PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORIES INDUSTRY

In the Matter of the Arbitration between

Motion Picture Laboratories Film Technicians, Local 702 I.A.T.S.E.

and

DuArt Film Laboratories, Inc.

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 proper rate for the Bell & Howell panel printer shall be 30c above the group 5 rate when the machine is operated at a speed of over 180 and up to and including 240 feet per minute. Eligible employees shall be so paid retroactively for the period of time that the machine has run under that condition.

The Arbitrator's fee shall be borne by the Company.

Eric J. Schmertz
Permanent Arbitrator

DATED: January /3/ 1970
STATE OF New York )
COUNTY OF New York )ss.:

On this /3 day of January, 1970, 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. 69A.21
In the Matter of the Arbitration between

Motion Picture Laboratories Film Technicians, Local 702, I.A.T.S.E.

and

DuArt Film Laboratories, Inc.

Opinion

As Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, the following stipulated issue was submitted to me for determination:

What is the proper rate for the Bell & Howell panel printers?

A hearing was held at the Laboratory on December 22, 1969 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties waived the Arbitrator's oath and the contract time limit for the rendition of the Award.

After a review of the entire record I conclude, consistent with my oral observations at the conclusion of the hearing, that under Section 17(c) of the contract DuArt is obliged to pay the same base wage rate for the operation of this machine as the Union previously negotiated at other laboratories under the same contract, namely 30¢ above the Group 5 rate when the machine is run at a speed over 180 and up to and including 240 feet a minute.

There is no dispute that the Bell & Howell panel printer is "new equipment" within the meaning of Section 17(c) of the contract. There is also no dispute that the same equipment
is in operation at certain other laboratories under this contract, and that subsequent to the effective date of the contract the Union negotiated the aforementioned rate of pay for the operation of this machine at those other laboratories.

With these factors undisputed I find that Section 17(c) of the contract mandates the same wage rate for the same operation of the machine at DuArt. I find the meaning and intent of Section 17(c) to be clear. When a piece of new equipment is installed the parties are to negotiate the wages and conditions with respect thereto. Failing to agree within the specified period of time, unresolved questions of wages and/or conditions may be referred to the Arbitrator. But if the same equipment either existed in other laboratories under this contract when the contract was entered into, or installed in other laboratories "hereafter" (or in other words during the term of this contract), any base wage rate agreed to by the Union and that Employer is thereafter applicable to all other employers under the contract who subsequently, during the term of this contract, install the same new equipment in their laboratories.

The facts in the instant case square precisely with the circumstances covered by Section 17(c) of the contract. After the effective date of the current agreement, this type of equipment was installed at Movielab, DeLuxe, VPI and other labs. And the Union negotiated a rate of 30c above the Group 5 rate when the machine ran at a speed over 180 and up to and including 240 feet a minute. Subsequently, the same new equipment, to be run at the same speed, was installed at
DuArt, giving rise to the instant dispute. Consequently I can reach no conclusion other than that DuArt must pay the same rate as the others.

I am persuaded that my conclusions in this case are in accord with the purpose and intent for which a master Collective Bargaining Agreement was negotiated. I am satisfied that the single contract, applicable equally to all covered employers, was intended to insure uniformity of conditions, wages and practices between and amongst the Union and those employers. Distinctions, if any, are set forth expressly within that Agreement. But Section 17(c) clearly applies to all. And it does so I believe, in order to insure that the rate of pay for new equipment, operating in the same manner, should be the same throughout the Industry, so that no laboratory can obtain an unfair competitive advantage or indeed be placed at a competitive disadvantage with regard to wages paid for the same work.

Eric J. Schertz
Permanent Arbitrator
In the Matter of the Arbitration between
Local 702 I.A.T.S.E.
and
Movielab, Inc.

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:

Because there is no present contract provision granting uniforms to the affected employees and because I do not find that the policy of Berkey-Pathé to grant such uniforms was a negotiated benefit with the Union, Movielab, as the successor to Berkey-Pathé need not continue supplying those uniforms.

The Arbitrator's fee and hearing room expense shall be borne by the Union.

Eric J. Schmertz
Permanent Arbitrator

DATED: March 7, 1970
STATE OF New York )ss.
COUNTY OF New York )

On this 7 day of March, 1970, 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. 69A-24
In the Matter of the Arbitration between
Local 702 I.A.T.S.E.
and
Movielab, Inc.

Opinion

The stipulated issue is:

Are certain employees entitled to uniforms at Movielab East?

A hearing was held at the offices of the American Arbitration Association on February 16, 1970 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was waived as was the contract time limit for rendition of the Arbitrator's Award.

The Company acquired Movielab East at the end of June, 1969. The predecessor owner, Berkey-Pathé, had supplied certain types of uniforms to certain employees (negative workers, developers, expediters, chemists and maintenance men). Berkey-Pathé bore the entire cost of those uniforms including cleaning.

Some time after acquisition, the Company decided to discontinue supplying those uniforms and posted a notice to that effect on August 28, 1969. The Union complained, and the parties agreed to maintain the "status quo" pending this arbitration.

The Union contends that the Company, as the successor to
Berkey-Pathé is obligated to continue the benefit of free uniforms to those certain employees. It further asserts that the plan to supply uniforms was bilaterally negotiated by the Union and Berkey-Pathé, to which the Company (Movielab) as the successor to Berkey-Pathé is bound. And finally the Union argues that continuing to supply the free uniforms during the months of July and August after the Company acquired the installation, constituted a ratification of that arrangement which the Company may not now avoid.

If the evidence persuaded me that the free uniform program was in fact a bilaterally negotiated benefit between the Union and Berkey-Pathé subsequent to the effective date of the present contract, I would sustain the Union's position and find the Company obligated to continue that benefit. But I am not so persuaded. The Collective Bargaining relationship between the Union and Berkey-Pathé was under the same industry wide contract as then obtained and now obtains to the Union and the Company. Based on my experience with the parties to that industry wide agreement, I believe that benefits bilaterally negotiated subsequent to the effect date of the contract, especially in case of such a significant benefit as uniforms, would have been reduced to writing, at least in stipulation or memorandum form. This is not to say that a subsequent oral agreement cannot add to or modify the written contract. Rather, I am convinced that in connection with free uniforms, the Union and Berkey-Pathé would not have consummated an agreement on such a benefit in so casual and informal way.
In this regard I do not dispute Mr. Vitello's testimony. There is no doubt that he, on behalf of the Union, urged Berkey-Pathé to supply uniforms for certain employees. But I am convinced that Berkey-Pathé's decision to supply uniforms, though prompted by the Union's request, was unilaterally made and in the nature of a grant rather than as a result of a bargain struck with the Union. The Union may well have concluded that the grant of uniforms constituted a negotiated benefit. But based on the evidence and circumstances before me I cannot endow the arrangements with that status.

It is clear that the Union gave no contractual consideration for the uniforms nor apparently was there any other discernible quid pro quo. This is not to say that what Berkey-Pathé did was not wise and conducive to improved productivity or morale, but only that the adoption of a Union request or suggestion, absent any give and take in the classic bargaining sense, and where unrecorded in stipulation or memorandum form, does not reach the level of a negotiated benefit to which either the predecessor employer or the successor company is bound.

I agree with the Company that even during the Berkey-Pathé administration, the supplying of the free uniforms had not continued for such a long and uninterrupted period as to become an implied contract benefit. Nor can I accept the Union's theory of ratification. It seems to me that a successor employer is entitled to a reasonable period of time to determine what changes and adjustments it wishes to make and
then to make them consistent with their rights and obligations.
Two months, from acquisition to the notice of discontinuing
the uniforms is not, in my judgment, beyond a reasonable per-
iod.

Accordingly, because there is no present contract pro-
vision granting uniforms to the affected employees and because
I do not find that the policy of Berkey-Pathé to grant such
uniforms was a negotiated benefit with the Union, Movielab as
the successor to Berkey-Pathé need not continue supplying
those uniforms.

Eric J. Schmertz
Permanent Arbitrator
ORDER ON REOPENING

Case No. C-18239-69

On the complaint of

EUSTACE BECKLES,

Complainant,

against

MOVIELAB, INC. and RON GABEL,
Chemical Analyst,

Respondents.

On April 23, 1969, a complaint was filed charging the above-named respondents with unlawful discriminatory practices relating to employment.

On May 29, 1969, a determination was issued after investigation finding that there was no probable cause to believe that the respondents had engaged in the said unlawful discriminatory practices.

The complainant has applied for reopening of the dismissal, which is permitted pursuant to the Rules of Practice of the Division of Human Rights. After a review of file, I find that justice does not require that proceedings before this Division be reopened. The respondent company has produced a considerable volume of documentary evidence to substantiate its position that the complainant was discharged because of the quality of his work performance. There is no evidence of discriminatory intent.

Therefore, pursuant to the Rules of Practice of the Division of Human Rights, it is hereby ORDERED, that the application for reopening be denied.

Dated: New York, New York March 17, 1970

Robert J. Mandum
Commissioner

TO: Harlem Assertion of Rights, Inc.
2133 8th Avenue
New York, New York 10026

Mr. Eustace Beckles
P. O. Box 801 Morningside Station
New York, New York 10026

Eric Rosenfeld, Esq.
777 3rd Avenue
New York, New York 10017

Courtney E. Brown, Regional Manager
State Division of Human Rights
62 East 125th Street
New York, New York
PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORY INDUSTRY

In the Matter of the Arbitration between

Motion Picture Laboratory Technicians
Local 702, I.A.T.S.E.

and

DeLuxe General, Inc.

Award

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:

I find that prior to reconstruction of the take-up system on the dry end, the complement of the #13 and #14 Black and White Positive Developing Machine when operating two strands was five men. Accordingly, the present complement shall be five men.

The Arbitrator's fee shall be borne by the Company.

Eric J. Schmertz
Permanent Arbitrator

DATED: April 7, 1970
STATE OF New York ) ss.:
COUNTY OF New York )

On this 7th day of April, 1970, 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. 70A-2
In the Matter of the Arbitration
between
Motion Picture Laboratory Technicians
Local 702, I.A.T.S.E.

and
DeLuxe General, Inc.

The stipulated issue is:

Shall there be a change in the present complement
of the #13 and #14 Black and White Positive Developing Machines as a result of the reconstruction
of the take-up system on the dry end when operating two strands?

A hearing was held at the Laboratory on February 18, 1970
at which time representatives of the above named parties
appeared and were afforded full opportunity to offer evidence
and argument and to examine and cross examine witnesses. The
parties waived the Arbitrator's oath and the contract time
limit for rendition of the Award. Both sides filed post hearing briefs.

Because of the reconstruction of the take-up system on
the dry end, the parties agree that this case falls within
Section 17(c) of the contract.

However, as I see it, there is a subsidiary but threshold question about which the parties are in dispute. And that
is over what the complement on the disputed machine was prior
to the reconstruction. An answer to this threshold question
will be determinative of the basic issue in dispute, simply be-
cause both sides argue that the present complement should be
no different from what it was prior to the reconstruction.
The Union claims that a crew of five men previously operated the machines when two strands were run. The Company asserts that the crew was four. (At present, subsequent to the reconstruction and pending the outcome of this case, the crew is four.)

On these different premises the Union asserts that there is nothing about the reconstruction which would justify a reduction in the crew complement from five to four; and the Company argues that because the reconstruction simplified the operation there is no reason why the complement should be increased from four (prior reconstruction), to five.

The weight of the evidence presented at the hearing, including testimony by Company witnesses, supports the Union's claim that the crew complement prior to reconstruction was five (two on the wet end; two on the dry end and a bridge-man for relief.) Therefore, since the positions of both sides in this case rest on their respective but differing contentions regarding the prior crew complement, it follows that the present crew complement on the machine in question, when operating two strands, should be five.

Moreover, I am persuaded that a crew complement of five is proper because, despite the thoroughly plausible contention of the Company that the reconstruction simplified the mechanical operation of the machines (though I was unable to make a comparison because the old take-up system has been abandoned and abolished) I find no difference now, in the amount of time that wet and dry operators require or are entitled to relief, from
those circumstances prior to reconstruction. The same rest breaks, meal periods and personal needs obtain as before, and a fifth crew member is needed, in part at least to cover in those situations. In short, the reconstruction of the dry end take-up system did not change the prior need for or use of the bridge-man, whom I have found to have been the fifth crew member prior to reconstruction.

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between

Motion Picture Laboratory Technicians
Local 702, I.A.T.S.E.

and

DeLuxe General, Inc.

The stipulated issue is:

What shall be the rate for the Hollywood Reduction Color Printing Machine?

Hearings were held at the Laboratory on January 12, 1970 and at the offices of the American Arbitration Association on February 16, 1970, at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was waived as was the contract time limit for the rendition of the Award. Both parties filed post hearing briefs.

The machine in question is admittedly "new" within the meaning of Section 17(c) of the contract, and hence the Arbitrator has jurisdiction to decide the rate of pay.

For a number of reasons set forth in its presentation and brief, the Union contends that the operator of this machine is entitled to 65c an hour above the present contract Group 5 rate. The Company's position is that the machine warrants no more than the present Group 5 rate for a color printer, namely $4.01 an hour.

Based on the entire record before me, together with my
observation of the operation of the machine in question; the
duties performed by the operator of that machine; and my ob-
servation of other color printing machines in the Laboratory,
I am not persuaded that the operation of the Hollywood Reduc-
tion Color Printing Machine and the duties of the operator in connection therewith are significantly more complex, more de-
manding or of a more responsible nature than what is presently expected of the operators of other color printing machines for
which the Group 5 rate is paid. Of course, because the machine
in question is new, it contains certain indigenous variations and differences from other color printing machines. But I am
not satisfied that these differences or variations are of a
magnitude to justify a higher rate of pay.

The Arbitrator's fee and the hearing room expense shall be borne by the Union.

Eric J. Schmertz
Permanent Arbitrator

DATED: April 7, 1970
STATE OF New York ) ss.
COUNTY OF New York )

On this 7 day of April, 1970, 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 in-
strument and he acknowledged to me that he executed the same.
The stipulated issue is:

Was Ben Levine overpaid for the period week ending March 9, 1968 through week ending June 14, 1969? If so, what shall be the remedy?

A hearing was held at the Laboratory on March 10, 1970 at which time Mr. Levine, hereinafter referred to as the "grievant," and representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was waived as was the contract time limit for rendition of the Award. The Union filed a post hearing brief.

Actually the parties are in dispute only over the second question of the issue - namely the remedy. It is clear that the grievant was overpaid for the stipulated period of time.

As I see it, a non-negotiated or non-mutually agreed to overpayment constitutes "unjust enrichment" for which recoupment is justified. This is true even if the employer, as seems to be the case here, was negligent in making the overpayment and had at least one opportunity (when the contract rates were increased) to correct it, but failed to do so. For even if negligence be the reason, the grievant received more money than
he was entitled to for the services he performed.

Accordingly I find that the Company is entitled to recoup the overpayment in proportionate amounts from the grievant's pay, over a period of time not less than the approximately 15 months of the overpayment, unless he and the Union agree to a shorter period of time.

I also direct that the grievant not suffer any financial loss due to any increase in income tax he may have paid as a result of the higher reported compensation during the period of time that he was overpaid. If, prospectively, his gross reported compensation is reduced because of the recoupment deduction, it would appear that any excess tax he paid earlier would thereby and in the future be offset. But if not, then the Company may recoup only an amount equal to the overpayment less any net increase in taxes which the grievant paid as a result of that overpayment.

Consistent with this Award I leave it to the parties to calculate the exact amount of the overpayment; to arrange the method of repayment; and to work out the details concerning the tax question, if any. Any dispute on these matters shall be referred to me for resolution.

The Arbitrator's fee shall be borne by the Union.

DATED: April 7, 1970
STATE OF New York ) ss.: 
COUNTY OF New York )

On this 7 day of April, 1970, 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.

[Signature]
Eric J. Schmertz
Permanent Arbitrator
Re: Local 702, IATSE
(DeLuxe General, Inc.)
Case No. 2-CB-4799

Mr. Joseph DeMarco
1105 Korfitsen Road
New Milford, New Jersey 07646

Dear Mr. DeMarco:

Your appeal in the above matter has been duly considered.

The appeal is denied. In view of the evidence that seniority was by department and that you had the lowest seniority in the department where you were working when transferred to night work, it could not be established that the Union had acted unreasonably in considering that your grievance was without merit. Moreover, the letter of April 11, 1970, from you indicated that you had been returned to day work.

Very truly yours,

Arnold Ordman
General Counsel

Irving M. Herman
Director, Office of Appeals

cc: Director, Region 2

Local 702, IATSE, 165 West 46th Street, New York, New York 10036

Pinto, Stein & Mozer, 270 Madison Avenue, New York, New York 10016, Attn: Robert Mozer

Poletti, Freidin, Prashker, Feldman & Gartner, 777 Third Avenue, New York, New York 10017, Attn: Edward Medman, Esquire

CERTIFIED MAIL
In the Matter of the Arbitration
between

Local 702 Motion Picture Laboratory Technicians, I.A.T.S.E., AFL-CIO

and

Deluxe General, Inc.

The stipulated issue is:

Is the Company required to pay negative rates for the processing of the present type of internegative film such as Eastman Kodak 72-71 (16 mm) and 52-71 (35 mm), and 72-70 (16 mm) and 52-70 (35 mm) on color positive developing machines?

A hearing was held at the Company on March 31, 1970 at which time representatives of the Company and Union appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath and the contract time limit for the rendition of the Award were waived.

Based on the record I conclude that in processing and use, the present type of internegative film referred to in the stipulated issue has characteristics of both positive and negative developing.

But this fact, which in my judgment makes it a film that squares exclusively with neither negative nor positive developing, points up the overriding fact that it is a film materially unique unto itself.

Accordingly I can find no more basis for it to be treated as negative developing, at the higher negative rate, than as
part of the positive developing process, where it is presently located.

But based on "past practice" I shall leave it where I find it, namely as part of the color positive developing machines at the regular rate of pay for those machines. I do so because this has been the practice for a number of years with regard to this type of film, during which time contracts were negotiated by the parties. It seems to me that because of the special characteristics of this type of film, a determination as to which rate of pay should obtain and where the developing work is to be performed, should have been specially negotiated in those contracts, if its location, methods of processing and pay were to be changed.

