formal written reprimand or warning, and the grievant shall be made whole for his loss of wages.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Fabrikoid Works Employees' Association
and
Stauffer Chemical Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 18, 1967 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company did not violate the contract in filling jobs classified as Inspector on May 1, 1967.

Eric J. Schmertz
Arbitrator

DATED: February 1968
STATE OF New York
COUNTY OF New York

On this day of February, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 67A6787
In accordance with Article XI of the Collective Bargaining Agreement dated January 18, 1967 between Stauffer Chemical Company, hereinafter referred to as the "Company," and Fabrikoid Works Employees' Association, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the contract by filling jobs classified as Inspector on May 1, 1967? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on September 12, 1967 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The parties filed post hearing briefs and the hearings were declared closed on January 22, 1968.

I deny the grievance because I am not persuaded that the grievants possess the qualifications to perform the jobs they seek. The jobs in question are those classified as Inspectors, First Class. They were filled by employees undisputedly qualified, but junior in seniority to the grievants. The Union contends that the grievants are qualified to do the work and should have been awarded the jobs because of their
greater seniority.

The most that the Union has established, if I was persuaded by all of its evidence and testimony, is that the grievants performed, and possess the qualifications to perform, the work of the classification Inspector, Second Class. But no evidence was offered to show that the grievants had or could perform the work of Inspector, First Class, or that the work of the Second Class Inspector job is the same or substantially similar to the work required of a First Class Inspector. The establishment and existence of two separate classifications, Inspector First Class and Inspector Second Class, carries with it the presumption that the duties of the former require greater skills and qualifications than do those of the latter. The Union's case fails to rebut this presumption and accordingly I am unable to find that the grievants, even if they possessed the qualifications to work as Inspectors Second Class, are qualified for the jobs of Inspectors First Class.

With the foregoing finding I need not decide whether the contract entitles the senior employee to the promotion if he is merely qualified to perform the job he seeks, or whether he has a right to the job only if his qualifications are equal to or greater than an employee with less seniority.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

District 15 IAM

and

Target Leasing

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The grievants are entitled to, and the Company shall pay them, a day's pay for April 9, 1968.

Eric J. Schmertz
Arbitrator

DATED: July 1968
STATE OF New York ) ss.:
COUNTY OF New York )

On this day of July, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0338 68
In the Matter of the Arbitration between
District 15 IAM

and

Target Leasing

The above named parties designated the Undersigned to hear and decide the following stipulated issue:

Are the grievants entitled to a day's pay for April 9, 1968?

A hearing was held at the offices of the American Arbitration Association on June 27, 1968 at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

On April 9, Target Leasing, hereinafter referred to as the "Company," was shut down in observance of the funeral of the Rev. Dr. Martin Luther King, Jr. The shut down was mutually arranged by the Company and District 15 IAM, hereinafter referred to as the "Union," but the Union's agreement was not unconditional. Its agreement was based on the express understanding that an entire F. & M. Schaefer Brewing plant, which the Company services, would also be closed that day. It turned out however, that though the Schaefer drivers did not work that day, other Schaefer employees, namely the inside plant personnel did work. Consequently, the grievants and the Union on their behalf, claim that because this condition, under which they agreed to the Company's shut down, failed, they were and should have been entitled to work on April 9 and seek pay for that day.
Additionally the Union argues that absent any binding mutual understanding to the contrary, Article 7 of the applicable contract guarantees a work week of five consecutive days of seven hours per day, Monday through Friday. And that on this basis as well, the grievants are entitled to a day's pay for April 9 which fell on a Tuesday.

I agree with the Company's argument that Article 7 does not provide for such a guarantee. Rather it is a traditional work week clause which sets forth the normal or expected work week. There is no language therein which can be construed as a guarantee. Clearly, therefore, it allows for circumstances under which the work week may be reduced for one or more employees. Layoffs may be effectuated when there is a lack of work. Also, work may be suspended or curtailed in the event of machinery or operational break downs and other emergencies beyond the Company's control which interfere with production or operations. Furthermore, of course, the plant may be closed during a normal working day by a binding mutual agreement between the parties.

However, I find none of the foregoing circumstances present in the instant case. The Company concedes that there was work available for the grievants on April 9 even though the Schaefer trucks which they service were not running. Although it was not essential that the available work be performed on that day, I cannot conclude that there was a lack of work which would justify a layoff. No emergency existed which interfered with the Company's capability to operate. And though the parties had mutually agreed to close the plant in observance
of the funeral, the significant consideration for that agreement - namely the understanding that all employees at the Schaefer plant would likewise observe the day, turned out to be untrue. In other words but for this consideration, the Union and the grievants would not have agreed to the day off, and presumably they would have worked. So with the failure of the condition upon which their agreement was based, the agreement itself failed and is not binding. It is not enough that the Company thought the entire Schaefer plant was to be closed. The responsibility for ascertaining the facts accurately rested with the Company, especially when, based on those facts, it obtained the Union's agreement to close down. So I fail to see how it would be fair to hold the Union or the grievants to that agreement when the facts upon which it is based proved materially different.

The observance of Dr. King's funeral is of course laudable. Yet my authority is limited to the contract between the parties. And under the contract, as applied to the circumstances of this case, I do not find that the Company had the right to unilaterally close the plant on April 9, nor do I find as binding, the initial agreement between the parties to do so.

Accordingly the grievance is granted and the Company shall pay the grievants a day's pay for April 9, 1968.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Newspaper Guild of Greater Philadelphia

and

Triangle Publications, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated September 23, 1966 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The grievance is arbitrable.

The issue of "just cause for discharge" is not part of this proceeding.

The resignation of Paul Huller was voluntary and not violative of the contract. Therefore it is valid and shall obtain. The Guild's grievance on his behalf is denied.

The fees and expenses of the Arbitrator, and the administrative costs of the American Arbitration Association, shall be shared equally by the parties.

Dated: October 23, 1968

STATE OF New York ) ss. :
COUNTY OF New York )

On this 23 day of October, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1430 0723 61
In accordance with Section 31 of the Collective Bargaining Agreement dated September 23, 1966, between Triangle Publications, Inc., hereinafter referred to as the "Employer," and Newspaper Guild of Greater Philadelphia, hereinafter referred to as the "Guild," the Undersigned was selected as the Arbitrator to hear and decide a dispute involving the Guild's grievance on behalf of Mr. Paul Huller.

Hearings were held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on January 3, February 7, March 20, May 1, May 17, July 10, July 12, July 22 and July 30, 1968, at which time Mr. Huller, hereinafter referred to as the "grievant," and representatives of the Guild and the Employer, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs and the hearings were declared closed as of September 23, 1968.

I have given what I consider to be full and careful consideration to the stenographic record of the hearings, consisting of 923 pages; my own notes taken in the course of the hearings; the large number of exhibits submitted by the parties; and the thorough and well reasoned briefs of each side. And I have reached my conclusions and findings which I shall con-
fine herein to those matters I deem pertinent; and which I choose to recite briefly, directly and to the point.

The grievance is arbitrable. It claims that the grievant's "resignation" is invalid and seeks his reinstatement with back pay and full benefits. The arbitrability of a grievance does not turn on its merits. It is not a question of whether a contract provision has in fact been violated; but rather whether there is a reasonable relationship between the grievance and the allegation of a violation of specific contract clause(s). To be arbitrable the grievance need only meet the requirements of the arbitration clause of the contract, namely "any dispute as to the interpretation of any clause of this agreement or as to the carrying out of any of its terms ...."

The instant grievance meets this test because, in pertinent part, it alleges violations of Sections 2 and 17 of the contract, and substantively, is related, prima facie, to those sections.

Also I am satisfied that well prior to the commencement of the arbitration hearings, the Guild, by letter, and during the course of the grievance meetings, made fully clear to the Employer the nature of its grievance; the contract provisions which it deemed violated; and the remedy it sought. So, if early in the processing of the grievance there was any procedural defect, it was cured by the time the parties jointly agreed to waive further "Joint Board" action and to proceed instead directly to arbitration. For these reasons the Employer's contention that the grievance is not arbitrable is denied.
The issue of "just cause for the grievant's discharge" is not before me in this proceeding simply because the grievant was not discharged. Unless an arbitrator is expressly authorized by contract or by joint request of the parties, he does not have the authority to render a declaratory judgment on the question of just cause. His jurisdiction is limited to that of review. He reviews the discharge action taken by an employer and determines whether or not it was based on just cause. But until and unless discharge action has been taken, the arbitrator has nothing to review. Here, neither the contract nor both parties authorized me to determine whether there would have been just cause for the grievant's discharge. And of course the Employer did not and has not initiated discharge action against the grievant. Indeed, it is the Employer's position that the grievant resigned; that the resignation was voluntary and therefore valid. For the Employer to advance that latter position, and at the same time contend that the Arbitrator has authority to find that just cause exists for discharge, is to argue in mutually inconsistent directions. Accordingly, because the question of "just cause" is not before me I make no judgment on the Employer's allegation that the grievant falsified his work reports and expense accounts, or whether, even if true, it would constitute cause for discharge. And consequently it would be unnecessary to afford the Guild an opportunity to meet or refute those allegations.