In other words I am satisfied that a change in what has been a practice for a number of years of processing this type of film on the color positive developing machines at the color positive developing rate (which has required little or no change in the technical methods or operations of those machines from what is required to develop regular color positive prints) is a matter for negotiation between the parties and not arbitration.

The Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, having duly heard the proofs and allegations of the parties, renders the following Award:

The grievance is denied. The Company is not required to pay negative rates for the processing of the present type of internegative film such as Eastman Kodak 72-71 (16 mm) and 52-71 (35 mm) and 72-70 (16 mm) and 52-70 (35 mm) on color positive developing machines.

The Arbitrator's fee shall be borne by the Union.

[Signature]  Eric J. Schmertz
Permanent Arbitrator
DATED: May /8/1970

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

On this /8/ day of May, 1970, 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. 70A-1

MARTIN A. CORNWILER
Notary Public, State of N. Y.
No. 24-12-1970
Qualified in Kings County
Comm. expires March 30, 1971
In the Matter of the Arbitration between
Local 702 Motion Picture Laboratory
Technicians, IATSE, AFL-CIO
and
Movielab, Inc.

The stipulated issue is:

Was there just cause for the discharge of E. Jacobs,
F. Isso, M. Germaine, G. Pizzolorusso, Jr., and R.
Kuklinski. (Messrs. M. Chylak and D. Scheurich were
also discharged but were subsequently granted immuni-
ty.) If not, what shall be the remedy?

A hearing was held on May 7, 1970 at which time the above
named employees, hereinafter referred to as the "grievants,"
and representatives of the above named Union and Company appear-
ed, and were afforded full opportunity to offer evidence and
argument and to examine and cross examine witnesses. The par-
ties expressly waived the contract time limit for rendition of
the Award, and each side filed a post hearing brief.

What I do not like about the Company's action is my con-
clusion that it imposed the penalty of discharge on the griev-
ants not solely because they failed to satisfactorily cooper-
ate in the Company's investigation of a potential incident of
misconduct (presumably dangerous "horse play"), nor because it
suspected one or more of them of that misconduct, but rather,
in addition, as a device to induce them to admit their own
guilt or to implicate others.

Arbitrations are not criminal proceedings and the "priv-
ilege against self incrimination" is not technically applicable.
Yet somewhere between the Company's right to investigate an incident which it believes to be dangerous and improper, and the right of an employee to job security unless just cause for discharge is shown, are found certain fundamental concepts of due process, which do obtain in matters adjudicated in arbitration.

I see a distinction between an objective investigation of an incident, in which the Company seeks information from employees either as witnesses or as the "source of knowledge," and an investigation in which the questioned employees are deemed suspects of the alleged misconduct under investigation. In the latter situation - which I conclude was the circumstance involved in the instant case- the Company's right of investigation does not extend to the point where the employees face discharge or other severe penalties unless they admit their guilt or implicate others.

In my judgment I consider it manifestly inconsistent with fundamental due process for an employer to discharge or indefinitely suspend an employee suspected of misconduct; when the employer has no other independent probative evidence of the employee's guilt; where the discharge or suspension is designed to induce if not compel the employee to provide answers satisfactory to the Company regarding the alleged misconduct; and where the only "satisfactory answer" is a statement by the employee tantamount to an admission of his own guilt or that of others.

In doing so the Company steps beyond the scope of the right of investigation and the attendant duty of employees to
cooperate with that investigation, encroaching into a proscribed area reserved for certain basic protections accorded anyone accused or suspected, whether in the employment relationship or elsewhere. And it is my conclusion that that is what took place here, whether the Company overtly intended it that way or not.

The Company suspected that one or more of the grievants had something to do with a broken coke bottle and the splattering of its contents on one of the grievants. It was not satisfied with the various explanations advanced by some of the grievants; namely that they "did not know" or "did not see anything" or that "the bottle fell off the table," or no answer at all. It seems to me that if the Company thought the grievants guilty of some offense in connection with that incident it should have taken disciplinary action for that reason. Or if it disbelieved the grievants' explanations, it should have disciplined them for that disbelief. Both actions of course, would have been subject to the grievance procedure of the contract. But though the Company asserts that its action was based on the latter (or in other words on the "failure or refusal of the grievants to cooperate in the Company's investigation"), I am persuaded that it went significantly beyond that point. That the grievants were treated as suspects cannot seriously be disputed. (Immunity is granted to either a suspect or one who might incriminate himself - and immunity was granted two of the grievants, situated similarly with the others, at the arbitration hearing.) Also, the Company's claim that the grievants did not cooperate is questionable,
The fact is that they or spokesmen on their behalf answered the Company's inquiry as to what happened.

The "lack of cooperation" is based on the Company's determination that those answers were either untrue or incomplete. It appears therefore that "satisfactory cooperation" is equated by the Company only with answers that the Company deems satisfactory. I am not sure that the Company is the sole judge of the meaning and standard of "cooperation." But that need not be decided because the Company went further. I believe it decided the grievants' answers were unsatisfactory, it imposed the penalty of discharge not just for that reason, but also as a device to induce the grievants to supply different answers which, in the judgment of the Company, would be either more complete or more accurate. And it is this latter purpose and procedure which I find improper and objectionable.

Let me explain what I think to be the absence of fundamental due process. The grievants were discharged, in part at least, for refusing to tell on themselves (or on others situated similarly); and if they had purged themselves of that refusal, they or others they implicated would have been subject to the same discipline as a result of the admission. In other words the grievants could not escape the penalty of discharge for failure to "cooperate with the Company's investigation" without providing the Company with the only answer that it deemed acceptable - an admission of culpability. Obviously that would be no escape at all.

Also, in disciplinary matters the burden is on the employer to prove the misconduct by clear and convincing evidence.
To me this means that the employer has the duty to collect, marshall and present evidence independent of the statements of the accused or suspected employee unless those statements are voluntarily made or are admissions within a "voluntary context." I think it improper that the Company's case be based solely on evidence or admissions out of the mouth of a suspected employee when such statements are obtained, apparently as the Company attempted here, by penalizing the employee with discharge. To my mind this simply does not meet the well settled burden on the employer, to produce clear and convincing evidence of an employee's misconduct. Rather it is evidence of misconduct produced by the employee himself, and involuntarily.

Indeed if the Company has no evidence independent of what it obtains in this manner from a suspected employee, it simply has no case for disciplinary action. For it to attempt to construct a case under those circumstances, by obtaining the evidence from the employees themselves under penalty of discharge, or because that evidence was not forthcoming from them, is to effectuate the very discipline which the Company otherwise, because of the absence of just cause, would not be able to sustain.

Contrary legal and arbitration citations, advanced by the Company during the hearing and in its brief, if not distinguishable from the facts in the instant case (and I think the Company's analogy to the duty of a witness to testify has been distinguished) are conclusions with which I simply do not agree. My research discloses a sufficient body of law and arbitration cases in support of my view to assure me that what I have said is by no means unique.
Accordingly the Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of the parties, makes the following Award:

There was not just cause for the discharge of E. Jacobs, F. Izzo, M. Germaine, G. Pizzolorusso, Jr. and R. Kuklinski. As they have continued at work pending the outcome of this arbitration, no remedy is necessary.

The Arbitrator's fee shall be borne by the Company.

Eric J. Schmertz
Permanent Arbitrator

DATED: August 1^st 1970
STATE OF New York )
COUNTY OF New York )

On this day of August, 1970, 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 # 70A-Q3
In the Matter of the Arbitration
between
Local 702 Motion Picture Laboratory Technicians, IATSE, AFL-CIO
and
DeLuxe General, Inc.

The stipulated issue is:

Was Anthony Caleca improperly reassigned? Was he improperly reduced in his rate by 16¢ an hour? If so what shall be the remedy in connection with both questions?

Hearings were held at the Company offices on July 30 and September 8, 1970 at which time Mr. Caleca, hereinafter referred to as the "grievant," and representatives of the Company and Union appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The Arbitrator's oath and the contract time limit for rendition of the Award were waived.

I find nothing in the contract which prohibits the Company from changing an employee's duties or assigning him from one set of duties to another within the same job classification. I find that the work which the grievant performed first in the Finishing Department; then on the VPI account; and after his removal from the VPI account, all fell within the Checker B job classification. So I find nothing contractually improper about his involuntary transfer from the VPI account to

7W-8
other work within the same classification.

It is undisputed that while on the VPI account the grievant received 16¢ an hour above the Checker B rate, and that this increase in pay was unilaterally granted by the Company because of the importance which it attached to that account. The additional 16¢ an hour was not an increase jointly negotiated by the Company and the Union. Therefore, as a bonus attached to that particular job, unilaterally by the Company, I see no reason why the Company could not delete it from an employee's pay when the employee no longer worked on the VPI account, provided the affected employee continued to receive at least the contractual Checker B rate for other work to which he was assigned in that classification.

And that was the situation here. While the grievant worked on the VPI account he enjoyed the higher rate of pay unilaterally granted by the Company. When he was reassigned to other duties within the Checker B classification, the Company reduced his pay by 16¢ an hour, but continued to pay him at the Checker B rate.

Had the additional 16¢ an hour been jointly negotiated by the parties, it would then have assumed the status of a contract rate and the affected employee would have enjoyed the protection of Section 4 Paragraph (c) of the contract. But because I find that Section of the contract applicable to contract rates or rates negotiated or mutually agreed to by the parties, the additional 16¢ an hour involved in the instant case is not "wages over the prior base rate" within the meaning of that Section. Accordingly the grievant's reduction in
pay by 16¢ an hour was not improper.

The Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of the parties, makes the following AWARD:

Anthony Caleca was not improperly reassigned nor was he improperly reduced in rate by 16¢ an hour.

The Arbitrator's fee shall be borne by the Union.

Eric J. Schmertz
Permanent Arbitrator

DATED: October 5 1970

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

On this 5 day of October, 1970, 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. 70A-8
In the course of the Arbitration hearing in Case #70A-7 between De Luxe General, Inc and Local 702, I.A.T.S.E. the permanent Arbitrator issued the following directive:

When the company makes a transfer under Article 13 of the contract, the employee so indicated must perform the assignment even if he or the Union believes that the assignment and the transfer is in violation of the contract or any other agreement between the Union and the Company.

The right of the employee and or the Union is under the grievance procedure of the contract. In other words, the employee must perform the work assigned subject to his right and the right of the Union on his behalf to complain to the permanent Arbitrator subsequent to performing the assignment that it is in violation of the contract, and to seek whatever remedy or relief would be appropriate.

The intent of this directive is to make clear to the parties that the permanent Arbitrator believes that work assigned must be performed by the employee so assigned whether or not in violation of the contract subject to his right to thereafter grieve before the permanent Arbitrator.

The only exception to this work assignment is when the assignment would place the employee in physical jeopardy or when the assignment is illegal or unsocial.

Eric J. Schmertz
Permanent Arbitrator
PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORY INDUSTRY

In the Matter of the Arbitration
between
De Luxe General Incorporated
and
Local 702, Motion Picture Laboratory 'Film Technicians, I.A.T.S.E., AFL-CIO'

FINDINGS AND AWARD
CASE #7AQ4

The Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of the parties makes the following FINDINGS and AWARD

1. On November 17, 1970 a dispute arose over the manning of the striping machine and the performance of striping work. As a consequence, and one orders of the Union, the Developers in the Developing Department interrupted regular production and engaged in a work stoppage within the meaning and proscription of Section 15(h) of the contract, by putting up "leader" on the Developing machines. This violated Section 15(h) of the Collective Bargaining Agreement.

2. The Union must bear responsibility for placing the Developers in a position which caused their suspension by the Company. Therefore the Union is responsible for the duration of time between the beginning of the stoppage and the employees' return to productive work—approximately two hours. The Union's defense of "lockout" is rejected. The Company is entitled to receive from the Union, as ordinary damages, the amount of wages paid and welfare and pension benefits credited to the Developers during that period of time. Accordingly the Union shall pay the Company the sum of three hundred dollars and fifty-four cents ($300.54).

3. I am not persuaded that the expenses incurred by the Company in shipping striping work to the West Coast and receiving it back was an inexorable consequence of that stoppage. While I understand the Company's decision as a matter of prudence, in view of my rulings at the first hearing I cannot conclude that the handling of striping work at the Company would again have been interrupted or refused by the employees or the Union. Therefore the Company's claim for money damages arising from its decision to have striping work done on the West Coast, is denied.
4. Pending the final determination of any dispute between the parties, including disputes arising from the temporary transfer clause, other contract provisions, oral agreements, and the meaning and application or alleged breaches of the "status quo" of Section 15(h), the Union and the employees may not engage in strikes, slowdowns, work stoppages, cessations of work or other interferences with normal production during the life of this contract. Section 15(h) expressly forbids such action. Even a breach of the "status quo" by the Company does not justify such action. And therefore I need not determine in this proceeding whether there was such a breach. The proper procedure in the case of any dispute is to process a claim through the grievance and arbitration provisions of the contract. The arbitration forum is fully adequate to fashion appropriate remedies and orders in the event of any violations.

5. Therefore as a response to a dispute during the life of this collective agreement, a strike, or any action which falls within that definition by the Union and/or the employees, just as is a "lockout" by the Company, is totally unnecessary as well as prohibited by the contract and this AWARD. Also, pending the determination of any dispute under the procedures of Section 15, the parties are required to maintain the "working conditions or methods of operation as they existed prior to the dispute except as they may be otherwise permitted by (the) Agreement". Henceforth, in the adjustment of disputes, the parties shall follow and comply with the provisions of Section 15 of the Collective Bargaining Agreement.

6. The Arbitrator's fee totalling $600.00 shall be borne 2/3rds by the Union ($400) and 1/3rd by the Company ($200).

DATED: December 14th, 1970
STATE OF New York )ss.
COUNTY OF New York)

On this fourteenth day of December 1970, 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

Deluxe General Incorporated and

Local 702, Motion Picture Laboratory Film Technicians, I.A.T.S.E., AFL-CIO

The Undersigned, as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of the parties, makes the following FINDINGS and AWARD:

1. In virtually all instances, vacancies which the Company decides to fill in the skilled classifications are filled by employees referred to the Company by the Union; or are filled from other sources after the Union has been asked to refer candidates and is unable to do so because none with that skill are on layoff or available.

2. The foregoing has represented a realistic business judgement by the Company and a procedure in furtherance of sound labor relations. For both reasons I recommend it be continued wherever possible.

3. However I do not find that the Company is required to follow the foregoing procedure under the Contract. The two Sections upon which the Union relies are not applicable. The effectiveness of the pertinent part of Section 1(e) awaits the happening of a condition precedent. And under the facts in the instant case Section 25 does not bind the Company to the provisions of Article 27 Section 1(a) of the Union's By-Laws. Therefore, the hiring of Mr. P. Giovanelli by the Company is not and would not be violative of the Collective Agreement.

4. There is evidence that the Union committed two ad hoc and temporary violations of my AWARD of December 14, 1970 in case #70AQ4, and threatened one additional violation. I reiterate that AWARD, and as stated therein, direct compliance for the balance of the Collective Bargaining Agreement. I choose not to consider imposing damages or penalties in this case because I have not previously given notice that such remedies would be applicable. Rather I shall make use of this case to serve notice that as Permanent Arbitrator I expect my orders and Awards to be strictly followed. Willful failures or refusals to do so will hereafter be subject to damages, both ordinary and punitive.
5. Much of this case including a ruling on the "status quo" is in the nature of a Declaratory Judgment. Accordingly the Arbitrator's total fee of four hundred and fifty dollars ($450.) shall be shared equally by the parties.

DATED: December 28th, 1970
STATE OF New York ) ss.
COUNTY OF New York )

On this twenty eighth day of December 1970, 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.

[Signature]

Eric J. Schmertz
Permanent Arbitrator
The stipulated issue is:

Was the transfer of Philip Lamendola from negative to positive developing a violation of his seniority rights? If so what shall be the remedy, if any?

A hearing was held at the Laboratory on March 18, 1971, at which time Mr. Lamendola, hereinafter referred to as the "grievant," and representatives of the above-named Union and Company 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.

This proceeding is in the nature of a "declaratory judgment" to determine which of two employees, the grievant or Robert Twilley (who was also present at the hearing) is entitled to a single available negative developing job.

The answer turns on whether Twilley, who concededly had more seniority than the grievant as a negative developer, abandoned or relinquished that seniority. I conclude he did not.

While working as a negative developer Twilley became ill and underwent a serious operation. Upon his return to work, at his request, and in apparent recognition of his need for a
period of recuperation, he was permitted to work at the less
demanding task of positive developing, though he retained his
negative developing classification and the higher rate of pay
of that classification. This arrangement was agreed to by the
Union and Company and confirmed in a letter dated April 22,
1969 from Mr. Quigley to Mr. Vitello. Though that letter states
that Twilley "will return to negative developing when the first
opening occurs," I am satisfied the parties intended to allow
him to remain in positive developing until his health permitted
him to return to the more difficult negative developing work.
Therefore unless it can be established that Twilley was physi-
cally capable of assuming the negative developing job on a full
time basis when first, one, and then a second job opening for
that classification was posted, his failure to bid in each in-
stance cannot be deemed prejudicial to his seniority rights as
a negative developer.

The evidence in the record does not support a conclusion
that at the time those two openings were posted the grievant
had sufficiently recovered from his illness to resume work in
that classification on a full time basis. It is undisputed
that at that time, and at the request of the Company he did
perform assignments as a negative developer, on a straight
time and overtime basis, and he concedes also that he worked
occasional "double shifts." But he also testified, without refu-
tation, that it was very difficult physically for him to do so;
that he was not fully able to perform that work on a regular
continuing basis; and that he did it out of a sense of obliga-
tion to the Company because it had allowed him to retain his
negative developing classification and rate of pay while working as a positive developer during his recuperation. I find no reason why his explanation and characterization of his physical condition at the time he willingly undertook negative developing assignments, should not be believed and accepted.

Also, though I appreciate the grievant's equitable argument that he should not have been removed from negative developing to make room for Twilley after the latter passed up two posted openings in that classification, I find no contractual reason why Twilley was obliged to either bid for those openings or claim those jobs in order to keep his seniority as a negative developer. While Twilley worked as a positive developer, he retained the negative developing classification and the higher rate. So there was no need for him to seek a classification or rate of pay which he already enjoyed. Also it is undisputed that job postings are promotional in nature - from a lower to a higher classification, rather than to a specific job opening.

So, put another way, because Twilley remained classified at the higher negative developing level there was no "promotion" for him to seek or claim.

This is not to say that an employee, ready and able to assume regular work in a higher classification to which his seniority attaches, cannot abandon his seniority rights to that position by failing to claim job openings when they occur. Rather it is that I do not find that the particular facts in this case can be interpreted to have reached that point.

Accordingly, the Undersigned as Permanent Arbitrator un-
under the Collective Bargaining Agreement between the above named parties, makes the following AWARD:

Because Robert Twilley had neither abandoned nor waived his seniority rights as a negative developer, the transfer of Philip Lamendola from negative to positive developing was not a violation of Mr. Lamendola's seniority rights.

The Arbitrator's fee shall be shared equally by the parties.

Eric J. Schmertz
Permanent Arbitrator

DATED: April 12, 1971
STATE OF New York )
COUNTY OF New York)

On this 12th day of April, 1971, 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.

Eric J. Schmertz
Permanent Arbitrator

Cas No. 70 A-13
The stipulated issue is:

Was the layoff of Louis D'Agostino in violation of his seniority rights? If so what shall be the remedy?

A hearing was held at the Laboratory on May 28, 1971 at which time Mr. D'Agostino, hereinafter referred to as the "grievant," and representatives of the above named 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.

The Union does not dispute the economic need for layoffs in the Raw Stock Department. It contends however, that before the layoff reached the grievant, the "10% Foreman" Mr. Lorenzano, who had less departmental seniority than the grievant, should have been laid off.

The question is whether the "10% Foreman" is to be included for layoff purposes, with the "rank and file" as part of the same job classification within the meaning of Section 7 (1) of the contract; or rather, whether the "10% Foreman" is a different classification from in this instance, Raw Stock
clerk, and subject to layoff only within the Foreman category irrespective of the layoffs and seniority of Raw Stock Clerks.

I find a contractual presumption in favor of treating the "10% Foreman" as part of the Raw Stock Clerk classification for purposes of layoffs. Schedule A of the contract is entitled "Classifications of Work and Rates." Nowhere in that schedule is the "10% Foreman" or the Working Foreman or the Sub-Foreman listed as a classification. The Raw Stock Department enumerates only Raw Stock Clerks, Raw Stock Handlers and Head Raw Stock Receiver (the latter two not involved in the instant dispute.) In short, Schedule A which contractually enumerates two job classifications, does not include the Foreman job assignment. Accordingly Section 16 of the contract, particularly Section 16 (e) cannot be construed as establishing the Foreman assignment as a job classification. Instead, I am satisfied that its purpose and intent is limited to fixing a pay premium of 10% above the existing classification, for performance of certain supervisory duties. I interpret it to mean that the supervisory job assignment carries a 10% premium above the highest base rate of the classification of the affected employee. In other words, narrowed to the instant dispute, the "10% Foreman" is paid the highest base rate of his classification plus 10% for performing certain supervisory work; but he remains classified pursuant to that base rate, namely as a Raw Stock Clerk.

The intent and spirit of the relationship between the "10% Foreman" and the "rank and file" in sharing the available work is found, I believe, in Section 9, though it relates spec
ifically to sharing overtime. In substance that Section precludes either a preference or disadvantage to the Foreman in the allocation of overtime work; permitting him to participate in regular departmental overtime on precisely the same basis as the rank and file. To my mind that means not only that contractually there may be neither a preference nor a restraint on the Foreman's entitlement to the extra available work together with the "rank and file" in his department, but that implicitly and reciprocally no preference should be accorded the Foreman if the available work falls below a full regular quantity. But contrary to this intent, a Foreman would enjoy such a proscribed preference, if though junior in seniority, he is retained in a layoff situation and thereby continues at work while others within the rank and file who enjoy greater departmental seniority, are laid off.

Finally I consider it significant that the "10% Foreman" is within the bargaining unit and covered by this Collective Bargaining Agreement. Though undisputedly he performs certain supervisory functions (like a group leader or leadman) he cannot be considered a managerial supervisor because he is not encompassed within the managerial ranks. The Company's argument in this case, that the Foreman must be retained or dealt with separately in layoff situations because of the essentiality of his supervisory assignment, and because his layoff might paralyze the work of the department, endows these bargaining unit Foremen with the kind of supervisory authority ordinarily attached to managerial supervisors who are excluded from the bargaining unit for that very reason. Absent proof in this area, I am not
persuaded that the "10% Foreman" who is covered by this Collective Bargaining Agreement as part of the bargaining unit enjoys that level of importance or authority. Also I think the Company exaggerates the impact of a ruling favorable to the Union in this case. It suggests that a determination which combines the "10% Foreman" with the rank and file for purposes of layoff would cripple its ability to operate the various departments involved. The fact however, is that the circumstances in the instant dispute are unique. Both sides recognize that in the overwhelming number of situations the "10% Foreman" is an employee with the highest seniority in the department, and therefore under any theory, not reachable in a layoff unless the less senior rank and file employees of the department have been laid off first. So as a practical matter, the concern expressed by the Company is most unlikely to develop.

The evidence on Industry practice and the practices of this Company do not change the foregoing. Uncontroverted is the Union's testimony that elsewhere in the Industry, involving Employers covered by this same master Agreement, departmental layoffs include the working Foreman and the rank and file as a group within the same classification. So apparently, absent evidence to the contrary, other employers faced with the same adverse economic conditions, have managed to maintain the remaining production even where a "10% Foreman" junior to employees in the "rank and file" is laid off.

The evidence advanced by the Company in connection with its practice is neither sufficiently extensive nor sufficiently comparable to the instant dispute to be controlling. I cannot
consider only two prior layoffs (in the Developing Department and in the Printing Department) to be of the quantity or consistency required to establish a "past practice." Also it appears that in the layoffs in these two departments, though affecting the rank and file first, and the foremen later (i.e. as separate groups) the foreman involved possessed higher seniority than any of the others first laid off. Hence under the Union's theory in the instant case, those layoffs were and would not be objectionable to the Union. And therefore the Union's failure to grieve in those instances cannot be deemed prejudicial to the Union's position here. Instead, as I previously indicated, the facts in the instant case are unique; indeed the first time that the problem has arisen. Here, as distinguished from any other prior departmental layoff, the "10% Foremen" just happened to be junior in the seniority to the rank and file Raw Stock Clerks; hence for the first time, in an unusual circumstance, the problem arose and the grievance was filed.

For all the foregoing reasons I am persuaded of a contractual presumption in favor of treating the "10% Foreman" in the Raw Stock Department as part of the Raw Stock Clerk classification. Consequently he should have been included amongst the other Raw Stock Clerks for purposes of the layoffs which took place on or about Friday, May 21, 1971 in accordance with Section 7 (1) of the contract. As such, because his departmental seniority was less than that of the grievant's, his layoff should have preceded the latter's, and because the layoff went no further, the grievant would and therefore should not have
been laid off at all. Accordingly he shall be reinstated and made whole for the time lost.

As the Permanent Arbitrator in the Industry I wish to make it clear that the presumption which I have fashioned in deciding this case, is just that - a presumption. It should not be deemed irrebuttable. For example, though in this case I have not been persuaded that the supervisory work of the "10% Foreman" in the Raw Stock Department (where only one Stock Clerk and one Foreman remain) mandates the retention of Mr. Lorenzano, there may be other situations where, based on evidence presented, the retention of a foreman, albeit junior in seniority, is a compelling business necessity. In other words, the presumption may be rebutted if the foreman's supervisory function is essential and I am persuaded that there is no other bargaining unit employee realistically and contractually able and willing to assume the supervisor assignment, and/or no managerial supervisor similarly available. Then the implicit right of the Company and its manifest need to continue the department at work to meet remaining business needs, would negate the presumption and allow the retention of the less senior foreman. But this exception to the presumption was not shown in the instant case. I do not know for example that the remaining senior Raw Stock Clerk, Mr. Contino, lacks the ability or willingness to assume Mr. Lorenzano's supervisory assignments; or that other senior employees elsewhere in the Laboratory are unqualified or unwilling to accept a transfer to that work; or that the managerial supervisory force would be unable to cope with or absorb
the supervisory work in the event of Mr. Lorenzano's layoff or his replacement by some other employee. (This is not to criticize the Company's case herein. Obviously it could not know or anticipate the presumption on which I rely until the rendition of this decision.)

Therefore I want the parties to clearly understand that the contractual presumption involved in deciding the instant case is not irrebuttable and therefore not absolutely controlling in all departmental layoffs. Instead it is a presumption favorable to the Union's argument that the Foreman and the rank and file are to be deemed within the same classification; but rebuttable on a case by case basis as indicated. For this reason I think it fair and appropriate that the Arbitrator's fee in the instant case be shared equally by the parties.

Accordingly the Undersigned, as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties and having heard the proofs and allegations of the parties, makes the following Award:

The layoff of Louis D'Agostino violated his seniority rights. He shall be reinstated and made whole for the time lost.

For reasons stated in the Opinion the Arbitrator's fee shall be shared equally by the parties.

Eric J. Schmertz
Permanent Arbitrator

DATED: June 7, 1971
STATE OF New York ) ss.
COUNTY OF New York)

On this 7th day of June, 1971, 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
Titra Film Laboratories, Inc. and Clement Falzarano

Motion Picture Laboratory Technicians, Local 702 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO and Clement Falzarano. Cases 22-CA-4375 and 22-CB-1850

January 10, 1972

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On July 30, 1971, Trial Examiner Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Trial Examiner: The charges in these cases were filed on February 26 and served on March 1, 1971. The complaint was issued on April 16. The hearing was held on June 2 and 3 in Newark, New Jersey.

The issue is whether Titra, a New York corporation, has a plant at North Bergen, New Jersey, where it processes motion picture film. Titra annually sells and ships film valued in excess of $50,000 directly from New Jersey to customers in other States. It is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Local 702 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Background

Local 702 represents the employees of a number of companies engaged in the business of processing motion picture film in the New York metropolitan area. Among them is Titra. Titra was originally organized and brought under contract by Local 702 in 1952.

From 1949 to 1961 Local 702's contracts, including its contracts with Titra, contained an exclusive hiring provision known as the industry experience roster. The provision was dropped in the contract which was negotiated in 1960 and took effect in 1961. It does not appear in the current contract, which took effect on October 1, 1968, and runs until September 30, 1971. The current contract between Local 702 and the various film processing companies, Titra included, does contain a valid union-security clause (paragraph 1, Shop Agreement) which requires membership in Local 702 as a condition of employment after 30 days. Subparagraph (e) of paragraph 1 reads:

(e) In case of repeal or amendment of the Labor Management Relations Act of 1947 or in case of new legislation rendering permissible any union security to the Union greater than that specified in this paragraph of this Agreement, then and in such event such provisions shall automatically be deemed substituted in lieu hereof. In such event, and if permissible under law, the Union agrees to supply adequate, competent and qualified employees for the job requirements of the Employer in the classifications covered by this Agreement, and if the Union fails to do so within 48 hours the Employer may secure such employees from any source.

The contract also contains a provision (paragraph 25, Union Requirements) which reads:

No employee shall be required to perform any act or work violative of the Constitution or By-Laws of this Union. The Union hereby represents that the provisions of this Agreement are not violative of said Constitution or By-Laws.

Paragraph 7 of the contract is entitled "Work Distribution and Layoffs." It provides for termination of employees with severance pay in situations where work becomes scarce. It also provides for employees in higher paid, more skilled job classifications to bump those in lower paid, less skilled classifications. Employees terminated pursuant to paragraph 7 have no recall rights.

Local 702's bylaws provide, in article 27:

Union seniority, as distinguished from plant seniori-
ty, shall be fixed for each member as of the date of his initiation into membership in this Local. . . When one or more unemployed members are equally available and competent to fill a job, preference shall be given in the order of the Union seniority of said respective unemployed members, but in the event that one or more of said available unemployed members were inducted on the same date, then and in that event, preference shall be given to such of said unemployed available members, who had been unemployed for the longest period of time.

Article 26 of Local 702's bylaws provides, in part, for a $10 fine, suspension, and/or expulsion of a member found guilty after trial of "soliciting employment in laboratories under collective agreement with the Union, without the Union's consent."

Local 702's membership is the only pool of experienced film laboratory technicians in the New York area. Consequently, despite the fact that they have not been required by contract since 1961 to seek employees first through Local 702, film laboratories have continued to call Local 702 when they need experienced help to see if anyone is available. When Local 702 refers an applicant to a company, it fills out a three-part form. It keeps the pink copy for its own file. It gives the white and yellow copies to the applicant to take to the company. The white copy is for the company's records. The yellow copy goes to Local 702's steward at that laboratory. There was little or no unemployment in the film processing industry in the New York area until 2 or 3 years ago. Since then, there have been some experienced film technicians out of work.

Inexperienced persons breaking into the industry start as preparation men, the least difficult and lowest paying job classification in Local 702's contract. As they become experienced they advance through jobs of increasing skill and higher pay. Timers are the highest skilled and paid technicians in the industry. Any experienced film technician can do the work of a preparation man.

B. The General Counsel's Case

Neither Respondent presented any evidence at the hearing, electing, instead, to stand on the record made by the General Counsel. As a result, there is no dispute as to the facts set forth above or in this section. The General Counsel specifically disclaimed any contention that there is an industrywide practice that film laboratories in the New York area will hire through Local 702 exclusively. Indeed, the testimony of three officials of three other laboratories called by the General Counsel belies any such theory because it establishes affirmatively that firms other than Titra have no such arrangement with Local 702. The General Counsel called these witnesses, in part, in an effort to prove Local 702's desire to establish an exclusive hiring arrangement with Titra by showing that it has made such a demand on other employers in the industry. Their testimony established, at most, that Local 702 has forced other employers to rescind the hiring of new employees for higher paying jobs such as timer and promoter from within. It has no probative value on the question whether Titra has an exclusive hiring arrangement or practice with Local 702, the basic allegation of the General Counsel's case.

Eight other witnesses called by the General Counsel gave testimony which did bear on this question. One was Richard Gramaglia, executive vice president of Local 702 from 1940 to 1958 and president from 1960 to 1966. Gramaglia testified that, as of the time he left office in 1966, there was an "agreement" between Local 702 and employers, Titra included, that "the employers, if they needed any employees, would ask Local 702 for reference of any people they had for jobs." Much of Gramaglia's time on the stand was spent in a dispute with the General Counsel as to whether Gramaglia had told the General Counsel, before the hearing, that employers were required to call Local 702 at the time he was president. Any value that his testimony might have had to establish that Titra had agreed to an exclusive hiring arrangement with Local 702 was destroyed when it became clear that he did not know the meaning of the word which counsel had been using to categorize Titra's commitment, if any, to Local 702, i.e., "obliged." On the basis of Gramaglia's testimony, I find that Titra did not, in the period following the abolition of its contractual obligation to use Local 702 exclusively as a source of new employees, make any explicit agreement with Local 702 to continue to do so although it did continue to ask Local 702 to refer experienced persons to it when it needed help.

The other-seven witnesses called by the General Counsel all worked for Titra at one time or another. One was Corroado Nastasi, secretary-treasurer of Local 702. Nastasi worked for Titra from 1947 until 1958. He was the steward from 1952, when Titra was first organized, until he left. He testified flatly that in the period from 1952 to 1958 Titra hired persons who came to it from sources other than Local 702. In view of Titra's contractual obligation under the "industry experience roster" during this period, I find this testimony by Nastasi incredible. I have not, however, discredited Nastasi generally. His testimony is, for example, the basis for my findings above about Local 702's three-colored referral slip and how it is used.

Another ex-employee called by the General Counsel was Louis Chiocco. Chiocco worked for Titra from 1954 until 1957. He was a member of Local 702's executive board from 1965 until he resigned in November 1970. Chiocco testified that, while he was an officer of Local 702, he recommended that five or six persons be sent to jobs at Titra, all but one of whom were hired. Among the persons successfully recommended by Chiocco during this period were Clement Falzarano, who was hired by Titra in 1967 or 1968, Joseph D'Amico, who was hired in December 1967, George Chiocco, Louis' brother, who was hired in July 1968, and Emil Ognisanti, who was hired in 1966 or 1967. In each case, Louis Chiocco recommended to Local 702's president that the applicant be sent to fill an opening at Titra and the man was sent to Titra, usually with a referral slip. Louis Chiocco testified to no specific incident which occurred on or after September 1, 1970, the 10(b) date in these cases.

Two other witnesses, Joseph Conti and Chris Karinja, went to work for Titra in 1952 and have been there ever since. Conti was hired just at the time the plant was being organized. He testified that he checked with the plant manager every day for a period of several months. When
the manager finally said he had an opening and would hire Conti, he sent Conti to Local 702's office. When Conti returned with a referral slip, he was put to work. Karinja testified that he was called by an unnamed friend who knew he was out of work and told to go to Local 702. He did so and was sent to Titra with a referral slip.

The General Counsel's last three witnesses were all hired by Titra in the period when the contract between Titra and Local 702 contained no exclusive hiring agreement. Edward Lanzillo testified that he was hired in November 1967. His brother was working for Titra at the time. Lanzillo was working as a truckdriver and wanted a change. He asked his brother to help him get a job at Titra. His brother spoke to Local 702's steward. Lanzillo went to the plant, talked to both the steward and the plant manager, and was sent by the manager to Local 702 to get a referral slip. Lanzillo returned the next day with the slip and was put to work. Lanzillo was the only one of the three post-1961 hires called by the General Counsel to testify about the manner of their hiring who was interviewed by the plant manager before he went to work.