It makes no difference whether I accept the grievant's version of the meeting on August 10 when the Employer confront-
ed him with the charges of falsification of records, or the version advanced by Messrs. Williams and Hoover. Either way, and despite the Employer's disclaimer, I am persuaded that representatives of the Employer made it unmistakably clear to the grievant, either overtly or subtly, that he had the choice of resignation or discharge. But I find nothing wrong with this. As I see it, to offer the grievant that choice in no way deprives him of his rights under the discharge provisions of Section 17 of the contract. He had the right to spurn the resignation suggestion. If he did so, all his rights, and those of the Guild, to challenge his discharge (if the Employer discharged him) would be fully preserved. So I cannot see how a suggestion of resignation, which the grievant could have rejected as well as accepted, would put him in any more of a prejudicial position than if he had been discharged without the choice.

Also where an employer believes it has good cause to discharge an employee, I do not believe it is always in the interest of that employee, or consistent with normal employment practices, for discharge to be the sole method of terminating his employment. Clearly, as is the situation in the instant case, he should retain the right to insist that his termination be by discharge, so that its propriety may be put to the test in the grievance procedure and arbitration. But so long as he may exercise this right if he chooses, it may also be in his best interest to be afforded and to select another choice - that of resignation. And provided he may choose one or the other, a contract provision requir-
ing just cause for his discharge, is in no way violated.

Therefore, for the Employer in the instant case to in-
form the grievant that he had a choice of discharge or resig-
nation, was not in and of itself violative of the contract.
What is critical however, is whether the circumstances allow-
ed the grievant to make a free, rational and unfettered choice.

I answer this critical question in the affirmative. No
doubt on August 10, when confronted by the Employer with
charges of misconduct, the grievant was stunned, distressed,
fearful and embarrassed. And I believe that he may well have
experienced all of these emotions whether the charges against
him were true or false. For to be discovered in a misconduct
may be just as traumatic as to be falsely accused. And if in
response to the option made available to him, he resigned
then, I would have little trouble declaring the resignation
void, on the grounds that it was submitted during an immediate
and initial period of emotional stress and mental adversity.
But though there is much evidence indicating that the grievant
offered to resign at that point, and indeed it appears that
the Employer could have obtained his resignation then, the
Employer representatives urged him to "take 24 hours to
think it over and to discuss it with anyone he wished."

Also, I am not prepared to conclude that at the August 10
meeting, the grievant was coerced, intimidated, threatened or
unduly influenced by the Employer representatives. Charges
of misconduct were levelled against him; but the Employer
had the right to present such charges for an explanation.
And their mere presentation, together with a review of the
grievant's work history, no matter how unpleasant or uncomplimentary, cannot be equated with unfair or unjust treatment.

I am critical of the Employer's failure to see to it that the grievant had adequate Guild representation at that time, because I find that Mr. Hoover, though bearing the title of Shop Steward, was manifestly an Employer representative, partisan to the Employer's position. But because the grievant had full opportunity to, and indeed did confer with top level Guild representation after the meeting and before he submitted his resignation (during which time he had not yet made his choice), I do not find this omission on the part of the Employer, however irregular, to be material in determining the issue in this case. Certainly, if as I have held, the Employer had the right to confront the grievant with allegations of misconduct, the grievant's emotional and physical response, peculiar to his own psychological and physiological make-up, is neither the Employer's fault, nor example of coercion, intimidation or undue influence.

What is material, in my judgment, is that the grievant had about 24 hours thereafter to think things over. He had the presence of mind to discuss the matter with the Guild's Unit Chairman, who in the strongest terms cautioned the grievant not to resign. During this period the grievant had no further contact with representatives of the Employer and in no way was under their direct influence. This is not to suggest that during this period his emotional stress subsided entirely, but rather that I believe his perspective became sufficiently balanced so that, together with his talk with the
Guild Unit Chairman, he could on August 11th, make a rational and voluntary decision despite the fact that it was a harsh and worrisome one. In other words, though he may have remained distressed, I do not believe that with the passage of approximately 24 hours and the fact of his initiative in seeking and obtaining advice from the Guild, his mind was so clouded by emotional or physical stress as to make his decision involuntary, irrational or unreasoned. Therefore, I conclude that the period of 24 hours during which the grievant conferred with the Guild, was a reasonable time within which to make a voluntary choice as between resignation and discharge. Hence I am satisfied that when on August 11th, he submitted a written resignation it was a voluntary act on his part. That before he did, he sought more time to think it over (which the Employer would not afford him) I attribute to the fact that he realized the trying nature and finality of his decision, not because his mind was not yet sufficiently clear to make a free or rational choice.

The events that followed support this conclusion. The grievant stated that he thought he "had done the right thing;" with some enthusiasm he shook hands with Employer representatives; permitted an announcement of his resignation to be made in the office; and authorized plans for a farewell luncheon or party. I do not consider these to be the acts or attitudes of a man who has been coerced or intimidated, or whose resignation was involuntarily produced as a result of undue emotional or physical stress.

The remaining question is whether the conditions and cir-
cumstances of the resignation violated the second paragraph of Section 2 of the contract which reads:

The Publisher will not enter into any agreement inconsistent with the provisions of this contract with any individual employe or group of employes affecting the conditions or terms of employment of said employe or group of employes.

There is no dispute over the fact that the grievant, upon resignation, received more severance pay than his entitlement under the contract. It is equally undisputed that he was paid what he would have received had he been discharged or resigned at age 60, instead of a lesser amount to which his age of 59 and his resignation entitled him. The Guild contends that the grievant's resignation was "induced" by the Employer's offer of a greater sum of money; and that this offer together with the grievant's acceptance, constituted an "individual agreement" proscribed by the foregoing contract provision.

I am unable to agree with the Guild's conclusion simply because I cannot accept its theory of inducement. The Employer did not offer the grievant the greater sum of severance pay in exchange for his resignation. Rather, it offered not to discharge him if he resigned. It was not the Employer who brought up the question of severance pay, but rather the grievant. When confronted with the choice of discharge or resignation, he asked the Employer what he would be entitled to as severance pay. Then, and only then, did the Employer indicate a willingness to waive the one year between age 59 and 60, thereby extending to the grievant severance pay in the greater amount. I have no doubt that this gesture on the part of the Employer had something to do with the grievant's decision to resign.
And I have little doubt that the Employer's decision was based on an effort to make resignation more palatable. But it was based also, I believe, on a sincere desire to assist him financially. So I am convinced that the greater sum of severance pay was neither advanced, nor offered, nor "dangled" in front of the grievant as an inducement or a consideration for his resignation. Rather it was a benefit which would attend his resignation, not a contractual offer to be accepted by the act of resignation.

Nor do I find the gratuitous statements of the Employer representatives, also during the August 10th meeting, that they would attempt to find some other job for the grievant, to be violative of Section 2 of the contract. Clearly, these statements were neither offers nor considerations for the resignation, because they were equivocal and speculative. Furthermore, as there is nothing in the contract prohibiting such statements, there is nothing about them that is "inconsistent with the provisions of the contract." Nor, to repeat again can such statements, which the Guild itself characterizes as "promises," be at the same time, construed as coercive, intimidating, or threatening.

Moreover, I am not persuaded that to grant an employee more severance pay than he is technically entitled to constitutes a proscribed individual agreement within the meaning of the second paragraph of Section 2 of the contract. There is much authority to the view that where a specific sum of money is due, the payment of a larger sum, which per force meets the total obligation plus more, is not inconsistent
with the contractual obligation to pay the lesser amount. In other words the larger payment, by liquidating the lesser obligation can hardly be held to be at variance with it. Standing alone this general principle would not be enough. But it appears that the parties have endorsed this general principle by practice. The evidence shows several examples where employees were accorded greater or larger benefits than their technical entitlement under the contract. Employees received added vacation time; severance pay when they were not eligible; additional sick leave benefits and a preferential hiring status. Some were by mutual agreement; but others were unilaterally promulgated by the Employer with notice to and without objection from the Guild. So it appears that the second paragraph of Section 2 was not designed as a general prohibition to the granting of benefits in excess of the contract entitlement. And this is logical. For except where the greater benefit is extended for some nefarious purpose or for a purpose inimical to the Guild's status, it is difficult to see why there would be any objection to giving an employee more than his bare entitlement under the contract. And while I can think of circumstances under which a grant of greater benefits would be contrary to the Guild's interest and status, I do not find the instant case, or its circumstances, to be among them.

So considering this practice, I believe that the second paragraph of Section 2 was designed primarily to prevent individual deals between the Employer and an employee for terms and conditions of employment less favorable than those under
the contract or for those damaging to the Guild's representa-
tional status.