Joseph D'Amico was hired in December 1967. He was working as a longshoreman at the time, and work was getting scarce. He asked Louis Chiocco to help him get a job at Titra. When an opening developed, Chiocco asked D'Amico if he wanted it. D'Amico said he did. Chiocco brought a referral slip to his house. D'Amico went to the plant and was put to work by the steward. He did not see the plant manager until an hour or so later when the manager arrived. The manager merely had him fill out the papers, such as a W-4 form, usually required of new employees. D'Amico testified that 13 persons were hired by Titra after him. The onlyhirings which can be dated, from D'Amico's testimony, as coming after September 1, 1970, were those which took place in February 1971, about which more below.

Finally, George Chiocco confirmed his brother's testimony about how George was hired by Titra. In June 1968 George asked Louis to get him a job in the film industry because his job with a trucking firm was getting slow. Louis Chiocco told him to go to Titra around the first of July. He went, apparently without a referral slip. The plant was closed for vacation at the time. Consequently, George Chiocco spent his first 2 weeks in Titra's employ doing odd jobs. When the plant reopened, Local 702's steward put him to work learning the duties of a preparation man. Like D'Amico, George Chiocco did not see Titra's plant manager until after the steward had put him on production work. The interview, as in D'Amico's case, concerned paperwork and not whether George Chiocco would or would not be hired. George Chiocco testified that six persons were hired after him. None can be dated from his testimony as coming after September 1, 1970.

The whole thrust of the General Counsel's case is that Titra has delegated the hiring function to Local 702. To this end he elicited testimony from all his witnesses except Gramaglia and Nastasi to the effect that everyone who comes to work at Titra gets hired through Local 702. Based on this testimony about what has happened in other cases as well as what has happened to the witnesses themselves, I find that Local 702's steward plays the key role in deciding who will be hired when a job opens up at Titra. The principal consideration, however, is not union membership but nepotism. Once again, with the exception of the events of February 1971 related in the next paragraph, all of the evidence about the hiring of specific individuals, as distinguished from Gramaglia's vague generalizations, relates to persons inexperienced in the film processing industry who were put to work initially as preparation men and advanced to more skilled jobs as they learned the business. Anyone who works in the plant or, apparently, anyone associated with Local 702 can recommend to the steward that a relative or a friend be given a job when one becomes available. The steward keeps a list and decides, according to his own discretion or according to the clout of the recommender, who shall be hired. The lucky applicant is sent to Titra with a Local 702 referral slip, reports to the steward, and is put to work by him. The result is that Titra's entire work force is made up of numerous groups of employees who share close family and social ties. Since there is no evidence that anyone has been hired by Titra in recent years in any other manner, I find that Titra has, in fact, delegated hiring to Local 702. Therefore, I find, Titra has continued to engage in the practice of using Local 702 as the exclusive source of employees even though its contractual obligation to do so ended in 1961.

Joseph D'Amico and George Chiocco also testified about the events in February 1971 which apparently gave rise to these cases.1 On January 8, 1971, Titra terminated the last 13 men it had hired, pursuant to paragraph 7 of its contract

---

1 The charges in these cases also allege that Local 702 and Titra required employees to join Local 702 sooner than 30 days after they were hired and that Titra discriminated against the Charging Party and others at the behest of Local 702. On April 13, 1971, in a letter to Clement Faltarano, the Regional Director dismissed all allegations of these cases other than the one litigated, i.e., that Titra and Local 702 are "parties to an hiring arrangement whereby job applicants are referred by the Union to employment on a preferential basis according to their respective length of union membership." That letter also said, in pertinent part:

The evidence adduced during the investigation is insufficient to establish that the above-named labor organization caused or attempted to cause Titra Film Laboratories to refuse to hire anyone because of your political activities within the Union or that such activities were the reason you were not hired by Titra. Rather Local 702 did refer you to Titra for employment and, contrary to your contention, the investigation revealed no evidence to support the conclusion that such referral was not made in good faith. Moreover, the evidence does not establish that the Employer failed to hire you by
with Local 702. The order of their plant seniority was the same as the order of their union seniority. George Chiocco, a finisher at the time, was seventh from the bottom of the list. Some, if not all, of the six below him were preparation men at the time they were terminated. D’Amico and Clement Falzarano were also among those terminated. As their hiring dates set forth above indicate, they were higher than Chiocco on the seniority list. In early February, Titra called Local 702 for preparation men (whether two or five is unclear in the record). Local 702 referred men to Titra who were among the six below George Chiocco on the seniority list and who were still preparation men at the time of their termination. D’Amico and Chiocco protested to Local 702 that they should have been given the jobs because of their greater seniority. They were told that the referrals had been made on the basis of job classification and not on the basis of seniority as, in fact, they had.

C. Analysis and Conclusions

I have found that Titra and Local 702 do, as contended by the General Counsel, have an exclusive hiring arrangement or practice2 whereby Titra looks to Local 702’s office for experienced employees and to Local 702’s agent, the steward in its plant, for inexperienced help. That finding, however, meets only half the General Counsel’s burden, for exclusive hiring halls are not, per se, illegal. *Hoisting and Portable Engineers, Local 302 (West Coast Steel Works)*, 144 NLRB 1449. To supply the second half—operation of the arrangement in a discriminatory manner—the General Counsel relies on an alleged presumption that Local 702 has given effect to article 27 of its bylaws in its dealings with Titra. No authority for the existence of such a presumption at law has been brought to my attention. However, assuming, for the sake of argument, that there is such a presumption, it is negated by the General Counsel’s evidence of the manner in which Titra’s and Local 702’s exclusive hiring arrangement actually works.

The only incident which clearly falls within the 10(b) period is also the only incident in the record in which experienced union members rather than inexperienced persons who had not yet joined Local 702 were referred to Titra by Local 702. In that instance, both Joseph D’Amico and George Chiocco, having been hired without experience and trained initially as preparation men, and having progressed to better paying jobs before they were terminated, were clearly, in the words of article 27 of Local 702’s bylaws, “competent to fill” the jobs for which Titra sought men in February 1971. Both had greater union seniority than the men who were referred by Local 702. If Local 702 had given effect to article 27 at that time, D’Amico and Chiocco, or possibly even ex-Titra employees who were above them on the seniority list and yet were caught in the January 1971 termination, would have gotten the jobs. With respect to the other incidents in the record where inexperienced persons were referred to Titra by Local 702, it is equally clear that article 27 was not invoked. None of those persons had any union seniority at the time he was referred. Presumably they all joined Local 702 somewhere along the way. But, as in the Regional Office’s investigation of the charges, there is no evidence in this record that any person hired in this manner has ever been required to join Local 702 as a condition of getting a referral slip or sooner than the legal grace period allowed him under the union-security clause of the contract between Titra and Local 702. In fact, all of the evidence relating to these incidents demonstrates affirmatively that the union status of the applicant played no part in Local 702’s decision to refer him.

If an inference is drawn that Titra, having called Local 702 for experienced help in February 1971, did so on other occasions when article 27 was given effect by Local 702, the General Counsel’s case runs afoul of Section 10(b) of the Act. The only evidence from which a finding could be made that Titra hired anyone in the period after September 1, 1970, other than the incident already discussed, is Louis Chiocco’s testimony that he recommended Local 702 send five or six persons to Titra while he was an officer and that his term ran until early November 1970. It is, I think, insufficient to support a finding that any of the persons recommended by Chiocco were, in fact, hired by Titra after September 1, 1970. Therefore, the only hiring which took place during the 10(b) period, insofar as the record is concerned, is the one in February 1971 in which Titra and Local 702 did not invoke article 27 and thus did no wrong. On this state of the record, Section 10(b) of the Act precludes a finding that the Act has been violated. *Cargo Handlers, Inc.*, 159 NLRB 321, 327 (fn. 12).

For the reasons stated, I find that the General Counsel has not sustained his burden of proving, by a preponderance of the evidence, that Local 702 has referred employees to Titra, pursuant to their exclusive hiring arrangement or practice, according to length of union membership, especially during the 10(b) period. Upon the foregoing findings of fact, and on the entire record in these cases, I make the following:

CONCLUSIONS OF LAW

1. Titra Film Laboratories, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Motion Picture Laboratory Technicians, Local 702 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The allegations of the complaint that Titra has violated Section 8(a)(1) and (3) and that Local 702 has violated Section 8(b)(1)(A) and (2) of the Act have not been sustained.

Upon the foregoing findings of fact, conclusions of law, merit. It requires a strained reading of the language which states what is to happen in the event the law as it presently stands is changed. The parties could not have made clearer their intention, when they included paragraph 7(e) in their contract, of explicitly agreeing to an exclusive hiring hall only if the Act is amended.
and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The consolidated complaint is dismissed in its entirety.
Mr. Samuel Paet
2615 Homcrest Ave.
Brooklyn, N.Y. 11235

Motion Picture Laboratory Technicians,
Re: Local 701, IATSE, AFL-CIO
(Du-Art Laboratories, Inc.)
Case No: 2-CB-5115

Dear Sir:

Your charge in the above-entitled case alleging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted.

The evidence does not tend to establish that the above-named Union violated the National Labor Relations Act as alleged by you. The evidence establishes that although the Union caused your employer, Du-Art Laboratories, Inc. to transfer you rather than another employee to a lower-paying job in the black and white processing operation, said action was based solely on the fact that you were the least senior man in the permanent-color classification. The Union's actions in this regard therefore cannot be deemed to have been motivated by any arbitrary, invidious or otherwise unlawful considerations. Further, the evidence does not tend to establish that the Union violated the aforesaid Act in any other manner encompassed by your charge. I therefore am unable to issue a complaint in this matter.
Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on April 13, 1972. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity of filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Ivan C. McLoud
Regional Director

Enc.

REGISTERED MAIL
R.R.R.

cc: General Counsel
National Labor Relations Board
Washington, D.C. 20570

Motion Picture Laboratory Technicians, Local 702, LATSE, AFL-CIO
Attn: Mr. C. W. Vitello
165 W. 46th St.
New York, N.Y. 10036

Plato Steins and Moser
Attn: Robert Moser, Esq.
270 Madison Ave.
New York, N.Y. 10016

Du-Art Laboratories, Inc.
243 West 55th St.
New York, N.Y. 10019
COSMO W. VITELLO, being duly sworn, deposes and says:

I reside at 95 Wayne Ave., Riveredge, N.J. My telephone # Co 2-7432 (201).

I am president and business agent of local 702 IATSE, and have been in this position for 6 years.

Around December of 1971, there was a layoff at Du-Art, and because of the layoff, a man was needed to fill a black and white dyers job on the day shift.

Mickey DiGiacomo, the shop steward at Du Art informed the executive board of the company's information that Vincent Seips, a wet end color man, on the third shift, was low man and that he would be bumped into the day shift job, which was a black and white dry end. According to this information, the union took the position that Seips would be the one to move to the day shift.

Seips appealed to the executive board of the union, claiming that the union took the wrong position. We then had DiGiacomo check the company records and found that even though Samuel Peet has more department seniority in the positive developing department, Seips had more seniority in the classified color.

The union called both men up to the union office, listened to their stories, and finally decided that a mistake had been made, and changed its position. The executive board decided that Peet would be bumped, and not Seips, because Seips has more time in the color classification.

It has always been the industry-wide policy that regardless of seniority, the last man into the color classification, will be the first man out. In this case, Seips was classified color before Peet, and therefore Peet would be the one to move not Seips. Seips was classified color on May 10, 1971, and Peet was classified color July 9, 1971.
The printing department is also broken down into black and white and color, and the same procedure is followed in that department. In fact, any department with color and black and white breakdowns would follow the same procedure.

There is nothing in the contract that covers this type of situation.

The union suggested that Dave Blum should take the job on the day shift and that Peet should take Blum's job, a wet end color job. But Peet told the union that he did not want the wet end job, so we could not move Dave Blum.

Before the layoff took place, the company asked for men to go on the third shift which it was just opening up. Peet was asked to work the third shift dry end job, but he refused it, because he did not want to work midnight shift. Seips took the job, but only if the company would continue to pay him wet end pay. He took the job and was classified color in May 1971.

The union is not carrying out any vendetta against Peet, and is not treating him unfairly in this case. There are no hard feelings against Peet in the union. The union is simply treating the case the way it would any other case. The union is following the past practice that it has always followed, and is not making any exceptions in this case. He is a good union man and there would be no reason for the union to be out to get him or to treat him unfairly.

I have read the above statement and find that is true and accurate.

C. W. Vitello Pres.

Sworn to and subscribed to before me the 15th day of March, 1972.
Elbert F. Tellem,  
NLRB Examiner
In finding a violation of Sec. 8(b)(3), Member Fanning does not rely on Westgate Painting and Decorating Corp. et al 186 NLRB No. 140, 453 (1972). 453 F.2d 783 (CA. 2, 1971). cert. denied 31 L.Ed. 2d 455 (1972). cited by the Trial Examiner. In Member Fanning's view the legality of the Union's conduct in this case, unlike that in Westgate Painting from which he dissented, does not fall within the criteria of lawful conduct set forth by the Supreme Court in Seafield v. NLRB. 394 U.S. 423. and is not otherwise protected conduct.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

SAMUEL M. SINGER, Trial Examiner: This proceeding was tried before me in New York, New York, on August 31 and September 1, 1971, pursuant to complaint issued March 19 based on charges filed on January 22, 1971. The complaint alleges that Respondent Union violated Section 8(b)(1)(A), (2), and (3) of the National Labor Relations Act, as amended, by various acts and conduct including forcing DeLuxe General Incorporated ("DeLuxe" or "Employer") to hire and fill vacancies on the basis of unionwide seniority (length of union membership); directing union members not to accept employment on other than union seniority under threat of union disciplinary action; threatening the Employer with a work stoppage if it employed an employee on other than union seniority basis; unilaterally modifying its collective agreement with the Employer to require filling vacancies in order of union seniority; and disciplining and expelling two union members (Charging Parties Giovanelli and Tardalo) for accepting employment in violation of the Union’s seniority rule.

All parties appeared and were afforded full opportunity to be heard and examine and cross-examine witnesses. All filed briefs or memoranda. Upon the entire record, and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

DeLuxe, a New York corporation, maintains its office and place of business in New York City, where it is engaged in film processing and related services. During the past representative year, it performed services valued in excess of $50,000 for customers located outside New York State. I find that at all material times DeLuxe has been an Employer engaged in commerce and in operations affecting commerce within the meaning of the Act and that assertion of jurisdiction herein is proper.

II. LABOR ORGANIZATION INVOLVED

Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

1 Transcript corrected by my order on notice dated September 30, 1971.
III. ALLEGED UNFAIR LABOR PRACTICES

A. THE FACTS

1. Contractual relations

Deluxe and Local 702 have been parties to a series of collective agreements, the most recent of which (and the one here involved) covering the period October 1, 1969, to October 1, 1971. The bargaining unit consists of what is normally referred to as production and maintenance employees, employed in various job titles and broken down by department in accordance with schedule A of the contract. In the fall of 1970, when the pertinent events arose, the bargaining unit at Deluxe consisted of about 360 employees.

The contractual provisions relevant here include section 1 providing for a union-shop clause (i.e., union membership as a condition of employment after 30 days on the job), notice to the Union of new lining within 7 days thereof, and an employer commitment to provide for union security "greater than that specified" in the contract (including use of Local 702 as the sole source for new employees) if lawfully permitted in case of repeal of the Labor Management Act of 1947 or an amendment thereof. Section 7, dealing with "work distribution and layoffs," provides, inter alia:

In the event of a layoff in any department consisting of more than one classification, if an employee in a higher classification shall first be affected by such layoff, such employee affected, having departmental seniority shall have the option to be reverted to the next lower classification in that department in accordance with his departmental seniority or accept severance pay and the employee finally displaced shall be laid off. In the event the employee affected was transferred from another department or classification within the plant, he shall have the option of reverting to a position in his former department or classification and retain his accumulated seniority in such former department or classification. In no event shall an employee be transferred to another department unless he had previously been employed in that department.

This section also provides that laid-off employees or employees reduced in classification "shall be entitled to demand and receive severance pay" and upon payment thereof "the employees' tenure in the plant shall be terminated." At the hearing, the Union conceded that all laid-off employees involved in this proceeding fall within this category and may be regarded as "former employees." The contract is silent with respect to reemployment rights of laid-off employees who did not elect to take severance pay. It is conceded that omission of provisions on such matters "was deliberate and intended after the discussion of the issues relating thereto in negotiations for the [current] agreement." The contract contains specific provisions covering "temporary transfers.

Section 2 provides that no employee "shall be discriminated against or deprived of employment or promotion because of race . . . union membership," etc. Section 25 states:

No employee shall be required to perform any act or work violative of the Constitution or By-Laws of this Union. The Union hereby represents that the provisions of this Agreement are not violative of said Constitution or By-Laws.

Finally, section 15 ("Adjustment of Disputes") provides for resolution of grievances, including "final and binding" arbitration by the "permanent" industry arbitrator. It also provides (sec. 15(h)) that:

Pending the final determination of any dispute, there shall be no strike or lockout, nor shall there be any change of working conditions or methods of operation as they existed prior to the dispute except as they may be otherwise permitted by this agreement.

2. Union bylaws: the union seniority rule

Article 3, section 4, of Local 702's bylaws provides that "it shall be mandatory for all members to obey and live up to the Union's Rules set forth in Article 26." Under article 26, section 1(b), a member may be fined, suspended, or expelled for various infractions, including "soliciting employment in laboratories under collective agreement with the Union, without the Union's consent." Article 2 provides that "union seniority" (i.e., length of local membership) rather than plant seniority shall govern unemployed members competing for jobs. This section (4(f) of that article states:

When one or more unemployed members are equally available and competent to fill a job, preference shall be given in the order of the Union seniority of said respective unemployed members, but in the event that one or more of said available unemployed members were inducted or the same date, then in that event preference shall be given to such of said unemployed available members, who had been unemployed for the longest period of time.

On September 25, 1970, the Union adopted a resolution applying its "union seniority" rule not only to unemployed, but to employed members, including those in a reverted status so that even those employees could not accept other positions (even these they held with their own employer prior to their reverstion) unless union seniority was followed. In effect, union seniority was made the controlling criterion for filling vacant jobs whether those jobs were being competed for by unemployed members of those presently employed in other classifications. According to Union President and Business Agent Vitello, the September rule was adopted "for the benefit of the old timers in the local," with the knowledge that it was contrary to the contractual "reversion clause" and in "conflict with the policies of Deluxe." It is clear, and I find, that at least to the extent that union seniority was made applicable to employees in a reverted status who sought to return to their former positions and could not do so because of their lower ranking as a member, the Union's...
resolution was contrary to the collective-bargaining agreement.

On March 11, 1971, the Union, upon advice of counsel, rescinded the September 1970 resolution. Since that date, Local 702 has not required members in a reverted status to abide by union seniority. However, the Union still takes the position that its members must comply with Article 27 of its bylaws, under which union seniority still is, and always has been, the rule with respect to members accepting new employment. According to Union President Vitello, "If an employer calls the Union, we will send out members according to Union seniority."

3. Past referral and hiring practices

The collective agreement, negotiated on a group basis, is substantially identical to those signed by 14 employers in the area. Union President Vitello estimated that normally about 50 percent of the Local's members (membership fluctuates around 2,000) are referred to new positions through the Union's hiring hall on the basis of union seniority. Industrial Relations Representative Slusser testified that the Company "has historically used the Union to obtain a trained source of employment," indicating, however, that it was "absolutely not" its sole source. General Counsel concedes that employers (including DeLuxe) are not required to hire exclusively through the Union and that the Union has operated a nonexclusive hiring hall.

According to Slusser, the Company generally fills vacancies with "reverted personnel," i.e., it returns a laid-off employee to the job or department where he formerly worked; or, if such employees are unavailable, it offers the vacant job to others in the plant (using a posted promotion list) or to former laid-off employees. "Familiar with the general operation of the plant," as a last resort, it requests new help from the Union or hires directly "from the street." Union President Vitello testified that, in accordance with the Union's bylaws, the Union always refers employees "as union seniority" in response to employer requests, and that its "opinion" employees can solicit their own jobs although "we would like them to go through the union." When referred to Article 26, section 1(I), forbidding members to solicit employment directly "without the Union's consent," Vitello indicated that he could not test as to the operation of that clause nor indicate the circumstances under which the Union would consent to direct solicitation.

4. The November 1970 layoffs and attempts to fill vacancies; the arbitration award

On November 9, 1970, DeLuxe laid off 50 employees for economic reasons. In view of the contractual rights of employees, in the event of a layoff, "to be reverted to the next lower classification in that department" and "of reverting to a position in his former department or classification" (Section 7 of the contract), the layoffs actually involved 100 to 150 "moves" in a sort of "musical chairs" or bumping action. In early December, four vacancies developed in the printing department, and Industrial Relations Representative Slusser offered the jobs to four employees (Mini, Zurenda, Marinelii, and Morgan) who had been reverted out of that department during the November layoff. Upon informing the union steward (Pizzuto) of this offer, the latter referred Slusser to Union President Vitello. Vitello told Slusser that the Union's recent (September 1970) resolution (supra, sec. A.2) on "union seniority" precluded the four employee-members from reverting back and that he would have to hire "the most senior unemployed." Local 702 members whether or not they were previously employed by DeLuxe, explaining at the hearing that the September union resolution was passed because of "a high degree of unemployment in the industry." When Slusser stated that he would then temporarily transfer the four into the printing department until "we could ... iron out the problem," Vitello objected, insisting again that the Company must hire the "senior unemployed people."

The next day, Slusser spoke with three of the four employees (Mini, Zurenda, and Morgan), advising them that they were being "temporarily transferred," but all three said they "could not take the temporary assignments" because "they had been instructed by [the] Union not to take it." At the hearing, the Union admitted the allegation in the complaint that Vitello "directed" all four employees to fill the reverted positions "not to accept transfers upward or reemployment ... and then warned them that failure to comply with such directive could result in disciplinary action.

Unable to fill the vacancies with "reverted" employees, Slusser subsequently (the next week) sought to rehire four other employees (Fiowanielli, Pioski, Cunningham, and Lawlar) who had been laid off or severed in the November layoffs. All four had worked in the printing department where the openings existed and were regarded by the Company as among its best and most senior employees. Advised of the Company's intention, Vitello said that he did not believe that all four were "senior people in the industry" and again insisted that the Company must hire on the basis of union seniority. Slusser demurred, explaining that he had "no intention to hire people from another lab when there were [satisfactory] people on the street who had worked at DeLuxe." He then contacted the four employees and all accepted the jobs, filled out applications and W-4 forms, and were scheduled to start work on particular days and shifts. However, the Union permitted only one of the four (Lawlar) to accept employment after learning that she had the requisite union seniority. The others were instructed by the Union not to work because they lacked union seniority. Vitello sent Cunningham a telegram directing him to report to the Union's office instead of to DeLuxe, warning him that "contractual right" to do so under sec. 13 of the collective agreement and on a directive issued by the permanent arbitrator in another case on October 8. That directive required employees to accept temporary transfers and provided that any union objections to such transfers must be handled through the grievance procedure.

In seeking to make the temporary transfers, Slusser relied on his
"Failure to comply [with the Union's order] will result in severe disciplinary action by the executive board."

While Cunningham and Pliski acceded to the Union's directives, Giovanelli (the fourth employee offered employment) did not. After several meetings with Vitello on the question of hiring, Slusscr on or about December 15 finally informed Vitello that Giovanelli would report to work. Vitello warned that if this takes place, "there will be no printing in DeLuxe laboratory . . . I'll pull the whole plant."

The question of the Company's right to hire Giovanelli was submitted for arbitration by the Union and Company, the latter referring to the Union's "threatened . . . mass stoppage and walkout" if Giovaneli were put back to work. In accordance with the Union's request, Giovaneli was not rehired pending determination of the dispute. After a hearing on the issue, the permanent arbitrator on December 28 issued his award, finding that the hiring of Giovaneli "is not and would not be violative of the Collective Agreement," thereby rejecting the Union's contention that the Company was required to hire on the basis of union seniority. The arbitrator also noted that there is "evidence that the Union committed two ad hoc and temporary violations" of his prior (December 14, 1970) award in another situation and that the Union here "threatened one additional violation." The arbitrator served notice on the Union that he expected his orders and awards "to be strictly followed."

5. The Union's disciplinary action against two member employees who returned to work in violation of the union seniority rule

Following the arbitration award, on January 4, 1971, Giovaneli and Tardalo, another laid-off employee, returned to work. On the same day, Union President Vitello filed identical "charges" against each alleging that they violated article 27 of the Union's bylaws (the union seniority rule) because they "went to work without regard to rights and seniority of fellow employees" and also article 26, section 1(f), of the bylaws (precluding job solicitation without union consent). Each was notified that "said charges will be read at our next membership meeting on Friday, January 8, 1971." Giovaneli and Tardalo were later tried and found guilty of violating both bylaws by Local 702's Executive Board on January 22, 1971, and expulsion from membership was recommended. On March 6, 1971, the membership acted on that recommendation and both employees were expelled from membership and their tender of dues returned. However, both continued to work at DeLuxe without further union request for their discharge.

B. Conclusions

1. The basic issues here presented concern: (1) validity of Respondent's "union seniority" rule and (2) application and enforcement of that rule by the Union through attempts to induce and force DeLuxe and Union members to abide by that rule. The rule in question (art. 27 of the Union's bylaws) provides that length of membership in the Union (as distinguished from length of employment in the plant or bargaining unit) governs unemployed members competing for jobs. By resolution adopted in September 1970, the rule was broadened to apply to all members including those employed in the plant, so that employee members were barred from accepting permanent return or temporary transfer to higher classifications from which they had been "reverted," except in "union seniority" order. In other words, union seniority was the controlling criterion for filling jobs both by applicants for new employment and members already employed.

2. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7. Under Section 7 employees are guaranteed the right to form, join, or assist labor organizations, and "the right to refrain from any or all such activities." However, the proviso to Section 8(b)(1)(A) preserves the right of a union "to prescribe its own rules with respect to acquisition or retention of membership therein." Applying those provisions, the Supreme Court has held that the language and legislative history of Section 8(b)(1)(A) made it plain that Congress "left internal union affairs to union self-government" and that the section did not contemplate the regulation of internal union discipline, such as fines or expulsion from membership. N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 185 Accordingly it is not unlawful for a union to fine members for crossing a picket line (Allis-Chalmers, supra) or to discipline employees for exceeding production ceilings (Local 283, United Automobile Workers (Wisconsin Motor Corp.). 145 N.L.R.B. 1097, 1099-04, affd. sub nom. Scorf and v. N.L.R.B., 394 U.S. 423. Standing alone, the union-seniority rule here involved appears to serve a legitimate union concern to spread employment among members and, in my view, is not unlawful. It is conceded that the collective agreement between Respondent and DeLuxe was not an exclusive referral contract and that the contract did not preclude employees from obtaining employment directly from the Employer. Accordingly, I reject General Counsel's and Charging Party's contention that the union seniority rule in itself constitutes illegimate exercise of union power and is in effect per se violative of the Act. Absent an exclusive hiring hall arrangement, a union may refer its members on the basis of length of union membership. See Frank Paulson, etc., International Association of Bridge, Structural and Ornamental Iron Workers, etc., (John F. Beasley Construction Company), 152 N.L.R.B. 1409, 1414.

3. However, as the Supreme Court pointed in Scorf and, supra, both legislative history and its prior Allis-Chalmers decision (supra) have "distinguished between internal and external enforcement of union rules." 394 U.S. at 428. Thus, while a "union rule duly adopted and not the
arbitrary that a union officer” is “enforceable against voluntary union members by expulsion or a reasonable fine” (ibid.), it is not enforceable so as to affect a member’s employment status. As stated in *Scoffield*, 394 U.S. at 428 429:

The Court in *Alis-Chalmers*, supra thus essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of Sections 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3). These forms set a web, of which Section 8(b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union’s rules. [Footnotes omitted.]

The Court (394 U.S. at 428, fn. 5) went on to affirm its earlier pronouncement in *Radio Officers’ Union v. V.L.R. R.*, 347 U.S. 17, 40, that “The policy of the Act is to insulate employees’ jobs from their organizational rights. Thus, Sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood.”

Here, the record shows that Respondent’s conduct was not confined to “internal enforcement” of its union seniority rule. It took repeated steps “to affect a member’s employment status.” (*Scoffield*, supra, 294 U.S. at 428). Not only did it threaten disciplinary action against employee-members if they accepted employment in contravention of its union seniority rule in “reverted” or new classifications, but it vigorously sought to force the Employer to apply the union’s internal rule in all hiring, i.e., it insisted that preference in all employment be conditioned on length of union membership. To bring home that this was not an idle threat, Union President Vitello threatened a mass work stoppage if the Employer hired Giovanni in breach of the union seniority rule. Furthermore, as presently shown, by seeking to force DeLuxe to abide by the sweeping union seniority rule (as promulgated in its September 1970 resolution) and by later preventing four “reverted” employees from accepting employment, Respondent effectively sought to impose unilateral terms and conditions of employment in violation of Section 8(b)(3) of the Act. Respondent was in effect seeking to require its members to accept its own breach of the collective agreement—action in itself contrary to public policy. See *Local 12419, etc., United Mine Workers of America (National Grinding Wheel Company, Inc.)*, 176 NLRB 628.

Under all the circumstances, I find that Respondent’s conduct in seeking to enforce its union seniority rule had its necessary and unlawful effect of encouraging union membership, in violation of Section 8(b)(1)(A) and (2) of the Act. Cf. *N.L.R.B. v. Brotherhood of Painters, Decorators

---

* In his brief, General Counsel advances various grounds, in addition to those relied on in this Decision, to justify findings of 8(b)(3) violations. Among these, for example, is the theory that Respondent’s conduct was “in derogation” of previously rendered arbitration awards. In view of the result reached, I find it unnecessary to consider General Counsel’s other theories.
three former employees (laid-off employees Giovanelli, Ploski, and Cunningham). All were offered employment directly by the Employer and all accepted the offers and were ready to report to work. While two of the three yielded to union pressure to abide by the rule, the third (Giovanelli) did not. On January 4, subsequent to the arbitrator's award upholding the Employer's contractual right to hire employees without regard to union seniority, Giovanelli and another employee (Tardalo) finally returned to work. The Union, however, continued to press its disciplinary charges against Giovanelli and also Tardalo for violating the union seniority rule and on January 22 the Union's Executive Board found them guilty (supra, sec. A. 5). On March 6, 1971, the Union expelled both employees from membership.

Having found that the union seniority rule, as enforced, was illegally imposed on the employees, that it was sought to be enforced through the employer as a condition of employment, and that its implementation was in breach of the subsisting collective agreement. I further find and conclude that the disciplinary action taken against Giovanelli and Tardalo for accepting the Employer's offer to work constituted "restraint and coercion" within the meaning of Section 8(b)(1)(A) of the Act. As in Local 1241, etc., United Mine Workers of America (National Grinding Wheel Company, Inc.), 176 N.L.R.B. 628, the penalty to compel conduct in violation of [the Union's contractual] obligation is also one where the immunity based on the internal character of the discipline is overcome by its offense to basic statutory policy. In National Grinding Wheel the union fired 16 members for crossing a sister union's lawful picket line. However, the governing collective agreement contained a no-strike clause and, accordingly, the fines were held to be penalties for members' refusal to participate in work stoppages forbidden by the collective agreement. The Board adopted the reasoning of its colleague, Trial Examiner A. Norman Somers that—

The policy in this case concerns the adherence to the terms of a contract between representatives of employers and employees and the condemnation of their violation. This is indeed implicit in the preamble of the Act from its inception (Sec. 1) and in the reports of both houses of Congress . . . To hold that a union, despite the prohibition in Section 8(b)(1)(A) against restraining or coercing of employees in their rights under Section 7 could nevertheless with impunity penalize members for failing or refusing to participate in a violation of a no-strike clause is to provide an incentive to unions and members to violate contracts. This too runs counter to a basic policy of the statute. Accord: Glaziers Local Union No. 1162, etc. (Tacco Glass, Inc.), 177 N.L.R.B. 593. 12

6. Respondent's basic defenses, as stated in its letter memorandum to the Trial Examiner are: (a) that "if there was any violation of the Act . . . it was cured both by the arbitration process" and the Union's compliance with the arbitrator's award; and (b) that "in any event, the conduct complained of and set forth in the complaint" was of short duration and "de minimis." The shortcomings to Respondent's second contention is that the conduct alleged and found to be violative is substantial and significant, requiring remedial action. Thus, the record establishes that Respondent's insistence that Deluxe do all its hiring on the basis of its union seniority rule made it impossible for the Employer to fill vacancies practically for the entire month of December. Moreover, Respondent did not rescind its September 1970 resolution broadening the scope of the union seniority rule to employed members (for "reversions" and transfers to higher classifications) until March 1972. Respondent continued to press its disciplinary charges against two employees (Giovanelli and Tardalo) long after December 1970, culminating in their expulsion in March 1971, despite the fact that the December 28 arbitral award upheld the Employer's position that it could properly hire the two employees without regard to the union seniority rule. As to Respondent's contention that its violations were "cured" by the arbitral process and its compliance with the arbitrator's award—thereby rendering unnecessary and superfluous the instant unfair labor practice proceeding—Respondent relies on the Board's recent Collier case. 13 To begin with, Collier is here inapplicable. There, the Board dismissed the complaint proceeding because of the supposed availability of grievance-arbitration procedures under the parties' collective agreement, reserving unto itself, however, jurisdiction over the proceeding in the event that he "expected my orders and Awards to be strictly followed." 14 Certain contingencies. Unlike in Collier, we are here concerned not with deference to afforded full opportunity to litigate it. See Federal Tax Litig. 1968 N.L.R.B. 210, 216. In S.S. Koger Constr. Co. v. N.L.R.B., 410 F.2d 1225 (5th Cir.), 60 Accordingly no findings are based on this point. The same is true with respect to General Counsel's contention that Respondent's refusal to handle process grievances for nonmembers (and expelled members) is violative of Sec. 8(b)(1)(A). Admittedly, the complaint made no such allegation. While Respondent's witness, Vitello, "admitted" that the Union would not represent employees "expressed for membership," I am not prepared to find, on the basis of the testimonies of this single witness on cross-examination, that Respondent, as the exclusive representative of Deluxe's employees, would fail to fulfill its statutory duty to represent all employees (including nonmembers) absent advance notice to Respondent that it would have to meet such issues. Nor am I aware of any showing that Respondent ever refused to represent nonmembers within the bargaining unit. Under the circumstances, General Counsel's application in his brief (p. 260) at this late date to "amend the complaint to conform to the petition with respect to this issue" is denied.


13 For like reasons I would not recommend that the Board defer to
arbitration where arbitration proceedings are available. Here the parties submitted their basic dispute (applicability of the union seniority rule) to arbitration. Moreover, Respondent did not raise arbitration as a defense in its answer to the complaint, did not seriously press it at the hearing, and voluntarily elected to litigate the matters in issue in the unfair labor practice proceeding. Finally, the record here shows that Respondent has ignored prior arbitral awards, prompting the arbitrator in his latest (December 28) award to deplore two earlier violations and admonishing Respondent.

Accordingly, I conclude that Respondent's defenses are without merit and they are hereby rejected.

CONCLUSIONS OF LAW

1. By forcing DeLuxe to give priority in employment to employees with greatest length of membership, and by causing employees to reject DeLuxe's offers of employment unless they had such union seniority, Respondent committed unfair labor practices within the meaning of Section 8(b)(4) and (2)(B) of the Act.

2. By causing and attempting to cause DeLuxe not to rehire or transfer employees Mini, Zurenda, Marmell, and Morgan to higher classifications on the ground that they allegedly did not have sufficient union seniority, Respondent committed unfair labor practices within the meaning of Section 8(b)(4) and (1)(A) of the Act.

3. By similarly causing DeLuxe to deny employment to former employees Giovaneli, Polski, and Cunningham because they allegedly had insufficient union seniority, Respondent committed unfair labor practices within the meaning of Section 8(b)(4) and (1)(A) of the Act.

4. By unilaterally enforcing changes in terms and conditions of employment during the term of its collective agreement with DeLuxe, Respondent committed unfair labor practices within the meaning of Section 8(b)(3) of the Act.