The amount of severance pay granted the grievant was
greater rather than less than the contract term, and he was
and has been afforded Guild representation both before and
after his resignation. Hence in those respects the second par-
agraph of Section 2, as thus interpreted, is not applicable.

For the foregoing reasons I find that the grievant's
resignation was voluntary, and not violative of the contract.
Hence there were no grounds upon which the Guild Unit Chairman
could have revoked it, following its submission, if indeed he
tried to do so.

I take note of the contract provision that the losing
party is to bear the full cost of the Arbitrator's fee and ex-
penses and the administrative charges of the American Arbitra-
tion Association, and the conditions under which the Arbitra-
tor may assess those costs otherwise.

I find good reason, both equitably and contractually to
apportion these costs equally between the parties. The Guild
is the losing party on the substantive question concerning
the grievant's resignation. But it is the winning party on
two procedural points, both of which are part of my Award -
that the issue is arbitrable and that the question of "just
causd' is not part of this case. So it would not be accurate
to say that either side won or lost totally.

Also, the Employer introduced much testimony and evidence
on the issue of "just cause," which I have ruled is not proper-
ly part of this case. If this evidence had not been introduced,
or if I had made my ruling on its admissability or applicability during the hearings, rather than in this Award and Opinion, fewer hearings may have sufficed. This may well have been so, even though the Guild held off responding to that evidence, based on my ruling that I would afford it an opportunity to do so, if, during my study and deliberations, I decided that that issue was before me in this proceeding.

So, because of this, to which I assume my share of the responsibility, and considering the nature of my Award in all its aspects, I shall rule that the Arbitrator's fee and expenses, and the administrative charges of the American Arbitration Association be borne equally by the parties.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

United Steelworkers of America,
Local 5971, AFL-CIO

and

Uddeholm Steel Corporation

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated July 1, 1966 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

Walter Kukulak was not entitled under the contract to holiday pay for Veterans Day, Thanksgiving Day or the day after Thanksgiving, 1967.

Eric J. Schmertz
Arbitrator

DATED: April 1968
STATE OF New York ) ss.
COUNTY OF New York

On this day of April, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0008 68
In the Matter of the Arbitration between
United Steelworkers of America,
Local 5971, AFL-CIO
and
Uddeholm Steel Corporation

Opinion

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated July 1, 1966 between Uddeholm Steel Corporation, hereinafter referred to as the "Company," and United Steelworkers of America, Local 5971, AFL-CIO, hereinafter referred to as the "Union," the Under-signed was designated as the Arbitrator to hear and decide the following stipulated issue:

Whether Employee Walter Kukulak is entitled under the contract to holiday pay for Veterans Day, Thanksgiving Day and the day after Thanksgiving Day, 1967?

A hearing was held on March 29, 1968, at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses.

The aforementioned holidays are amongst those enumerated in Article VII Section 11a of the contract as paid holidays for eligible employees. Paragraph c thereof reads:

No employee will receive holiday pay if a holiday occurs while he is laid off or on leave of absence or if a holiday occurs during a work stoppage in violation of Section 4 Article II of this agreement.

The Company contends that Mr. Kukulak, hereinafter referred to as the "grievant," was on leave of absence when the fore-
going holidays occurred and hence ineligible for holiday pay. The Union disputes the Company's characterization of the grievant's status. It asserts that he was "out due to a Workmen's Compensation injury;" that he was not on leave of absence because he never requested such a leave.

The parties stipulated that the grievant enjoys more than 12 years of seniority; that he was out due to illness from September 29 to December 3, 1967 inclusive; and that he received sick pay in accordance with Article XI of the contract through November 7, 1967.

It is the Company's position that subsequent to November 7, 1967, when the grievant exhausted his sick pay he was placed by the Company on leave of absence until he was physically able to return to work. Only in this manner, the Company argues, was it able to protect his status as an employee and his right to return to his job.

The Union points to Article V Section 8 of the contract which reads:

In its sole discretion, the Company may grant a leave of absence. Employees will retain but will not accrue seniority during leaves of absence. It is understood that leaves of absence will not be granted for the purpose of taking employment elsewhere and an employee who engages in gainful employment elsewhere during a leave of absence will lose his status as an employee.

and argues that a leave of absence may be granted by the Company after it has been requested by the employee, but that the Company may not initiate a leave of absence on its own motion.

I do not dispute the fact that the grievant was out of
work because of a compensable injury. Indeed the Company does not dispute that. But I am also persuaded that his status was not one of active employment. Yet, he was neither laid off nor terminated from the Company's employ. I find there to be only one other possible recognized status which would, as it did here, protect his job during his absence and permit him to return to that job upon recovery from his injury. And that is the status of a leave of absence. There was no evidence adduced as to whether the grievant was or was not credited with accrual of seniority during the period November 7 through December 3, 1967. Hence that factor cannot be determinative of the issue in dispute.

I am satisfied that Section 111c of Article VII was intended to deny holiday to those employees who are not actively at work at the time that the holiday occurred. Hence the exclusion of those on layoff or leave of absence. Put another way, the intent was to grant holiday pay to those who would or could have worked, but for the holiday. It is clear to me that the benefit of holiday pay, under this contract, is not a guarantee to all employees; but rather is extended to those who were actively employed at the time of holiday. The grievant does not fall within this category. He was away from his job ill or recovering from an injury. He was not nor could he have been actively employed at the time of the holidays involved.

I am persuaded that the grievant's status could have been nothing other than a leave of absence due to illness or to injury. His job was being held open for him and he retained
the right to return to it when able to do so. This right is neither consistent with the status of layoff nor of termination. Rather it is a right which traditionally attaches to an employee on leave of absence. One of the benefits which accrues to an employee on leave is that during his absence his job rights are protected. Either his job is not filled or filled only temporarily while he is away. At the end of the leave he is entitled to reclaim his job, assuming it is still being worked, to the exclusion of all other employees. And this is precisely the benefit which the Company extended to the grievant. It told him and his wife that his job would be kept open for him, and administratively, though not requested by the grievant, it placed him on a leave of absence after November 7, 1967, the day his sick benefits ended.

I cannot agree with the Union that a leave of absence must be initiated by the employee. Certainly most come about that way. But that does not mean that the Company cannot, for good cause, establish a leave of absence on its own motion. In fact it seems to me that Section 8 of Article V permits either. The Company may grant a leave of absence, presumably requested by an employee. It may also grant a leave "in its sole discretion." The fact is, that in industrial relations generally, a leave of absence initiated by an employer for an employee who is or will be out ill for an extended period of time, is by no means uncommon. Employers have and may initiate such leaves of absence, and I find nothing in the contract between the parties herein which prohibits this Company from doing so.
For the foregoing reasons I conclude that though the grievant was out of active work due to compensable injury, his status with the Company, for the purposes of protecting his right to return to his job, was, after his sick benefits had expired, that of a leave of absence. And that both by the wording and intent of Section 11c of Article VII of the contract, he was not entitled to holiday pay for the holidays which fell during the period November 7 through December 3, 1967.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Wire Service Guild, Local No. 222
American Newspaper Guild

and

United Press International, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated March 16, 1965 and having been duly sworn and having duly heard the proofs and allegations of the Parties, renders the following OPINION AND AWARD:

Central to the issues in this case is the question of what constitutes an "out-of-town assignment" within the meaning of Article VI Section 4 of the Collective Bargaining Agreement. Neither the language of the contract nor the history of its negotiation provide a definition. Resort to past practice, the classical approach under such circumstances, is of no help either. Though the evidence offered by both parties on past practice is substantial, I find it inconclusive. The fact is that there has been no consistent or unvaried practice with regard to the application of both the "out-of-town assignment" and the "transfer" provisions of the contract. The evidence of past practice offered by the Company supports its interpretation of the disputed contract clauses; and that offered by the Union supports the Union's
view. The practices have been both ways, and the evidence offsets each other. The consequence is that there has been no practice which can be determinative of the central question. The parties, therefore, must be left without a precise delineation between a "transfer" and an "out-of-town assignment" pending a subsequent proceeding where the evidence is more conclusive, or collective bargaining on the issue.

I suggest that certain procedural facts unique to this case, reflect its substantive inconclusiveness. Following the first hearing in November of 1966, the parties did not undertake a second hearing until almost a year later at the end of September, 1967. Thereafter five months elapsed before briefs and reply briefs were filed. And the Arbitrator required 90 days rather than the customary 30 to render his Award.

Because I have determined that an answer to the central question is impossible because of the inconclusive nature of the record, it follows that the Union, which is the grieving party, has not met its burden of proving its theory of the case. Accordingly on that basis I render the following Award:

The grievances of Albert Auvil and Charles Richards are denied because the evidence offered by the Union does not conclusively show that their work was an "out-of-town assignment" within the meaning of Article VI Section 4 of the contract.

This Award is dispositive of those two grievances but is in no way determinative of what constitutes an "out-of-town assignment" under the aforementioned contract section. Therefore this Award is without prejudice to the positions of either party in future matters or in collective bargaining.