5. By disciplining and expelling Giovaneli and Tardalo from membership under the circumstances described supra, sec. B. 3, Respondent committed unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

6. Each of the aforesaid unfair labor practices affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. The affirmative action will include a requirement that the Respondent


justice and bargain collectively with DeLuxe concerning changes in terms and conditions of employment prior to effecting such changes; that it revoke its disciplinary action (expulsion) against employees Giovaneli and Tardalo and restore to each of them union membership with full union seniority rights; and that it make whole the employees named in the complaint for any loss of earnings suffered by them by reason of the discrimination against them. 15

Backpay shall be computed in accordance with the formula set forth in F. W. Woolworth Co., 90 NLRB 389, with interest as described in Isis Plumbing & Heating Co., 138 NLRB 176.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER 16

Respondent Motion Picture Laboratory Technicians, Local 702, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Enforcing, implementing, and giving effect to its union seniority rule, as set forth in article 27 of its bylaws, by forcing DeLuxe General Incorporated, to give priority in employment to employees with greatest length of membership and by causing employees to reject DeLuxe's offers of employment unless they have requisite union seniority.

(b) Causing or attempting to cause DeLuxe to discriminate in the hire, transfer, and upgrading of employees in violation of Section 8(a)(3) of the Act.

(c) Unilaterally, and without notice or consultation with the above-named employer, effecting changes in terms and conditions of employment.

(d) Disciplining, including expelling employees from membership, for accepting offers of employment in accordance with practices and procedures sanctioned by its collective agreement with DeLuxe.

(e) In any other manner restraining or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employees listed below for any loss of pay they may have suffered because of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy":

<table>
<thead>
<tr>
<th>Name</th>
<th>Union Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mini</td>
<td>Mike Marmell</td>
</tr>
<tr>
<td>Zurenda</td>
<td>John Cunningham</td>
</tr>
<tr>
<td>Polski</td>
<td>Chitt Morgan</td>
</tr>
<tr>
<td>Giovaneli</td>
<td>Frank Giovaneli</td>
</tr>
<tr>
<td>Tardalo</td>
<td></td>
</tr>
</tbody>
</table>

15 In each case, the comments of the arbitrator, supra, sec. B. 3, which was not included in the record, are similarly directed to the Respondent.

16 In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

**Note:** The text contains a mix of complex legal and technical terms, typical of a legal document. It pertains to unfair labor practices and the legal actions to be taken by a labor union to ensure compliance with the National Labor Relations Act.
(b) Upon request, bargain collectively in good faith with DeLuxe prior to effecting changes in terms and conditions of employment.

(c) Rescind its expulsion of employees John Cunningham and Gloria Tardalo from union membership; restore the said employees to membership with full union seniority rights; expunge from its records all reference and other evidence in its files relating to the disciplinary actions against them; and notify each in writing of all such actions.

(d) Notify, in writing, Respondent's International to which the two above-named employees have appealed their expulsion, of the aforesaid actions, with a copy of such writing to the two employees.

(e) Upon request, make available to the Board or its agents, for examination or copying, all records relevant and necessary to compliance with above paragraph (a).

(f) Post at its business office and meeting halls, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Furnish the Regional Director for Region 2 signed copies of said notices for posting by DeLuxe General, Incorporated, if willing, in places where notices to employees are customarily posted. Copies of said notices, on forms provided by said Regional Director, shall, after being signed by Respondent, be forthwith returned to the Regional Director for disposition by him.

(h) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

It is further ordered that the complaint be dismissed in all other respects.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

To all members of Motion Picture Laboratory Technicians, Local 702, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL CIO:

Pursuant to the recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policy of the National Labor Relations Act, as amended, we hereby notify you that:

We will not enforce, implement, and give effect to our union seniority rule (as set forth in art. 27 of our bylaws) by forcing DeLuxe General, Incorporated, to give priority in employment to employees with greatest length of membership and by causing employees to reject DeLuxe's offers of employment unless they had requisite union seniority.

We will not cause, or attempt to cause, DeLuxe to discriminate in the hire, transfer, and upgrading of employees in violation of Section 8(a)(3) of the National Labor Relations Act.

We will not unilaterally, and without notice or consultation with the above-named Employer, effect changes in terms and conditions of employment.

We will not discipline, including expulsion from membership, members accepting employment in accordance with procedures sanctioned by our agreement with DeLuxe.

We will make whole the employees listed below for any earnings they may have lost as the result of our objections to their transfer, upgrading or hire, because of enforcement of our union seniority rule in December 1970.

Terry Mint
Ceil Zurenda
Mike Marinelh
Chlff Morgan

Frank Giovanelli
Rose Ploski
John Cunningham

We will, upon request, bargain collectively in good faith with DeLuxe prior to effecting changes in terms and conditions of employment.

We will rescind our order expelling Frank Giovannelli and Gloria Tardalo from union membership and restore to said employees full union seniority rights.

MOTION PICTURE LABORATORY TECHNICIANS LOCAL 702 INTERNATIONAL ALLIANCE OF THEATRICAL STATE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA AFL CIO (LABOR ORGANIZATION)

Dated By

(Representative) (Title)
This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-3311.
PERMANENT ARBITRATOR, FILM LABORATORIES INDUSTRY

In the Matter of the Arbitration between

Guffanti Film Laboratory

and

Local 702 Motion Picture Laboratory Film Technicians, I.A.T.S.E., AFL-CIO

The Company contends that due to an error Ernest LaBracca and James Haviland were overpaid in wages. The Company seeks recoupment.

In the case of LaBracca the Company seeks the right to recover the overpayment by making deductions from his wages. In the case of Haviland the Company deducted what it claims he owes from his severance pay upon his recent retirement. The Company seeks affirmation of the right to have done so.

Factually the LaBracca case is on all fours with the facts in Case No. 69-A 27, Local 702, Motion Picture Film Technicians and Movielab, Inc. Hence my Award in that case, namely that the Company is entitled to repayment by the employee of the amount of wages overpaid him, is applicable to the instant case.

However, in the instant case, unlike its position in Movielab the Union advanced the defense among others, that Section 193 of the Labor Law of the State of New York allows only certain specified deductions from an employee's wages. And that deductions for overpayment of wages is not among them. The Union argues that Section 193 thereby bars the Company from making deductions from Mr. LaBracca's wages to liquidate the amount of overpayment.
I need not interpret Section 193 of the Labor Law, because I am satisfied that repayment to the Company can be achieved without the Company unilaterally making deductions from Mr. LaBracca's wages. I rule that Mr. LaBracca's proper rate of pay was as a Shipper (c). I do not find that he was either classified as or performed the duties of Head Shipper (d), nor, because he was not a Shipper, Checker and Packer (b) was he entitled to a 5% wage increase for "foreign shipments." I find accordingly that he was overpaid by the Company in the amount of $778.70. He owes that total amount of money to the Company. The Company shall not unilaterally make deductions from his wages. Instead I direct that he and/or the Union on his behalf arrange with the Company a mutually agreeable method of repayment together with the other considerations to which I made reference in my Movielab Award. However if the parties are unable to agree upon a method of repayment within twenty days from the date of this Award, the matter may be referred back to me for determination as to how repayment is to be made.

The Haviland case is different. Based on the evidence before me I am persuaded that Mr. Haviland had reasonable grounds to believe that the work he performed, namely "Jiffy Tests," were "Reprints" and higher classified work. And that after performing that particular work for the requisite contractual period of time, he had reasonable grounds to apply for a permanent upward reclassification.

Mr. Haviland was told by his steward that Jiffy Tests entitled him to a (c) Positive Joining Department rate. For thirteen weeks he performed that work and noted it as "reprint"
on his card. He was paid at the higher rate without the Company questioning it. Thereafter, consistent with the contract, he applied for and was reclassified upward to the (c) rate, again without question, refutation or inquiry by the Company, and was paid at the higher rate for almost two years up to his retirement.

To my mind this is persuasive evidence of the reasonableness of Mr. Haviland's belief that he was properly paid the higher rate for the Jiffy Test work and was entitled to a permanent upward adjustment in his wage rate. Whether he was correct in fact is immaterial. For it seems to me that after the first thirteen weeks, at the point that he was officially reclassified upward, or within a reasonable time thereafter the Company had the opportunity and should have protested or eliminated the higher payment or at least looked into the bona fides of the upward reclassification it made. That it did not means to my mind that the disputed work was higher rated, or if not, by failing to take steps to correct the wage payment for such an extended period of time it acquiesced in Mr. Haviland's reasonable belief that he was being properly paid.

Accordingly the Company did not have the right to deduct $345.70 from Mr. Haviland's severance pay upon retirement. The Company is directed to return to Mr. Haviland that sum of money.

The Undersigned as Permanent Arbitrator under the Collective Agreement between the above parties and having duly heard the proofs and allegations of the parties, makes the following AWARD:
Ernest LaBracca owes the Company a total of $778.70 in overpayment of wages. He and/or the Union on his behalf and the Company shall work out a mutually agreeable method of repayment together with the details of any tax effect. Failing to do so within twenty days from the date of this Award, the matter may be referred back to me for determination of how repayment is to be made.

James Haviland was not overpaid in wages by the Company. Accordingly, the Company did not have the right to deduct $345.70 from his severance pay upon retirement. The Company shall return that sum of money to him.

The Arbitrator's fee shall be shared equally by the parties.

Eric J. Schmertz
Permanent Arbitrator

DATED: October 30, 1972
STATE OF New York )
COUNTY OF New York)

On this 30th day of October, 1972, 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. 72-A 6
Case No. 72-A 7
CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

---

OUTFACKTI FILM LABORATORIES INC.,
Plaintiff,

-against-

ERNEST LA BRACCA,
Defendant.

---

STIPULATION

Trial term,
Part 40,
111 Centre Street,

BEFORE:

HON. SHANLEY N. EGETH, Judge.

APPEARANCES:

Messrs. POLETI, FREIDIN FRASHER FELDMAN & GARTNER, Attorneys for Plaintiff,
777 Third Avenue,

By: EDWARD F. BEANE, ESQ., of Counsel.

ERNEST LA BRACCA, Pro Se,
Defendant,
643 46th Street,
Brooklyn, New York.

Stuart Fishman,
Official Court Reporter.
ERNEST LABRACCA, called as a witness on behalf of the defendant, having been duly sworn by the Court, testified as follows:

THE COURT: State your name.
THE WITNESS: Ernest LaBracca.
THE COURT: Where do you reside?
THE COURT: Put your stipulation on the record.

MR. BEANE: My name is Edward F. Beane. I am with the firm of Poletti, Freidin, Prashker, Feldman & Gartner appearing for the Plaintiff in this matter.

THE COURT: Sir, you have spoken to the lawyer for the Plaintiff in this matter?

MR. LABRACCA: Yes.

THE COURT: You have worked out a time payment plan with the attorney for the Plaintiff. Is that correct?

MR. LABRACCA: Yes, with a stipulation that if I miss a payment --

THE COURT: I am taking care of that.
STIPULATION

MR. LABRACCA: I am not working right now.

THE COURT: You have agreed to pay him a down payment?

MR. LABRACCA: No down payment.

MR. BEANE: Your Honor, if I may, Mr. Labracca is entitled to a $40.00 credit from Guffanti Film Laboratories. We are considering the $40.00 credit as a down payment.

THE COURT: Fine. You are giving him a credit of $40.00 towards the entire amount, as of now.

MR. BEANE: Yes.

THE COURT: When is the first payment to commence?

MR. LABRACCA: June 1st, your Honor.

THE COURT: How are they to be paid?

MR. LABRACCA: $10.00 per week.

THE COURT: Then you agree to pay $10.00 per week beginning June 1st.

MR. LABRACCA: Yes.

THE COURT: Each week you will give him $10.00 until this is paid off.
STIPULATION

Is that correct?

MR. LABRACCA: Yes.

THE COURT: In the event that there is a default in any of the weekly payments, which shall continue uncured for a period of three weeks following written notice of default to him, from you, by certified mail, return receipt requested, you may then docket a judgment for the unpaid balance crediting the monies paid on account. Is that correct?

MR. BEANE: That's correct.

THE COURT: That's your understanding?

MR. BEANE: Yes, your Honor.

THE COURT: You won't have to make a motion to get that docketed. You can submit an affidavit to the Clerk of the Court setting forth the circumstances of the default. Do you understand that?

MR. BEANE: Yes.

THE COURT: Is that your understanding?

MR. LABRACCA: Yes, sir.
STIPULATION

THE COURT: The matter is settled.

Certified to be a true and correct record of the within stipulation.

Stuart Fishman,
Official Court Reporter.
PERMANENT ARBITRATOR, FILM LABORATORIES INDUSTRY

In the Matter of the Arbitration
between
Cineffects Color Laboratory, Inc.

OPINION

and

Motion Picture Laboratory Technicians Local 702, I.A.T.S.E., AFL-CIO

AWARD

CASE #72Q2

The Undersigned as Permanent Arbitrator under the collective bargaining agreement between the above named parties; and having duly considered the evidence presented, renders the following Opinion and Award:

For at least the last five years under the terms and conditions of the collective bargaining agreement, and with the knowledge of and without objection from the Union, bargaining unit maintenance mechanics have been periodically and regularly assigned to and have performed certain work in the "Optical Section". As to that particular work (the disputed work herein) this consistent practice, over an extended period of time during which successive collective agreements were negotiated, pierced and eliminated any "corporate veil" between the Company and the Cineffects, Inc. (a sister corporation at the same location) and effectively classified the disputed work performed by the maintenance mechanics at the Cineffects, Inc. or Optical Section location as bargaining unit work under the collective agreement between the Company and Union even though Cineffects, Inc. as a corporate entity is a not a signatory to the contract.

Accordingly I render the following AWARD:

1. The maintenance mechanics have no right to refuse to accept or to refuse to perform, and the Union has no right to direct them to refuse assignments of work which maintenance mechanics have previously performed in the Optical Section.
2. When so assigned during the life of the collective bargaining agreement and under its terms and conditions, the maintenance mechanics shall continue to perform that particular work.

3. If the Union's notice directing employees not to perform the work is still posted the Union shall remove that notice forthwith. If the Union does not do so, the Company may remove the notice.

4. The Arbitrator's fee and expenses shall be borne by the Union.

DATED: February 12th, 1973
STATE OF New York )ss:
COUNTY OF New York)

On this 12th day of February, 1973, 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.

MAURICE L. SCHOFIELD
MAGISTRATE, STATE OF NEW YORK
No. 30-80377
Qualifies in Kings County
Term Expires March 30, 1974
PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORIES INDUSTRY

In the Matter of the Arbitration
between

Motion Picture Laboratory Film Technicians, Local 702, IATSE AFL-CIO

and

Movielab, Inc.

Award
Case No. 72A10

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 Employer has violated the contract by requiring a single employee to run both the Total Vision Step Printer and the Hollywood Printer in the 8mm Department. The Employer shall no longer require a single operator to run both machines.

The Arbitrator's fee shall be borne by the Employer.

Eric J. Schmertz
Permanent Arbitrator

DATED: March 26, 1973
STATE OF New York )ss.:
COUNTY OF New York)

On this 26th day of March, 1973, 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

Motion Picture Laboratory Film Technicians, Local 702, IATSE AFL-CIO

and

Movielab, Inc.

The stipulated issue is:

Whether the Employer has violated the contract by requiring a single employee to run two machines in the 8mm Department, i.e. one Hollywood Printer, and one Total Vision Step Printer? If so what shall be the remedy?

Hearings were held on November 21 and November 27, 1972. Thereafter the parties submitted briefs.

The Union's principal argument is that the Employer violated Sections 17(d) and (b) of the contract. I find the Union's case to be meritorious.

The Total Vision Step Printer was placed in operation significantly earlier than the Hollywood Printer. Prior to the introduction of the Hollywood Printer, the operation of the Total Vision Step Printer was the sole and exclusive duty of the operator of that machine, and I find it to have been a "present method of (machine) operation" within the meaning of Section 17(b) of the contract.

Thereafter (perhaps two years later) the Employer introduced the Hollywood Printer, which I find to be a "new" machine within the meaning of Section 17(d) of the contract. The Employer concedes it did not notify the Union in writing when the Hollywood Printer was placed in production, as required by Section 17(d).
The application of Section 17(d), in the instant case with the introduction of the Hollywood Printer, expressly brings into play the provisions of Section 17(b). Obviously the Employer should not benefit by relying on his failure to give notice under 17(d) to avoid the express interrelationship of Sections 17(d) and 17(b).

When the operator of the Total Vision Step Printer was also assigned the additional job of operating the subsequently introduced Hollywood Printer, a change in "operations from a single to a dual operation of machines, so that one operator may operate two machines" took place. That language of Section 17(b) makes no distinction as to which types of machines, when operated by a single operator, constitute a "dual operation;" Therefore I am persuaded that the phrase "dual operation" is not limited to the operation of two of the same type machines. Instead I am satisfied it encompasses the assignment to a single operator, of the responsibility of running two machines whether those machines are the same or different types. Hence when the operator of the Total Vision Step Printer, also required to run the Hollywood Printer, a "dual operation of machines" by one operator was effectuated within the meaning of Section 17(b).

Section 17(b) allows for a change from a single to a dual operation of machines "provided such dual operation is presently or may hereafter be in existence in a laboratory operating under a collective agreement with the Union." Testimony offered by the Union that a dual operation of the Total Vision Step Printer and the Hollywood Printer neither existed in any laboratory cov-
ered by the contract when the contract was negotiated nor sub-
sequently, was not disputed by the Employer. Accordingly the
condition under which the Employer is allowed to unilaterally
effectuate this type of dual operation of machines was not and
has not been met.

Therefore the Employer is directed to discontinue the dual
operation by a single operator of the Total Vision Step Printer
and Hollywood Printer. The Operator shall no longer be requir-
ed to run both machines.

Eric J. Schmertz
Permanent Arbitrator
PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORY
INDUSTRY

In the Matter of the Arbitration
between
Cinneffects Color Laboratories
and
Motion Picture Laboratory Film
Technicians, Local 702 IATSE

The Undersigned as Permanent Arbitrator under the Collective
Bargaining Agreement between the above named parties and
having duly heard the proofs and allegations of said parties,
makes the following AWARD:

The time limit for rendition of the Award as set forth
in Section 15(b) of the contract was waived.

There is just cause for the discharge of Dennis Torres.

In accordance with Section 15(f) of the contract,
which provides that the fee and expenses of the
Arbitrator shall be paid by the losing party, the
Arbitrator's fee and expenses in the amount of
$2000. shall be borne by the Union. To expedite pay-
ment thereof (which the Arbitrator believes he has the
right to expect) said sum shall be paid to the Arbi-
trator by the Company, and the Union shall reimburse
the Company in that amount.

DATED: April 16, 1973
STATE OF New York } ss.
COUNTY OF New York)

On this 16th day of April, 1973, 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 in-
strument and he acknowledged to me that he executed the same.

Case No. 73A1

Eric J. Schmertz
Permanent Arbitrator
The stipulated issue is:

Whether the Company violated the Collective Bargaining Agreement in failing to make proper wage payments to Orlando Temple? If so what shall be the remedy?

A hearing was held on July 17, 1973 at which time Mr. Temple, hereinafter referred to as "the grievant" and representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath and the contract time limit for rendition of the Award were expressly waived.

The grievance is denied. I find that the disputed 25 cents and hour attached to certain work performed within the Expediter classification, and that the grievant first received that additional sum when and because he performed "CBS" expediting in that classification.

Based on the record before me I find that the grievant agreed to assume the Expediter classification in January, 1967 provided he continued to receive his higher Negative B rate of pay plus a shift differential. The 25 cents in addition thereto was not part of his pay when he was a Negative B worker but was added to the rate he carried over from that classification when he commenced work as an Expediter, because it was expressly and
uniquely applicable to the work of the latter classification and "authorized by CBS." Therefore I consider it immaterial, whether as a payroll error as contended by the Company, or otherwise, that he retained the 25 cents an hour after he returned to the Negative B classification in September, 1967 and for an extended period of time thereafter. The fact is that inasmuch as the additional 25 cents attached to and was paid for certain Expediter work, he acquired no contract right to that additional pay when, as now, he is no longer in the Expediter classification. Though the Company may not recoup any such payments during the period he worked as a Negative B worker following his word as an Expediter, it is not now required to continue such payments from May 18, 1970 when he resumed the Negative B classification following a period of time as a Printer No. 3.

Whether he would again be entitled to the additional 25 cents if and when he is reclassified as an Expediter is not presently before me and therefore need not be decided until and unless that situation occurs.

The Arbitrator's fee and expenses totalling $210 (representing one half-day hearing, one-half day for preparation of this Award, and room rental at the American Arbitration Association) shall be borne by the Union.

DATED: August 3, 1973
STATE OF New York
COUNTY OF New York

On this first day of August, 1973, 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 702 IATSE and
Movielab, Inc.

The stipulated issue is:
Was there just cause for the discharge of Louis Chiocco? If not, what shall be the remedy?

Hearings were duly held. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath and the time for rendition of the Award were waived.

I find Mr. Chiocco, hereinafter referred to as the "grievant," to have been negligent in two respects. First, considering his many years of service and experience as a Developer, he should have been able to make an adequate hand splice even while the machine was running. Second, I am persuaded that he should have known that a "flash test" was running through the Developing machine at that time and should have stopped the machine to make the splice. He should have known that the safer procedure would have been to stop the machine to insure making a satisfactory splice, in order not to endanger the original negative which followed. His failure on either or both counts resulted in irreparable damage to the original negative.

However, considering the grievant's long period of em-
ployment and the fact that only recently has he experienced
difficulty with his work resulting in two warnings prior to
the instant incident, I conclude that the penalty of discharge
is too severe. Rather I shall fashion what I consider to be
a proper remedy as set forth below.

Accordingly the Undersigned as Permanent Arbitrator under
the Collective Bargaining Agreement between the above named
parties, and having duly heard the proofs and allegations of
said parties, makes the following Award:

Louis Chiocco shall be restored to work without
back pay, but with his seniority intact. He shall
not return to an original negative Developer's job.
Rather the Company shall place him on a different
Developing job of its choosing, even if a reduc-
tion in pay is necessary. Following six months
of satisfactory service in the job in which he is
placed, Mr. Chiocco shall be permitted to exercise
his seniority to return to an original negative
Developer's job.

The Arbitrator's fee for three days of hearing and
one day for study and preparation of the Award and
Opinion shall be shared equally by the parties.

DATED: November 19, 1973
STATE OF New York )ss.:
COUNTY OF New York)

On this 19th day of November, 1973, 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.
In The Matter of The Arbitration between

Motion Picture Laboratory Film Technicians, Local 702 I.A.T.S.E.

and

Cineffects Color Laboratory

The stipulated issue is:

Whether the Employer has violated the collective bargaining agreement in failing to make proper wage payments to Joseph Linton, and if so, what shall the remedy be?

Hearings were held on February 18, March 6 and April 8, 1975 at which time Mr. Linton, hereinafter referred to as the "grievant" and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived.

Based on the record before me I am not persuaded that the grievant is performing duties beyond his job classification of can carrier to the extent that would warrant an increase in pay or reclassification to vault man or expediter.

There are no formal descriptions of the jobs covered by the collective bargaining agreement. The evidence advanced by the grievant and the Union on his behalf is inadequate to conclude that his duties in connection with carrying cans containing negative film; the delivery of such cans to the vault room and
placement on racks therein; or their delivery to printing or
other departments are outside the can carrier classification
or significantly different from what is done by can carriers
paid at the can carrier rate at other laboratories covered by
this collective bargaining agreement. Moreover it is undisputed
that these duties about which the grievant complains have been
part of his job assignment, and have not changed, since he was
first employed by this Employer in September, 1971.

While there is some evidence that some of these duties
may on occasion be similar to a segment of what a vault man or
expediter does, I am not satisfied that the grievant performs
that type of work either in quantity or with frequency that
would be necessary for an upward reclassification or an increase
in pay.

Therefore the claim for pay at the vault man or expediter
rate, or reclassification to either of those jobs, is denied.

However in the course of the hearing it was disclosed
that the grievant may not be receiving an extra five cents an
hour to which he is entitled for handling raw stock. The Employer
and the Union shall look further into this matter, and if as it
appears, the grievant should have been receiving four dollars an
hour instead of three dollars and ninety five cents an hour, the
employer shall make him whole retroactively as is appropriate.
The Arbitrator's fee shall be shared equally by the Union and the Employer.

DATED: April 10, 1975
STATE OF New York
COUNTY OF New York

On this tenth day of April, 1975, 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.

[Signature]

MARGA H. STEINWALD
Notary Public, State of New York
No. 24-450476
Qualified in Kings County
Commission Expires March 30, 1976
The stipulated issue is:

Whether the Employer paid employees on vacation commencing October 1, 1974 at the wrong rate under the contract? If so what shall be the remedy?

The Union withdrew with prejudice a grievance contending that the Employer violated the contract by not paying holiday pay, November 28th and November 29th, 1974 or birthday pay to those employees on vacation at that time.

Employees commencing vacations on and after October 1, 1974 were paid by the Employer at the rates of pay in effect and applicable to their job classification between the period May 1 through April 30, 1974. It is the Employer's position that the "vacation year" for purposes of calculating the proper vacation pay is period May 1 through April 30th of the year in which the vacation is taken, and that this has been his practice since June 27th, 1974 when the Union insisted on that interpretation of the contract in settling a grievance involving one George Flammer.

The Union's contention is simply that vacation pay is to be paid at the rate which the employee is earning at the time.
the vacation is taken. The instant dispute arises because on
and after October 1, 1974 the rates of pay of the affected
employees were higher than the pay rates they received during
the preceding period May 1 through April 30th. This case is
novel in that the positions of the parties herein are complete-
ly opposite the respective positions they took in the settlement
of the Flammer vacation pay grievance in June of 1974. At that
time the Union told the Employer that Flammer was entitled to
vacation pay at the May 1 through April 30th rate, which was a
higher rate because it included a shift differential than his
pay rate when he went on vacation. (He had changed shifts in
the interim and the shift differential was not longer applicable)
Prior to that grievance the Employer had followed the practice
of paying vacations at the rate an employee received when he
took his vacation. But, on the Union's insistence, the Employer
agreed to pay Flammer at his higher May 1 to April 30th rate.
The Employer confirmed the Flammer settlement in a letter dated
June 27, 1974 and took the opportunity therein to further in-
form the Union that henceforth it would pay vacation pay "based
on (the) classification rate of pay....that is in effect during
the May to May period plus shift premium....to conform with
your request." In short whereas the Union now seeks vacation
pay at an employee's rate when the vacation is taken, it sought
a different application for Flammer in 1974; and whereas the
Employer prior to June, 1974 followed the practice sought by
the Union in this arbitration, now argues that the Flammer settlement is binding and constitutes a jointly agreed to interpretation of the vacation pay section of the contract.

In further arguing its case the Employer suggests that by virtue of the Union's position in the Flammer matter, as a consequence of the Flammer settlement and the Employer's letter of June 27, 1974 advising as to how the vacation pay provision would thereafter be applied, the Union has "hoisted itself on its own petard" and is now estopped from seeking a new and different contract interpretation.

As the parties well know the Arbitrator is bound to the language of the contract, where that language is clear. Any prior bi-laterally negotiated grievance settlement or even a prior practice contrary to the clear contract language, is immaterial to how the contract is to be interpreted now. I find that to be the situation here. The Flammer case was a grievance settlement at variance from otherwise clear contract terms. The Employer suggests that it was more than simply a grievance settlement, but a bi-laterally agreed to interpretation of the vacation provision of the contract prospectively, or in other words a negotiated contract change. I do not agree. As I see it the Union sought vacation pay for Flammer at the May to April 30th rate because it was a higher rate of pay than he was earning when he went on vacation. The Arbitrator did not participate in that grievance settlement. The Employer was not
required to accept or accede to the Union's interpretation of the contract at that time. It could have continued its practice of paying for vacations at the rate the employee earned when he took his vacation, and had the Employer done so this Arbitrator would have upheld its position had the matter been grieved and submitted to arbitration. If the Union "hoisted itself on its own petard", so did the Employer, by agreeing to a method for the payment of vacation pay that differed from the clear contract language when it was not required to do so. Therefore I view the Flammer grievance as nothing more than the settlement of a single dispute, by mutual agreement and on terms different from the wording and intent of the contract. Nor, contrary to the Employer's position can its June 27, 1974 letter be construed prospectively as a bi-laterally negotiated or agreed to contract interpretation or modification. Though the Employer notified the Union that henceforth it would apply the vacation pay provisions of the contract as the Union had requested in the Flammer matter, that statement by the Employer was not affirmatively accepted by the Union. The Employer argues that because the Union did not respond to that letter or dispute or reject the Employer's notification of how he intended to apply the vacation pay provisions of the contract in the future, it constituted agreement to that new approach. If the contract language was unclear or ambiguous I would agree with the Employer's argument in that regard. But otherwise the Employer's expansion of the Flammer grievance settlement to
Include a different vacation pay formula prospectively for all employees was only unilateral and self-serving, and could not go beyond the Flammer case to either a binding interpretation of the contract or a modification thereof unless there was positive and affirmative agreement by the Union. In this case the Union's silence cannot be so construed.

Obviously the foregoing hinges on the foundational premise that the contract language is clear and unambiguous. I am satisfied that it is. Section 6(b) provides in pertinent part that:

"Vacation pay shall be at an employee's regular rate of pay including shift premium."

Nowhere in Section 6 is there a provision calculating vacation pay at an employee's rate between May 1 and April 30th of the vacation year. Had the parties intended to measure vacation pay by the rate paid during that period they could have easily so provided somewhere in Section 6. But they did not.

Nor can I read the Employer's interpretation within the provisions of 6(d) of the contract. That Section deals with specific circumstances; for example, the rate of vacation pay when an employee has worked in different classifications during the year and has accumulated 130 or more days in the higher classification. In that specific and limited instance Section 6(d) grants him vacation pay at the higher classified rate. And in similar limited fashion 6(d) provides an apportionment
in vacation pay between the higher rate and a lower classified rate when an employee works more than 65 but less than 130 days in the higher rated classification. But 6(d) does not provide for the payment of vacation pay generally, at the rate an employee earned between May 1 and April 30th, and to read that into the otherwise specific and narrow provisions of Section (d) is to do by gross indirection what the parties could and should have done clearly and directly had they intended the first sentence of Section (b) ("vacation pay shall be at an employee's regular rate of pay ...") to mean not his rate when he took his vacation but a different and earlier rate during the period May 1 to April 30th. Indeed among the possible interpretations of 6(d) is that it represents an explicit and limited exception to the otherwise applicable rule that an employee receives vacation pay at the rate he is earning at the time he takes his vacation. For example, if when he takes his vacation an employee is classified in a lower rated job, but during the vacation year ending April 30th he worked 130 or more days in a higher classification, then, as an exception, he would receive vacation pay at the higher classified rate. In that particular event, if an employee would not otherwise get vacation pay at this rate at the time he went on vacation, this exception would be unnecessary. I cite this example not to suggest that 6(d) supports the Union's case herein, but rather that it can cut both ways and therefore, neither by language nor intent does it provide an answer to the instant dispute. It covers a different problem and does
not change the first sentence of 6(b).

Consequently, therefore, the first sentence of 6(b) remains clear, and subject only to one logical interpretation. It means what it says, namely that an employee's vacation pay shall be his regular rate of pay including shift premium.

An employee's regular rate of pay, for vacation purposes, must be the rate he is earning when he takes his vacation. Absent any other definition, explanation or relevant modification, no other interpretation is realistic. And I have found no other modifications, definitions or explanations in the contract or by virtue of the settlement of the Flammer matter.

Accordingly the Union's grievance is granted.

The Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above named parties and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The Employer paid employees on vacation commencing October 1, 1974 at the wrong rate under the contract. The Employer should have paid the employees vacation pay at the regular rates of pay including shift premium which they were earning at the time they commenced their vacations. The Employer shall make appropriate pay adjustments.

The arbitrator's fee shall be shared equally.

Eric J. Schmertz
Permanent Arbitrator
DATED: December 26, 1975
STATE OF New York, ss.: COUNTY OF New York

On this twenty sixth day of December, 1975, 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.

[Signature]

MARSHA L. STEINHARDT
Notary Public, State of New York
No. 34-410976
Qualified in Kings County
Commission Expires March 30, 1977
Permanently Arbitrator, Film Laboratory Industry

In The Matter of The Arbitration:

between

Local 702, I.A.T.S.E.

and

Radiant Laboratory, Inc.

The stipulated issue is:

Was there just cause for the discharge of Shale Dworan? If not what shall be the remedy?

Hearings were held on March 31, April 5, April 8 and April 14, 1976, at which time Mr. Dworan, hereinafter referred to as the "grievant", and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath and the contractual time limit for rendition of the Arbitrator's Award were waived.

The grievant is charged with negligently causing scratches on a negative film. The Company asserts that this offense, coupled with the grievant's prior disciplinary record which includes other errors and infractions, warrants his dismissal. Obviously, for the discharge to be upheld, the last offense must be proved.

This is a discharge case with the burden on the Company to show, to the Arbitrator's satisfaction, that the grievant was at fault, causing the damage to the negative film. The standard of proof required in such matters is well settled though variously defined as "clear and convincing", or "by a preponderance of the
credible evidence", or by "substantial evidence." In my view all of these standards have the same requisites, namely that the quantum and quality of the proof advanced and adduced by the Company must be sufficiently probative and persuasive as to satisfy the Arbitrator that the grievant committed the act charged. At least, in connection with offenses, as here, which do not parallel a criminal charge (in which event this Arbitrator tends to hold an employer to a higher standard but less than "beyond a reasonable doubt") there should be a showing of "compelling probability" that the employee involved was at fault or committed the offense charged.

Therefore only to the extent that the standards of proof in bailment or tort cases coincide with the foregoing, are those standards applicable to a discharge case. For it is noted that in bailment and tort actions a defendant is liable only for money damages if he has been negligent; whereas in the instant case the grievant faces discharge, a more serious penalty.

The Company's case falls short of the requisite standards, irrespective of which definition is applied. The Company has not proved, fully or even as a compelling probability that the grievant was negligent. It cannot show how the scratches occurred. It cannot point specifically to but rather speculates on what the grievant did wrong that caused the damage. The Company's case has not foreclosed the reasonable possibility that the scratches were due to machine malfunction or other operational factors beyond the grievant's knowledge or fault. This is not a
res ipsa loquitur situation. There are plausible explanations for the damage other than negligence on the part of the grievant. The mere fact that the film was in the grievant's possession does not make him automatically liable for the damage. He is not an absolute guarantor of the condition of the film. Rather, if damage occurs, some actual or compellingly probable proximate and causal relationship must be established between what the grievant did and the damage. That causal connection has not been shown.

The evidence on the grievant's alleged "admission against interest", namely the Company's assertion that he admitted to his foreman that he scratched the negative while taking it down, is offsetting and inconclusive. The foreman testified to that "admission", but the grievant vigorously denied it. While I find no reason in the record why the foreman would falsify what the grievant said, he may have been mistaken and there were no other witnesses to the conversation. One could conclude that the grievant inspected the negative after taking it down, not because that was his normal precautionary procedure, but rather as an exception to his normal routine because he had done something wrong, thought he may have done some damage to the film, and made the inspection to find out. But on the other hand, considering the grievant's prior record of errors and other infractions and that he knew that future mistakes or negligence would jeopardize his job, one could find it most doubtful for him to have voluntarily and on his own initiative notified the
foreman that the negative was scratched, if he was responsible for that damage. And under that circumstance, it would be equally doubtful that he would have acknowledged that he caused the damage.

In sum, I conclude that the evidence on what the grievant said to the foreman and its significance, is not sufficiently unequivocal to sustain the discharge. Or in other words, in the absence of adequate evidence showing where and how the grievant was negligent, his disputed statements to the foreman are simply not enough to justify the imposition of the ultimate penalty of discharge from the Company, and his probable loss of employment in this industry.