Eric J. Schmertz
Arbitrator
On this 24th day of May, 1968, before me personally came and appeared Eric J. Schmertz, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0428 66
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
International Union of Mine, Mill and Smelter Workers, Local 837

and

U. S. Metals Refining Company

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 1, 1964 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Norvill Clark is reduced to a suspension. He shall be reinstated with seniority, but without back pay. The suspension shall run from the date of his discharge to the date of his reinstatement and shall be noted as a disciplinary suspension on his employment record.

Eric J. Schmertz
Arbitrator

DATED: December 17, 1968
STATE OF New York    )ss.:
COUNTY OF New York   

On this 17th day of December, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0599 68
In accordance with Article XII of the Collective Bargaining Agreement dated July 1, 1964 between U. S. Metals Refining Company, hereinafter referred to as the "Company," and International Union of Mine, Mill and Smelter Workers, Local 837, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the Company's discharge of Norvill Clark on April 20, 1967 not for proper cause?

If the discharge was not for proper cause, what shall the remedy be?

A hearing was held at the Company plant in Carteret, New Jersey on November 19, 1968 at which time Mr. Clark, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The immediate reason for the grievant's discharge was set forth by the Company in a telegram to him dated April 20, 1967 which read:
As of this date, 4/20/67 you are hereby discharged for failure to report in after being out five consecutive days.

The Company took this action under Article XIII Section 57(d) of the contract which reads:

An employee shall lose his seniority rights if a break in service occurs because of any one of the following reasons:

(d) Is absent for five or more consecutive days or shifts without notifying his foreman or department head and obtaining permission, unless the employee can establish that it was impossible to so notify his foreman or department head.

In addition, and in the alternative the Company contends that certain medical statements produced by the grievant covering a portion of his absences, are falsified. And for that reason itself, apart from any determination on the alleged failure to report in as required by the foregoing contract clause, the discharge was justified.

Because of the grievant's prior disciplinary record, I would have no difficulty upholding this discharge if he is guilty of either of these latest offenses of absenteeism. His record of absenteeism and tardiness is manifestly excessive, and he received a series of prior disciplinary warnings and suspension because of that record, all of which are uncontested. So the penalty of discharge, in accordance with the well established formula of progressive discipline, would be appropriate for any further unauthorized or falsified absences or tardiness.

However, as a discharge case, the burden is on the Company to establish the grievant's culpability by clear and convincing evidence. I find that the Company's case falls short of this standard.
Certain facts are not in dispute. On the first day of his absence, April 10, 1967, the grievant's wife did call the plant and advise that the grievant was "sick and will not be in." The record of this call was noted in the Company daily log. Also the grievant underwent a minor eye operation on or about April 26. He was absent from work from April 10 until his discharge on April 20. He attempted to return to work on May 9 but was not permitted to do so by the Company.

The Company claims that from April 10 to on or about April 19 when the grievant was examined by Dr. Cunningham for an eyelid lesion, he was not sick at all, or not so ill as to be unable to report for work. The Company contends that the various medical statements from Drs. Verner and Cunningham, covering treatments or visits from April 10 to April 19, are either falsified, forged, or altered to suit the grievant's purpose. I find the Company's case in this regard to be basically a conclusion, unsupported by hard evidence. The grievant was not visited at his home by a Company representative, to verify the alleged absence, though the Company has followed this practice in other instances. None of the doctors were called by the Company to testify nor were their records of visitations and treatment produced or subpoenaed. The Company points to a difference in some of the signatures and to the addition of or over-strikes of dates set forth in these medical statements, as evidence of falsification. No doubt these factors give rise to some suspicions, but absent other supporting evidence, I cannot conclude that they represent proof of falsification. There is no doubt that the grievant suffered
from some sort of eye ailment as evidenced by the operation and treatment, at least on and after April 19. On the face of it the medical statements indicate that the grievant was under medical treatment from April 10. The grievant's statement that some of the slips were prepared by the doctor and others by his nurse, in explanation of possible signature discrepancies, is plausible. And in the absence of contrary testimony or other probative contradictory evidence, I cannot find his explanation to be untrue. The same applies to his statement with regard to the addition of the day of "April 12," as an office visit to Dr. Cunningham, on the medical statement of that physician dated April 30, 1968. In short, with the burden on the Company to prove the grievant's culpability, mere suspicions and conclusions regarding the authenticity of the medical statements are not enough to overturn the presumption of their validity.

The Company's suspicion about the lack of bona fides of the grievant's claim of illness between April 10 and April 19 was also derived, in part, by a phone call to the plant during that period from the grievant's daughter, seeking the grievant's whereabouts. To the Company this meant that the grievant's story of illness was untrue, because he obviously was not at home. However, the grievant's explanation of this event is equally plausible. He had separated from his family on or about April 10 and was living elsewhere. So it is quite possible that his family would not know if he was ill or at work, because he was not living with them.

Accordingly, though there are some questionable aspects
to the medical statements and the grievant's story concerning his ailment, the evidence advanced by the Company does not clearly and convincingly resolve those questions adverse to the grievant. Rather they remain either unanswered or speculative, which I find is not enough to conclude that the medical statements are false, forged or altered or that the grievant's testimony is materially untrue.

There remains the question of whether the grievant lost his seniority by failing to comply with Article XIII Section 57(d) of the contract. The Company argues that by its language and intent that Section requires an absent employee to "report in" no later than after each of every five consecutive days of his absence. In the case of the grievant, the Company concedes that he reported in on April 10, but asserts that in order to comply with the contract, he was required to report in again no later than five days or shifts thereafter. And that any time after the passage of five such days or shifts, the Company may terminate an employee if this periodically required notification has not been met.

I am not persuaded that Section 57(d) can be interpreted so rigidly. Manifestly, it is intended to provide the Company of notification when an employee is absent for more than a few days. So notification within at least the first five days or shifts of the onset of illness causing absence from work, is clearly required. Or conversely, because the Company is entitled to know the whereabouts and condition of an employee who is absent due to illness, so that a substitute can be obtained and productivity planned, any employee who fails to notify the Company after the first five such days of
absence, is subject to termination. In that case failure to notify may properly be deemed an abandonment of one's job. But the grievant met that requirement. Notification was supplied the Company on April 10 that he was ill and would not be in. So he met the undisputed obligation to notify the Company of his absence within the first five consecutive days or shifts thereof. Was he obligated, however to again notify the Company some time after the fifth day of his absence? I believe that he should have, solely because of his past unsatisfactory attendance record, but not because it is required under Section 57(d) of the contract. I find that because of his prior disciplinary record, he had a special duty to keep the Company notified of his illness and whereabouts. For his failure to do so, he should be penalized. But I am not convinced that loss of seniority (and hence his discharge) is mandated by Section 57(d).

It seems to me that if the parties intended Section 57(d) to require an employee to report in every five consecutive days or shifts it could easily have said so. But it does not. It leaves unclear whether subsequent reports, after the first within five days, are required. The instant contract clause is not uncommon to collective bargaining agreements; and in my experience its purpose has been confined to the requirement that the employee notify the Company of his absence within the prescribed time from its onset. But that unless it expressly requires repeated notification within certain prescribed time, the clause has not been interpreted to require a regular "reporting in" at specific periodic points during the illness.
Instead, this type of clause has been interpreted and applied in accordance with a "rule of reason." The employee must report in within the first five days. Thereafter he should keep the Company informed of his condition, prognosis and approximate date of return, at reasonable intervals. Indeed this has been the practice under Section 57(d) as indicated by the evidence in the record. The evidence does not disclose that employees regularly and invariably notify the Company each five days of their absence. Nor does the evidence show a practice of simply one phone call within the first five days irrespective of the length of the absence thereafter. Rather, the evidence indicates a reasonable interpretation of the duty to inform the Company during the period of any absence that exceeds five days after the first notification has been given. Some employees have reported in a second or subsequent time. Other have had their physician complete the disability forms which the Company sends to employees ill for more than five days, on which there is a statement of the diagnosis, the expected length of disability, and the approximate date of return. In both ways the Company has been kept informed about an employee's illness and absence. But neither method has included the rigid requirement that notification be provided the Company by the absent employee after each and every five consecutive days or shifts of his absence. So I am not prepared to conclude that Section 57(d) requires a report each five days; and therefore I cannot interpret it to mean that a failure to do so would result in loss of employment. Accordingly the Company's interpretation of Section 57(d) in support
of its action in terminating the grievant is not upheld.

Yet I am not persuaded that the grievant either did or was planning to keep the Company informed of his medical condition on a reasonable basis and at reasonable intervals. His only notification to the Company was on April 10. He concedes that he did not receive medical forms and therefore cannot rely upon their completion as notice to the Company of the details of his condition or its duration. He cannot deny knowledge of some obligation to keep the Company reasonably informed, in view of his past record of excessive absenteeism and tardiness and his disciplinary penalties for that record. I think it doubtful that he intended to again inform the Company of the details of his ailment until he returned to work, which would have meant no information from him from April 10 to May 9. I conclude such a period of time to be beyond reasonable bounds and inconsistent with the reasonable application of Section 57(d) of the contract.

Under the circumstances, though I have not found his discharge justified on either of the grounds advanced by the Company, I am not prepared to find the grievant blameless. He had a duty to do more than he did. He could have and should have kept the Company better informed of the nature of his illness, his whereabouts and when he would be able to return to work. I shall impose what I consider to be an appropriate penalty, which because the grounds for the Company's action have not been proved to my satisfaction, shall be less than the penalty of discharge. I direct that the grievant's discharge be converted to a suspension. He shall be reinstated
with seniority but without back pay. The period of time from the day of his discharge to the date of his reinstatement shall be deemed a disciplinary suspension and so noted on his employment record. The grievant is admonished that any continuation of a record of unauthorized absenteeism or tardiness or any other misconduct or violation of the contract would, in the opinion of this Arbitrator, be grounds for his summary discharge.

[Signature]
Eric J. Schmertz
Arbitrator
FEDERAL MEDIATION & CONCILIATION SERVICE, ADMINISTRATOR

In the Matter of the Arbitration between

Communication Workers of America and
Local 3060 Communication Workers of
America, AFL-CIO

and

Western Electric Company, Incorporated
North Carolina Works

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated November 1, 1963 and having duly heard the proofs and allegations of the Parties, Awards as follows:

1. The Company did not discriminate against Mrs. Cavan because of her sex in violation of Article 4 of the Labor Agreement.


Eric J. Schmertz
Arbitrator

DATED: June 17, 1968
STATE OF New York
COUNTY OF

On this 17th day of June, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

FM&CS #67A/3821
In the Matter of the Arbitration between
Communication Workers of America and
Local 3060 Communication Workers of
America, AFL-CIO

and

Western Electric Company, Incorporated
North Carolina Works

In accordance with Article 29 of the Collective Bargaining Agreement effective November 1, 1963 between Western Electric Company, Incorporated, North Carolina Works, hereinafter referred to as the "Company," and Communication Workers of America and Local 3060 Communication Workers of America, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company discriminate against Mrs. Cavan because of her sex in violation of Article 4 of the Labor Agreement, or did the Company unreasonably exercise its judgment in violation of Article 25 by its selection of Mr. Wilson for the job of Tape Control Drill Press Operator on May 2, 1966?

Hearings were held in Greensboro, North Carolina on February 9 and February 17, 1968 at which time Mrs. Cavan, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath, and filed post hearing briefs.

The resolution of this case, after thorough study of the entire record, has caused me considerable concern. I find that
a judgment must be made among conflicting positions of the parties, each of which I deem to be held in good faith and with sincerity.

I understand the Union's dismay at the Company's refusal to grant the grievant, who is concededly a superior employee with an outstanding record of competence, skill and loyalty, a promotion to the job of Tape Control Drill Press Operator, when undisputedly she can perform 97 to 99% of the duties required. And I understand the Union's bewilderment by the Company's disinclination to make adjustments in the work methods of the remaining 1 to 3% so as to eliminate the risk of injury which the Company fears.

Similarly I understand the Company's vigorous denial of the Union's charge that the grievant was discriminatorily denied the job promotion solely because she is female. Rather, the Company asserts, she was passed over for the promotion in favor of a less senior male employee, not because of her sex, but because she, as an individual lacked the physical requisites to perform certain aspects of the required duties; and that it would have denied the job to a male bidder had he also lacked the physical ability to perform those duties.

Also, an ingredient in my concern is the manifest fact that by the wording of the issue (specifically the second part thereof) and the express provisions of Article 29 of the contract, my authority is narrow. Unless I find that the Company discriminated against the grievant because of her sex, or unreasonably exercised its judgment in denying her the promotion, the Company's action must be sustained even if I think
that action to be unwise, unnecessary or even damaging to good industrial relations.

The pertinent contract sections are Articles 4, 25 and 29 which read respectively.

"Article 4 - Non-Discrimination

"Neither the Company, its agents nor the Union, its agents or members shall:

"1. Discriminate against any employee or applicant for employment because of race, creed, color, sex or national origin, ....

"Article 25 - Movement of Personnel

"1. General

* * *

"1.2 For purpose of upgrading or reclassification upward, the factors to be taken into consideration shall be qualifications for the job and TERM OF EMPLOYMENT. TERM OF EMPLOYMENT shall be given most weight in the selection of an employee for a vacancy when two (2) or more employees possess substantially the same qualifications needed to fill such vacancy.

"1.3 Qualifications as used in this Article shall be determined by the Company and shall be based upon the employee's experience, transferable skill and demonstrated productive efficiency. If the LOCAL objects to the Company's determination of qualifications within ten (10) days after the effective date of any move under this Article, or within ten (10) days after date of notification to the LOCAL of such move, whichever is later, the matter may be processed in accordance with Article 27, 'Grievance Procedure', and Article 29, 'Arbitration', provided that in any such case the authority of the Arbitrator shall be limited to a determination as to whether the Company's judgment has been unreasonably exercised."
There is no dispute over certain facts. The grievant is senior to Mr. Wilson. She is an outstanding employee who has established a superior record during her approximately 15 years of service with the Company. At present she operates a manual Drill Press with a high degree of skill, ability and dedication.

The problem regarding her bid for promotion to the Tape Control Drill Press centers on the required duty of handling two castings or fixtures, RS-184 and RS-223, both of which weigh approximately 30 lbs; measure about three feet in diameter and are of irregular configuration. The Company contends that the grievant does not possess the physical ability to remove these castings from the service rack on which they are delivered to the job; or to position them on various required locations on the machine; and that she is not tall enough to reach and operate, without strain, various levers on the upper part of the Drill Press which must be activated when these castings are worked on. It is the Company's judgment that to allow the grievant to perform this work is to subject her to the risk of injury. There is no dispute that Wilson can do this work. There is also no dispute that work on the castings has averaged about 1 to 3% of the total work on the job.

Specifically the Company determined that the following four operations involving these two castings "would have posed a serious danger to the grievant's health and safety," if she had been awarded the job.

1. She would be required to remove the RS-184 casting from a five level horizontal storage
rack, with the top level about 57 inches above the floor; and carry the 30 lb. casting to the Drill table.

2. She would be required to remove the RS-223 casting from a vertical storage rack either by reaching over the front of the rack and lifting the casting vertically to a clearance height of 33 inches or by reaching across the 26 inch width of the rack from a position at its side and lifting the casting out vertically. And again carry the casting to the machine.

3. While carrying the castings for placement on the machine, she would be required to step up on to a 13 inch platform from which the machine is operated, and raise the edge of the casting high enough to clear a piece of equipment which protrudes over the drill table. She would be required to place, attach, and re-position the RS-184 casting on the machine as work on the casting was performed.

4. Work on the castings would require her to manually operate a level or spindle wheel which is located on the top of the machine, 82 inches above the platform on which the operator stands. This is a recurring task and requires the operator to exert about 23 lbs. of force downward.

Based on medical testimony, it is the Company's position that because of the grievant's height and reach, all four tasks
would be too demanding physically, and any one of them, performed singly, as well as cumulatively, could result in strains and other injuries. The grounds for this conclusion by the Company is apparent with regard to lifting the castings from the storage racks and positioning them on the machine. Its conclusion in connection with the operation of the spindle wheel is based on a measurement showing that the grievant's normal reach falls 7 or 8 inches short of the spindle wheel. And that if, as needed, she stood on her toes, leaned inward and stretched upward to reach the spindle wheel, she would be exposed to both strain and frontal bodily injury, especially when 23 lbs. of downward force must be exerted to make the wheel work.

The Union's answer is threefold. First, it claims that as a matter of policy the Company is determined not to place a female employee on this job in the Machine Shop irrespective of her physical capabilities; and that the Company's arguments about the grievant's height, reach and physiological make-up are only advanced to camouflage that policy. Second, the Union claims that the grievant possesses the physical attributes necessary to perform this work, principally because she has handled fixtures of equal or greater weight on her present job. And that accordingly she should have at least been given an opportunity to demonstrate her ability to handle the heavier work of the job she seeks. And third, assuming without conceding that handling the castings would expose her to risk of injury, the exposure is so infrequent (only 1 to 3% of the total work), that the Company acted unreasonably in failing to
change the work methods to accommodate that small percentage to the grievant, whose ability to perform all other duties of the job is undisputedly superior. In this connection the Union suggested that the platform on which the operator stands could be raised to eliminate or reduce any difficulty in reaching the spindle wheel. And that the side railings on the racks could be adjusted to unhinge and swing outward so that the castings could be removed vertically and from a less awkward standing position. Additionally the Union suggests that because the grievant can perform 97 to 99% of the job duties under present work methods, there is no reason why the Company should not have made a male attendant available to assist her on those very few occasions when work on the castings was to be performed. The Union states that there is precedent for this in the grievant's present job, where heavier work is routed to male employees in the same job classification.

There is just not enough in the record to support the Union's first claim. Based on the evidence, I think it probable that the machine shop foreman preferred a male employee on the job, but I am not persuaded that he and the Company rejected the grievant on that basis. I think that if, in the opinion of the Company, the grievant was tall enough and strong enough to handle the castings, she would have been placed on the job despite any predilection for a male employee. Indeed though there is testimony that the machine shop foreman "did not want a female in the machine shop" his testimony at the hearing indicates in my view the primary basis upon which he selected Mr. Wilson. His statement:
"Well, of course this was quite apparent to me that one was a male and the other a female..."

might be interpreted to mean that he only wanted a male on the job. But that is to take it out of context, for he went on to explain as part of the same statement:

"...but wasn't the sole deciding factor. Mr. Wilson, being a male, had attributes that I felt provided for the accomplishment of the job, as opposed to Mrs. Cavan whose physical attributes were somewhat less effective, I think, or less adequate. The fact that Mrs. Cavan's height, for example - I couldn't conceive of placing her or subjecting her to handling the heavier objects, not just from a standpoint of weight, the dead weight of the part alone; this is only a small part. But in the operation of the machine and the strenuous positions that the body is subject- ed to, the position of the body trunk, the twisting motions, the bending motions, the strenuous positions that the operator would be in transporting the large-diameter parts, I felt just would not be in Mrs. Cavan's best interest."

There is more that supports this view. Mr. Wyrick testified in a manner most flattering to the grievant. He freely acknowledged her skills, competence and conscientiousness. I judged that he was pleased to have her among the employees he supervised. And therefore I find no reason to disbelieve his statement that he did not nor would he discriminate against her merely because she was female. This is further supported by his statement that he would not have hesitated to grant the promotion if the job did not include the two heavy castings. Additionally, there is no evidence that any other Company official or the Company itself intends to deny any and all female employees access to jobs in the machine shop. Such intent would of course be violative of Article 4 of the contract as well as the equal opportunity statutes.
Therefore, taken as a whole, there may be reason to believe that Wyrick would have summarily chosen a male employee, if he had absolute discretion. But I am satisfied that in the instant case he knew his discretion was limited by Articles 4 and 25 of the contract, and weighed the relative qualifications of the grievant and Wilson in making the selection.

I am not persuaded that the grievant could have performed the 1 to 3% of the work dealing with the castings, without exposing herself to risk of injury. That she handles fixtures of equal or greater weight on her present job is not determinative. The Company makes a distinction. It points out that if she handles heavy weights on her present job, she deals with them no higher than waist level, usually in connection with a washing procedure, part of which entails sliding the fixture on a horizontal platform. Even if this not be so, but rather that the grievant presently deals with heavy fixtures to a comparable degree and manner as she would if promoted, I do not see how that eliminates the risk of injury. It may be that she is presently exposed to risk of injury by handling heavy fixtures, though I make no determination on that one way or the other. So, the mere fact that she handles heavy weights on her present job does not mean that there is no risk in doing so if promoted.

Critical, I believe, is the medical testimony advanced by the Company. Dr. Belk's professional opinion, based on a study of the duties required in handling the two castings, was simply that the grievant would risk serious injury each and every time she handled them. No evidence offered by the Union, including the written statement by the grievant's doctor, refutes this
testimony. And this Arbitrator, in the absence of contravening evidence has no probative basis upon which to make a different evaluation. Clearly, again in the absence of contravening medical evidence, it is not for the Arbitrator, who is not a physician, to substitute his judgment for that of Dr. Belk. Therefore I must conclude that had the grievant been promoted she would have been exposed to risk of injury on 1 to 3% of the total work involved on the job.

The question then is whether in view of this percentage of risk, the Company's judgment in denying the promotion was unreasonably exercised. Though I think the Company could have acted differently, I do not find that it acted unreasonably. If the grievant was unable to perform 1 to 3% of the duties because of lack of experience or for any other reason which could be cured after a short period on the job, I would no doubt find that she was entitled to the promotion. I do not believe that one who bids for a promotional opportunity must be able to perform every single duty. When he is qualified to handle 97 to 99% of the work, his lack of familiarity with the balance should not disqualify him. Also if, as here, the 1 to 3% of the work exposed the operator to risk of injury on a cumulative basis, - i.e. where no single job function represented a risk of injury itself - I might well determine that such risks would be no greater to the grievant than to any other employee, including a male. In other words, where an injury is possible only as a cumulative result of a series of duties, I do not think that I would be persuaded that such duties, performed only 1 to 3% of the time, would constitute any more than a normal risk attend-
ant to the job. And therefore the risk would be no greater nor any less normal to the grievant than to Mr. Wilson.

Under those two hypothetical instances, and especially because the grievant's qualifications on the balance of the work is at least equal to that of Mr. Wilson, I would find the grievant to be at least substantially equal in qualifications to Mr. Wilson and therefore entitled to the promotion because of her greater seniority.

But such are not the circumstances in this case. Experience on the job will not increase the grievant's height nor her reach nor her strength. So what difficulties she might have with the castings because of her individual physical make-up, she would continue to have. And though the exposure to risk of injury would occur infrequently, only 1 to 3% of the time when the castings came through, the potential of injury is not based on the repeated or cumulative nature of that work. Rather, the risk of injury is present each and every time a casting is handled. Just one occasion, any time within the 1 to 3%, could produce a serious injury. Therefore, though the frequency of the risk is rare, the possibility of severe injury is real and present with each frequency. Thus as a real possibility, no matter how infrequently it might occur, I cannot find as unreasonable the Company's decision not to so expose the grievant. That subsequent to the arbitration hearing the job ran or will run without these castings is not significant to this case. My determination must be based on the conditions of the job at the time the grievant bid for it. However, if the two heavy castings are now no longer part of the job duties
and are not expected to be reintroduced later, it would appear that the grievant could qualify for any subsequent opening.

There remains the question of whether the Company should have made adjustments so as to accommodate the grievant to that small portion of the job which she could not perform without risk of injury. I am of the opinion that the Company could have done so but was not required to do so.

In this regard I have decided to make some gratuitous remarks, because they represent part of my concern about this case. Rarely do I do so. I am mindful of the limits of my authority and the fact that such remarks cannot, of course, be fashioned into an Award. Frankly though I find the Company did not act unreasonably, I am disappointed that it did not act differently.

I am surprised, considering the grievant's outstanding record and the high regard in which she is held by supervision, that the Company did not undertake ways and means to effectuate this promotion. I think the Company lost a good opportunity to confirm its willingness to promote good and loyal employees. I am not suggesting that it should expose her to risk of injury. Rather I think that certain feasible adjustments could have been made to obviate those risks. Experimentation with the height of the platform was possible. Adjustment of the storage racks was clearly practicable, since the Company had given an award for that suggestion. And simply a de minimus availability of a male employee is all that would be needed to help her on those few occasions when the castings came through the job.
I am aware that to have made these adjustments might open the door to claims by other employees that jobs should be tailored to them as well. There is this possibility of course. But I wonder how real it may be. I think the grievant's situation is isolated and unique. What tailoring had to be done applied to only 1 to 3% of the total work. It was the type of job promotion which I think, will not often occur within the plant. The circumstances are sufficiently peculiar in my judgment, to be limited to themselves. In any event I think that the value achieved by satisfying a worthy employee, with the wider positive effects which would flow therefrom, outweighs any speculative possibility of adverse precedent.

But, returning to the limits of my authority, I find nothing in the contract which requires the Company to make any adjustments in existing jobs or changes in the methods of handling the job duties, so as to accommodate any particular bidder. Article 25 of the contract is applicable to jobs as they are constituted when promotion is sought. Here the job as constituted represented, in part, a risk to the grievant's safety and health. The Company was not required to take steps to change the job to eliminate those risks. Accordingly, as between the grievant and Wilson, I cannot find that the Company unreasonably exercised its judgment in selecting the latter.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
International Union of Electrical, Radio and Machine Workers, Local 746, AFL-CIO
and
Westinghouse Electric Corporation

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated October 1, 1950 as revised and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The "severance" of Josephine V. Funk was a discharge in violation of the progressive disciplinary procedure of Rule 9, Group C of the Plant Rules. Her discharge is reduced to a three-day suspension, and she shall be reinstated, but without back pay.

Eric J. Schmertz
Arbitrator

DATED: May 13 1968
STATE OF New York
COUNTY OF Westchester }ss.:

On this 13th day of May, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 52 30 0178 67

MARJORIE PEYSER
Notary Public, State of New York
No. 60 833500
Qualified in Westchester County
Term Expires March 30, 1971
In the Matter of the Arbitration between

International Union of Electrical, Radio and Machine Workers, Local 746, AFL-CIO

and

Westinghouse Electric Corporation
Columbus Plant

Opinion

In accordance with the Grievance and Arbitration Procedures of the Collective Bargaining Agreement, dated October 1, 1950 as revised, between Westinghouse Electric Corporation, Columbus Plant, hereinafter referred to as the "Company," and International Union of Electrical, Radio and Machine Workers, Local 746, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute relating to the grievance of Josephine V. Funk.

A hearing was held in Columbus, Ohio, on February 21, 1968 at which time Miss Funk, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived and the parties filed post hearing briefs.

The Union claims that the grievant was discharged without just cause. It is the contention of the Company that she was released from the Company's employ because she was no longer industrially employable.

The excessiveness and unsatisfactory nature of the griev-
ant's attendance record is manifest. For a number of years, especially since 1964 to the date of her termination, she was absent from her job more than half the time. These absences were due primarily to various illnesses and disabilities. The Company may wish to characterize the action it took as a "release" or "severance" and this no doubt is accurate. But it was no less a "discharge" as well. Based on the facts in this case all three terms are correct and synonymous with each other.

The grievant's termination was involuntary. Though her dismissal was not based on any misconduct on her part, it is well settled that cause may exist for a discharge even though an employee is blameless. Indeed it is well established, as the Company argues in its brief, that an employee who absents himself excessively may be discharged even though he is unable to control those absences because of illness or other disability.

It is precisely a discharge of this nature which is involved in the instant case. The grievant has suffered from various illnesses and disabilities which appear to be chronic, and which caused her numerous absences. Though she is not guilty of any misconduct in connection with the absences, the fact that the Company is unable to rely upon her as a steady and regular employee, places a burden on the Company which it is not required to tolerate indefinitely.

In my judgment Rule 9 of Group C of the Plant Rules promulgated by the Company, was intended to cover and is explicitly concerned with this type of problem. It relates to excessive absences. It does not limit its application to absences caused
by factors other than illness or disability. Rather it is all inclusive, covering excessive absences for any reason. In fact, because it is well known that excessive absenteeism stems in a vast number of cases from illnesses and disabilities, those reasons must have been within the contemplation of the Company when it promulgated this Rule. If absences due to illness or disability were not to fall within this Rule, the Company could have and should have expressly excluded those causes. Hence I am satisfied that a discharge or termination of an employee because of excessive absenteeism is a disciplinary penalty within the meaning of Rule 9 of Group C.

It is clear to me that the Company dismissed the grievant, not because she suffered from illness or disabilities, but because those conditions impeded her attendance on the job. Obviously if though ill and disabled she was able to attend to and perform her job with the Company, no action against her would have been taken or warranted. The Company concedes this, and therefore the grievant's termination was for excessive absenteeism.

I am in full agreement with the well settled line of arbitral decisions that an employer may discharge an employee who is unable to meet his regular work schedule even though his absences from work are due to illness or disability beyond his control and fault. But the Company overlooks the fact that this well accepted rule is based, in most instances, on the application of the equally well recognized rule of "progressive discipline." In other words the penalty of discharge is proper but only in the ultimate, after the subject employee
has been warned and suspended. Indeed Rule 9 of Group C contemplates just this approach. It provides for a reprimand for the first violation; a three-day disciplinary suspension for the second violation and discharge for the third.

In my judgment there is a compelling presumption in favor of a strict application of Rule 9, especially when that Rule was promulgated by the Company. Based on the record before me I do not find that the Company's action against the grievant was either immune from the Rule or that any of the steps set forth in the Rule were justifiably waived. I am mindful of the decision of Arbitrator Milton Rubin in which he held that under the facts in the case before him, involving a different grievant, the imposition of a three-day suspension would be useless because the employee there involved could not be rehabilitated. I am not prepared to conclude that the grievant in the instant case was similarly situated. No doubt she suffered from chronic disorders; but the record shows that she produced first one doctor's statement and then at the request of the Company, a second from a different physician, attesting to her employability. Because the Company asked her for these statements, which she then obtained, there must have been some thought in the mind of the Company that she might be employable. And I believe that she is entitled to the benefit of that possibility which the Company itself raised.

However, even if that were not the case, I am not persuaded that the Arbitrator should rule that the imposition of a three-day suspension under Rule 9 would be a useless or meaningless act. Again the Rules do not limit the circumstances
under which the progressive disciplinary penalties are to be imposed. Instead, they provide (under Group C) for a three-day disciplinary furlough for a second violation. There is no provision for the waiver of that penalty (before discharge) where it is thought that it would have no rehabilitative effect.

I am fully cognizant of the fact that one of the purposes of the theory of progressive discipline is to attempt to correct the offender before it is too late. But it is equally true that where by contract or by Plant Rules, a progressive disciplinary system has been legislated without explicit exception, the Arbitrator should not introduce exceptions into its application. So for this latter reason together with my conclusion that the grievant, by the Company's own act, was entitled to a presumption of possible employability, I find no reason why the penalty for a second violation of Rule 9 was bypassed.

I am also persuaded that Rule 9 is applicable to the instant case because the Company used it previously in connection with the grievant's absentee records. She received a formal reprimand under Rule 9 and had been warned on several occasions that a continuation of her unsatisfactory attendance record could result in her discharge. It should be noted that the Company did not warn her that she would be "released" or "severed" rather than discharged. So the Company all along treated her record within the intent and application of that Rule. And I find nothing which now ousts it therefrom.

The grievant's discharge followed a formal reprimand. She was not suspended for three days. Therefore I must conclude
that the Company's action was premature and violative of its own applicable Plant Rule. Accordingly, the grievant's discharge is reduced to a three-day suspension. She shall be reinstated. But, because I do not know whether in fact she would have been physically able to attend to her job regularly had she been returned to active duty following her disability leave, her reinstatement under this Award shall be without back pay. It should be recognized by all concerned that a continuation of her unsatisfactory attendance record will be just cause of the imposition of the final penalty under Rule 9 - the penalty of discharge.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Local 1805, International Brotherhood of Electrical Workers, AFL-CIO
and
Westinghouse Electric Corporation Aerospace Division

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated as last modified November 26, 1966 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company violated the provisions of Article XV Section 2 when it did not allow H. Wauters a second shift employee, to bump a less senior employee on the first shift on or about February 13, 1967. The Company is directed to permit Mr. Wauters to do so.

Eric J. Schmertz
Arbitrator

DATED: May 1, 1968

Case No. 1430 0771 67
In accordance with Article III of the Collective Bargaining Agreement as last modified November 26, 1966, between Westinghouse Electric Corporation, Aerospace Division, hereinafter referred to as the "Company," and Local 1805, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the provisions of Article XV, Section 2 when it did not permit Employee H. Wauters, a second shift employee, to bump a less senior employee on the first shift, on or about February 13, 1967? If so, what shall the remedy be?

A hearing was held in Baltimore, Maryland on January 11, 1968 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. The parties waived the Arbitrator's oath and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs.

On or about February 13, 1967, while H. Wauters, hereinafter referred to as the "grievant," occupied the classification of Class "A" Inspector on the second shift in Section X-73, two vacancies in that classification became available, one on
the first shift and the other on the third shift. The vacancies were filled by up-grading two qualified class "B" Inspectors to Class "A" category. Based on their seniority, both elected to work on the first shift; one filling the vacancy on that shift and the other bumping a less senior employee. The less senior displaced employee moved to and filled the vacancy on the third shift. Thereafter the grievant who was undisturbed by the aforementioned moves sought to transfer from the second shift to the first shift by exercising his seniority over a less senior first shift Inspector. The Company denied him the opportunity to do so on the grounds that he was not "the employee involved" within the meaning of Article XV Section 2 of the contract. The contract provision reads:

In the assignments resulting from the administration of this procedure, management will give shift preference to the most senior employee involved in each instance to the extent that previously unforeseen operating conditions permit, except in those cases where temporary shift changes are made for the purpose of obtaining qualified replacement in which event reassignment to the previous shift will be made when the replacement has acquired sufficient skill to perform the job.

In the event of reassignment from one job to another (transfer, upgrading, downgrading), shift preference may be exercised on the job within the job classification and section on the basis of seniority at the time the employee involved is reclassified or reassigned and placed on such job.

The Company contends that what the grievant sought is prescribed by the clear and unequivocal language of Article XV Section 2. It asserts that only the employee or employees involved in the transfer, up-grading or down-grading, and those bumped or displaced as a result, may exercise their seniority
for the purpose of selecting their shift preference. But that employees within the Section who are not affected thereby possess no such right.

The Union argues that by intent and application Article XV Section 2 affords all employees within a job classification and Section the opportunity to select their preference of shift, based on seniority, in the event of a reassignment resulting from a transfer, up-grading or down-grading. And that only in this way may employees with greater seniority periodically move to more desirable shifts.

As stated, the Company's case is based primarily on what it considers to be the clear language of Article XV Section 2. With this premise I am unable to agree. Indeed, I am persuaded that Article XV Section 2 is manifestly ambiguous. It is susceptible, in my judgment, to two divergent but equally plausible interpretations. On the one hand, as the Company argues, it may vest only the employees involved in the reassignment and those directly affected thereby, with the right to exercise seniority in the selection of shifts. On the other, as the Union contends, the bare contract language, and especially the second paragraph thereof, may well be interpreted to mean that all employees within the job classification and section may exercise their seniority in the selection of shifts when a reassignment of any employee is made within the Section. Paragraph 1 refers to a shift preference for "the most senior employee involved in each instance" whereas Paragraph 2 provides generally for the exercise of a shift preference within the job classification and Section, on the basis of seniority at the time of a
reclassification or reassignment. No limit is placed on which employees may exercise their seniority when that event occurs.

In short, the bare language of Article XV Section 2 is by no means clear or subject to a single logical interpretation.

In the circumstance of an ambiguous contract clause it is well settled that the Arbitrator may look to past practice and the manner in which the clause has been administered for clarity. The Union's case on past practice, in support of its interpretation of Article XV Section 2, I find to be not only of probative value but persuasive. The Union offered not just general testimony but specific instances since 1963 when the disputed clause was negotiated, of an unvaried practice of allowing all employees within a Section to select their shift based on seniority when a reassignment within the Section was made. Significant is the fact that the Company offered not one single example in refutation. Additionally, the Union further buttressed the details of past practice by offering into evidence a string of grievances settled by the Company in favor of employees who sought to exercise their seniority in the selection of shifts though they were not directly involved or displaced when reassignments were made in their Section and job classification. And while it is true that the settlement of grievances is not necessarily prejudicial to the party acceding to the demands, the unvaried and consistent recognition by the Company of the right of each grievant to exercise seniority in circumstances comparable to the instant case, rebuts the Company's argument that the Union's case on past practice lacks specifics.
But if this was not enough, the testimony of the Company witness, Kendall, the Administrator of the assembling and wiring Sections, conclusively supports the Union's position. In answer to Union counsel Rubinstein, Kendall testified as follows:

Rubinstein: I am now not talking about Article XV, Section 2 -- that is up to the Arbitrator to decide what it means -- what I am interested in is the way that it has operated, and the way that it has operated is that when -- is this not correct? -- there is an upgrading, for example, all the employees in the section, in the job and in the section, are given their shift preference -- all the employees - and you then fill the shifts from their preference, I believe, as you said, in the cases where you can't give everybody his choice, the least senior person has to take the remaining shift. Is that correct?

Kendall: Yes, that would be correct.

(Transcript Page 136)

Kendall also stated that the testimony of Union witness, Gladys Greene, in support of the Union's case on past practice, was "correct," and that since he has been administrator there had been "no problems ...because of our flexibility..." And he replied in the affirmative to the Arbitrator's question of whether he could manage his department by giving all employees an opportunity to select their shifts based on their seniority at the time of an up-grading within the department or section.

The foregoing evidence, particularly in the absence of any contradictory evidence or testimony by the Company, meets the Union's burden of establishing a consistent and uniform practice over an extended period of time. As such it clarifies the meaning and intent of Article XV Section 2 of the contract.

The Company argues that if the Union's interpretation is adopted, all Sections would be immobilized by the application of a "musical chairs" procedure each time a reassignment
(transfer, up-grading, down-grading) took place, and that this would be administratively intolerable. This argument by the Company, however, is not supported by the evidence in the record. Rather, supervision and the Union have worked closely together in determining seniority and the shift preference of employees when reassignments were made. Kendall testified as to the procedure he follows. He stated that he works closely with the Union with which he has "a good relationship." He notifies the Union and the employees of the job vacancy. He determines which employees are interested in the vacancy. When he has obtained the people he needs, he then undertakes "to determine the preference of all the employees in the Section for the shift on which they wish to work." He said:

"I would say that towards the end of the amount of people that I need, I notify the Supervisor to get all his people in line. By this I mean his people that are on the first shift, the people on the second shift, based on their seniority and their preference at this particular time which shifts would they desire to be on at this particular time based on their seniority."

(Transcript Page 133)

And explicitly in connection with the Company's claim that a department would be immobilized if subjected to the "musical chairs" procedure, Kendall testified as follows in response to a question by the Arbitrator:

Mr. Schmertz: And you have found you can do it as described by Mrs. Greene and yourself within your large department? You have found you could manage to administer that department by giving all the employees in the department an opportunity to express their preference for shifts at the time of an upgrading, and then to allocate them amongst the shifts in accordance with those preferences, based of course upon their seniority?
Kendall: Yes sir. We have found that we could do this.

(Transcript page 138)

The department to which Mr. Kendall referred consists of 1200 employees. Certainly if the procedure worked within that large department, through a cooperative effort between the Company and Union representatives, there can be little doubt of its workability in Section X-73 consisting of 8 employees.

Accordingly, the grievance of employee H. Wauters is granted. The Company shall allow him to exercise his seniority by permitting him to bump a less senior employee on the first shift in Section X-73.

[Signature]
Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Local 144 Hotel & Allied Services Employees Union, BSEIU, AFL-CIO

and

Wyckoff Heights Hospital

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated August 1, 1966 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The assignment to Mr. Giaraffa, a supervisor, of driving an ambulance on a regular scheduled basis violates the contract. The assignment shall be removed from his duties.

Eric J. Schmertz
Arbitrator

DATE: March 1968
STATE OF New York )
COUNTY OF New York )ss.: On this day of March, 1968, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0800 67
In the Matter of the Arbitration between
Local 144 Hotel & Allied Services Employees Union, BSEIU, AFL-CIO
and
Wyckoff Heights Hospital

Opinion

In accordance with Article VII of the Collective Bargaining Agreement dated August 1, 1966 between Wyckoff Heights Hospital, hereinafter referred to as the "Hospital," and Local 144 Hotel & Allied Services Employees Union, BSEIU, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Is the assignment to Mr. Giaraffa, a supervisor, of driving an ambulance on a regular scheduled basis, a violation of the contract? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on January 25, 1968 at which time representatives of the Union and Hospital, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. Post hearing briefs were filed and the hearings were declared closed on February 16, 1968.

The facts are simple and undisputed. Both prior and subsequent to the recognition of the Union and the negotiation of the Collective Bargaining Agreement, the Hospital has assigned an employee with supervisory authority as one of the ambulance drivers. The Union was recognized as the bargaining agent by decision and order of the New York State Labor Relations Board, 28 SLRB No. 58, Case No. SE 37101. dated August 24, 1965.
Said certification included within the bargaining unit, the employees in the ambulance department. Recognition of the Union as the bargaining agent for all employees in the Hospital, as set forth in said certification, is further recited in Article I Recognition of the aforementioned Collective Bargaining Agreement. Schedule A of the Collective Bargaining Agreement lists, among others, the wage rate for ambulance drivers.

The Union contends that because the job of ambulance driver is within the bargaining unit, and because the Union is the exclusive representative of employees within the unit, only bargaining unit workers may be assigned the duty of driving an ambulance. Accordingly the Union objects to the use of a supervisory employee in that capacity.

The Hospital points to the continuing practice of assigning a supervisory employee to ambulance driving duty, both prior to and since the Union's certification and the negotiation of the contract. It asserts that because the contract does not expressly prohibit the use of supervisory employees on jobs within the bargaining unit, and especially because a supervisor's assignment to an ambulance pre-dates the contract, the Hospital is and should be able to continue that assignment.

I am not persuaded by the Hospital's argument. My view is that where a job falls clearly within the bargaining unit and where the Union is certified as the exclusive representative of employees within that unit, all employees within the covered classification should be part of the bargaining unit and not supervisory. A contrary interpretation would open the door to
an erosion of the Union's certified jurisdiction. Exceptions should be clearly and unmistakably set forth in the contract. I find no such express exceptions here.

In general I agree with the Hospital's assertion and with Arbitrator Turkus' theory in the Anton Machine Works case, that an employer retains all rights except as relinquished in the collective bargaining agreement. But in applying that theory I do not reach the same conclusion reached by that Arbitrator and advanced herein by the Hospital. In my judgment the contractual recognition of the Union as the exclusive representative of all the employees within the certified bargaining unit, including those in the ambulance department, serves to relinquish the Hospital's right to assign non-bargaining unit personnel to jobs within the bargaining unit. I consider the certification, and the definition of the bargaining unit which specifically includes the ambulance drivers, as an explicit contractual limitation on the Hospital's pre-contract authority.

Nor can the use of the supervisor to drive an ambulance be upheld as a continuing practice. For there is no evidence that the Union, after certification, accepted or acquiesced in the assignment. On the contrary the record shows that it complained repeatedly, leading to the grievance in this case.

Therefore, considering the contract, and the absence of a practice binding on the Union, any exception, which would permit the assignment of a supervisory employee to the work of driving an ambulance ought to be specially described within the contract. Otherwise in my view, it is proscribed,
No such exception is herein present and hence the assignment to a supervisory employee of driving an ambulance on a regular basis is violative of the contract. The Hospital shall remove that assignment from Mr. Giaraffa's duties.

Eric J. Schmertz  
Arbitrator