However the record does disclose a serious failure on the grievant's part which though not proved as the cause of damage, is a serious enough violation of operating procedures to foreclose a full remedy. The grievant ran his machine at a prohibited high speed when taking the negative down and when "piggy-backing" the second negative onto the first. Though as indicated a causal or contributory connection has not been made between the speed of the machine and the damage, a disciplinary suspension for that offense is manifestly warranted.

Based on the entire record before me, the Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above named parties makes the following AWARD:
The discharge of Shale Dworan is reduced to a disciplinary suspension. He shall be reinstated but without back pay, and the period of time between his discharge and his restoration to duty shall be deemed a disciplinary suspension. He should note that he has been given some benefit of the evidentiary doubt in this case, and therefore he is warned that future acts of negligence on his part, other violations or misconduct, would be grounds for his dismissal.

The Arbitrator's fee shall be borne equally by the parties.

DATED: May 10, 1976
STATE OF New York )ss: 
COUNTY OF New York)

On this tenth day of May, 1976 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.

MAURICE L. SCHOENWALD
NOTARY PUBLIC, STATE OF NEW YORK
No. 30 LS.19725
JURISDICTION IN ROCK COUNTY
Tenth Edition March 30, 1977
INTERIM OPINION

of the

Permanent Arbitrator

In the instant case the Union contends that the reference to "40 hours" in Article 29 (a) and 30 (a) of the Collective Bargaining Agreement includes overtime hours worked as well as straight time hours worked up to 40 hours worked in a week, for payment of Welfare and Pension contributions to Motion Picture Laboratory Technicians, Local 702 Pension Fund and Motion Picture Laboratory Technicians Local 702 Welfare Fund.

The Company does not dispute that contention. Therefore, in this proceeding, there is no issue before the Arbitrator over the interpretation of the foregoing contract provisions.

Pursuant to the foregoing, the Company has offered to make payments to said Funds retroactive to May 1, 1975, and thereafter.

The Undersigned, as Permanent Arbitrator, refers the foregoing Company offer to the Trustees of both Funds, and retains jurisdiction pending word of action by the Trustees.

October 12, 1976

Eric J. Schmertz
Permanent Arbitrator
In my Award dated December 18, 1969 between the above named parties I upheld the Union's grievance and directed that "the complement of the Gevachrome machine shall be three (3) men."

The question now posed is how the machine should be operated if it runs continuously through regular meal and break periods. The Union contends that the Company must obtain another operator to relieve any of the regular operators during meals or break periods to ensure a three-man complement at all times. The Company contends that for meals and break periods the assigned crew members should individually relieve each other, and that the machine may be run during those periods with only two operators present.

My Award of December 18, 1969 does not deal explicitly with the instant question, and the contract is silent on this particular problem.

The Union relies principally on "past practice", asserting that the practice has been for each member of the crew to be relieved for meals and break periods by an operator obtained from outside the crew, and that when the machine operated through those
periods, there were three operators present at all times. The Company disputes this "past practice", contending that until recently the machine was shut down during meal and break periods and that the dispute arose only recently when the Company decided to operate the machine continuously through meal and break periods as well as during regular operating hours.

The testimony on "past practice" is sharply conflicting, offsetting and hence indeterminative of the issue presented. The Union offered testimony that for some time the machine has been operated through meal and break periods and that a fourth operator was obtained from elsewhere to replace whichever member of the regular crew was at a meal or taking a break. On the other hand the Company offered equally probative testimony that the machine has been shut-down during meal and break periods; or that there was not enough work to run the machine through the meal period; or that occasionally if the machine ran through the meal and break periods the regular three man crew remained on and the Company paid overtime for work performed through those periods. Accordingly, based on the testimony in the record, I am unable to decide whether there was a consistent practice relevant to the issue before me, and therefore I am unable to direct, pursuant to Section 17(b), that the "present method of operation .... continue without change."

However I am persuaded that the issue may be resolved by a logical, and proper, albeit inferential interpretation of my Opinion accompanying the aforementioned Award of December 18, 196
together with a practice that is undisputed. In that case the Union sought manning comparability between the Gevachrome machine and developing machines #1, 2 and 3. In establishing manning comparability between the Gevachrome machine and developing machines #1, 2 and 3, I stated:

The Gevachrome machine is a color developing or processing machine with an attached applicator. It is undisputed by the Company that other color developing machines with applicators in the Laboratory, namely developing machines #1, #2 and #3, are run with a crew of three when one strand is developed and with a crew of five for two strands. The testimony of Messrs. Vitello and Kaufman, of the Union and Company respectively, coincide on one crucial point, and that is that by agreement between the parties, color developing machines with applicators are and have been run with a crew of no less than three men.

As I see it the question before me is whether this latter referred to agreement applies to the Gevachrome machine, on which the applicator is utilized only infrequently. I conclude that it does. (Emphasis added).

In other words, in that Opinion, I determined that the manning of the Gevachrome machine should be the same as the manning on developing machines #1, #2 and #3. In the instant case, there is one past practice which is undisputed, and that is that developing machines #1, #2 and #3 operate through meal and break periods and the operators of developing machines #1, #2 and #3 relieve each other during those times, thereby reducing the complement on those machines by one member during those periods. The import and intent of my prior Award was to treat the Gevachrome machine and developing machines #1, 2 and 3
simply for purposes of manning. To grant the Union's grievance in the instant case would be to change that similarity by according the operators of the Gevachrome, and the Union on their behalf, a greater right or benefit than has been extended to the operators of developing machines #1, #2 and #3 by practice and under my prior Award. As indicated, I find no contractual or "past practice" basis to support a distinction between the way the Gevachrome machine is operated continuously during meal and break periods and the way machines #1, #2 and #3 are operated during similar periods. Therefore the similarity or "parity" of manning which was established by my Award of December 18, 1969 shall continue to obtain, and the manning of the Gevachrome machine during meal and break periods shall be handled in the same manner as has been done on developing machines #1, #2 and #3.

For the foregoing reasons, the Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD:

The Union's grievance is denied. When a member of the three-man complement of the Gevachrome machine takes a meal or break period, he shall be relieved during those periods by the remaining members of the crew. The Company is not obligated to obtain a replacement from another location.
The Arbitrator's fee shall be borne by the Union.

DATED: November 29, 1976
STATE OF New York ss.
COUNTY OF New York

On this twenty-ninth day of November, 1976 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.

Maurice L. Schenwald
Notary Public, State of New York
No. 30-6205725
Qualified in Nassau County
Term Expires March 30, 1977
June 8, 1976

Mr. Eric Schmertz
122 East 42nd Street
New York, New York

Re: Matter of Arbitration between Local 702 and DuArt Film Laboratory

Dear Mr. Schmertz:

The undersigned, as attorney for Motion Picture Laboratory Technicians Local 702 hereby demands arbitration against DuArt Film Laboratories regarding the following issue:

"Whether the employer is forcing employees to run the gevert developer at times and under circumstances which are improper and if so, what shall the remedy be?"

Would you be so kind as to schedule this matter for hearing at your earliest convenience.

Very truly yours,

Gerald Schilian

cc: Mr. C. W. Vitello
    DuArt Film Laboratories
PERMANENT ARBITRATOR, FILM LABORATORY INDUSTRY

In The Matter of The Arbitration:
between
Motion Picture Laboratory Technicians Local 702, IATSE

and
Radiant-Technicolor Laboratory

The stipulated issue is:

Whether the Employer has violated Article 16(e) of the Collective Bargaining Agreement between the parties in failing to pay the proper wages to working foremen and sub-foremen, and if so, what shall be the remedy?

A hearing was held at the offices of the Employer on September 28, 1974 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath and the contract time limit for rendition of the Award were waived. The Employer and Union filed post-hearing memoranda.

The pertinent part of Article 16(e) reads:

Working foremen and sub-foremen shall receive no less than 10 percent above the highest base rate in their respective departments.

This case really involves deciding the meaning of "base rate" in the foregoing Article. The Opinion and Award shall be addressed to that. The Employer contends that the base rate is the schedule of rates for each of the groups and job classifications set forth in Schedule A of the contract. The Union asserts
that the "base rate" is the actual compensation received.

For all purposes I do not find the position of either party to be correct. The term "base rate" is common in industrial relations and has a traditional meaning. It means the hourly rate which an employee receives or which attaches to his job classification, exclusive of such additional compensable items as premium pay, fringe benefits, shift differentials, and incentive earnings.

I find nothing in this contract which endows the terminology "base rate" with any different or special interpretation. I consider it irrelevant that employees receive overtime, holiday pay, vacation pay, sick pay, severance and bereavement pay calculated on their actual compensation rather than on the rates of pay set forth in Schedule A. For it should be noted, not only that these are additional items of compensation for each eligible employee and not a formula for differential between an employee and his foreman or sub-foreman, but that the contract provides for the payment of holiday and vacation pay at an employee's regular rate, and expressly provides for the inclusion of shift premium. The parties must have meant that there be a difference between regular pay and base rate, because they used two different terms. I am satisfied that the term regular pay means the actual compensation an employee is receiving when he goes on vacation or when a holiday falls, and the contract intends that during those two periods of time he will be compensated as if he had been
working. The same rationale and its irrelevance to Article 16(e) applies to severance pay, bereavement and sick pay.

The Union asserts that the contract provides no definition of "base rate." However the foregoing differentiation between the contract use of "regular pay" and "base rate" together with Article 4(c) impels a conclusion closer to the Employer's interpretation than that of the Union. In pertinent part Article 4(c) provides:

......employees, if any, receiving wages over the prior base rate of their respective classifications shall continue to receive the same amount over the base rate set forth in Schedule A, so long as they remain in said classifications. (Emphasis added.)

In the absence of any other contract definition the foregoing juxtaposition of "base rate" and Schedule A, provides, inferentially at least, a logical argument that Schedule A and "base rate" are synonymous. I recognize that Article 4(c) could represent the use of Schedule A as the base rate under the specific circumstances mentioned therein, and not for all purposes including the application of Article 16(e). Article 4(c) does provide for wages less than the scales of Schedule A for new and inexperienced employees; the rates of Schedule A for new and experienced employees; and for rates in excess of Schedule A for those who had been receiving a higher rate. Confining to those circumstances I would be inclined to agree with the Union that Article 4(c) may not necessarily be interpretative of the term "base rate" as found in Article 16(e). But frankly, I find
nothing else in the contract which supports the Union's unusual view that base rate is synonymous with actual compensation, when actual compensation includes premium pay, shift differentials, merit increases and incentive earnings, and consequently I am not persuaded that Article 4(c) should be so confined.

Therefore, based on the traditional interpretation of "base rate"; the coincidence of "base rate" with Schedule A as set forth in Article 4(c); and in the absence of any other explicit definition of the term, I must conclude that "base rates" are more often, and probably most often, the rates found in Schedule A of the contract. However it should be noted that Section 16(e) refers to the "highest base rate in their respective departments", not the "highest base rate of a classification in their respective departments." To my mind this means that the "highest base rate" referred to in Article 16(e) is the base rate applicable to and received by the highest paid employee supervised by a foreman or sub-foreman in a particular department(s), not merely the Schedule A rate attached to the classification of that employee. And therein lies the exceptions to the use of Schedule A as the base rate for the application of Article 16(e). For example, an employee may have been hired at an hourly rate in excess of the rate for that classification as set forth in Schedule A. In that event, that employee would receive a base rate different from and higher than the Schedule A base rate. And if his higher hourly rate was greater than others within the department, that rate of pay would constitute the "highest base
rate in the respective department" within the meaning of Article 16(e), and the supervising foreman and/or sub-foreman would be entitled to be paid at least 10 percent higher. In other words as between the Schedule A rate for a job classification and a higher hourly rate paid an employee working within that classification, the base rate for purposes of Article 16(e) would be the latter.

Similarly if an incumbent employee is transferred from one job classification to another, and upon assuming the latter is paid an hourly rate in excess of the Schedule A rate for that job classification, his higher hourly rate would be his "base rate." And if that was the "highest base rate" in the department, it would be the basis upon which the Article 16(e) differential for foremen and sub-foremen would be calculated.

There may be other instances in which an employee's hourly rate, exclusive of premium pay, fringe benefits, incentive earnings and other special compensation might exceed the hourly rate set forth in Schedule A. The formula, as referred to in the above examples, should be followed in those instances as well.

One specific question remains, and that is whether merit increases serve to increase the hourly rate or base rate within the meaning of the foregoing discussion. The record is not clear as to whether merit increases are red circled and separated from an employee's hourly rate or base rate, or whether they are merged into his hourly rate causing an increase in that rate and, by consequence, the establishment of a new and higher hourly rate. If the former is true a base rate would not include merit increases. If the latter is true, merit increases would have to be included
in the calculation of "the highest base rate." That phase of the issue I leave to the parties for application and implementation, with their respective rights reserved to refer to me for specific resolution disputes or questions arising therefrom.

One final point. Though no evidence of the negotiation history of Article 16(e) was introduced, I think it probable, and agree with the Union, that the intent of Article 16(e) was to provide compensation for foreman and sub-foreman in excess of the pay received by those they supervise. I would expect with my ruling that the phrase "highest base rate" means the highest actual hourly rate received by an employee whom a foreman or sub-foreman supervises, many of the possible instances in which subordinate employees would receive more money than their foreman or sub-foreman, would be corrected. On the other hand if subordinate employees are earning more because of overtime payments, shift differentials and incentive earnings, and if this frustrates an intent of Article 16(e), it can only be cured by negotiations and not arbitration.

Accordingly the Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above named parties, makes the following AWARD:

The phrase "highest base rate" in Article 16(e) of the contract means the highest actual hourly rate paid to an employee in the department or departments supervised by a working foreman and/or sub-foreman. In most instances that "base rate" will correspond with the rates of pay set forth in Schedule A of the contract. However where an
employee is hired at an hourly rate higher than the Schedule A rate; transferred from one classification to another and upon assuming the latter receives an hourly rate higher than the Schedule A rate; or under other similar circumstances with the same result, the "base rate" shall be the higher rate. Because "base rate" is limited to the "hourly rate", it does not include incentive earnings, premium pay, shift differentials or fringe benefits. Whether merit increases are to be included in or excluded from the calculation of base pay is remanded to the parties for interpretation and implementation consistent with the foregoing OPINION.

The parties are directed to apply the foregoing AWARD to the circumstances presented in the instant grievance, and to make adjustments, if any, in the pay of foreman and/or sub-foremen under Article 16(e) of the contract retroactive to the date of the grievance.

The Arbitrator's fee shall be shared by the parties equally.

DATED: May 24, 1977
STATE OF: New York ) ss
COUNTY OF: Nassau )

On this twenty fourth day of May, 1977, 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.

VALERIE R. HANSEN
Notary Public, State of New York

Valerie R. Hansen
Valerie R. Hansen
Notary Public, State of New York
No. 20-51981
Qualified in Nassau County
Term Expires March 30, 1982
In The Matter of the Arbitration between

Local 702 Motion Picture Laboratory Technicians, I.A.T.S.E.

and

Du Art Film Laboratories, Inc.

The stipulated issue is:

Whether the Employer has breached the contract by excluding a new employee hired to perform plant clerical functions in the Maintenance Department from the bargaining unit. And if so, what shall the remedy be?

A hearing was held on August 1, 1977 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.

For about ten years the clerical duties which are the subject of this case were performed by a bargaining unit employee classified as a Maintenance Mechanic B. Those duties constituted his principal straight time hours assignment.

I consider this extended and undisputed history of how and by whom the work was performed, to be constructive if not explicit acknowledgement and acceptance by both sides that those duties were within the contractual jurisdiction of the bargaining unit, and hence covered by Article 1 of the contract. Particularly so, as here, in the absence of any
specific job description which does not include those duties within that classification.

That other types of clerical duties elsewhere in the laboratory have and are being performed by non-bargaining employees is immaterial. None of those situations had any history — let alone such an extensive history — of being performed by a bargaining unit employee as a principal part of his bargaining unit classification.

That the incumbent bargaining unit employee who performed that work has now retired does not mean that the work is lost to the unit, nor does it mean that the Company may now unilaterally remove it from the unit and assign it to a non-bargaining unit new hire. Having ripened into a bargaining unit assignment for reasons previously stated, it must remain so placed unless the parties mutually agree otherwise.

The Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above named parties and having duly heard the proofs and allegations of said parties makes the following AWARD:

The Employer has breached the contract by excluding a new employee hired to perform plant clerical functions in the Maintenance Department from the bargaining unit. The Company is directed either to include that employee within the bargaining unit at a rate of pay to be negotiated by the parties, or to return the clerical duties to the Maintenance Mechanic B classification, or establish a new bargain-
ing unit job covering those duties and negotiate with the Union the wage rate for that job, which, in my judgement, should be less than what is paid a Maintenance Mechanic B.

The Arbitrator's fee shall be borne by the Employer.

DATED: August 17, 1977
STATE OF New York ) ss.:
COUNTY OF New York )

On this seventeenth day of August, 1977, 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 702 Motion Picture Laboratory Technicians, I.A.T.S.E.
and
Du Art Film Laboratories, Inc.

The stipulated issue is:

Is the Employer in violation of the Agreement by operating the Photomec 16mm color reversal process with a crew of less than three? If so what shall be the remedy?

A "quickie" arbitration hearing was held on August 15, 1975 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 July 14, 1966, when the NOTE at the end of the reference to Negative Developing Department in Schedule A of the contract read as it presently reads, the then Industry Arbitrator Joseph E. McMahon held (Case 702-66 Al) that development of color reversal film stock, then done on the Pako machine was not "color negative developing" within the meaning of the NOTE.

In pertinent part he stated:

"The type of work performed by the Pako machine is the crux of this dispute. The machine processes color reversal film stock.

"...the Pako machine does not fall squarely within either the Positive or Negative Developing Department."
"The note in Schedule A relating to color negative developing, fixes the crew-complement. That provision is not binding here, in view of my previous determination that the Pako machine does not come within the Negative Developing Department." (Underscoring supplied.)

He ruled therefore that a crew of three operators on the Pako machine was not required by the contract, and that the Employer could operate that machine and run the color reversal development process with a crew of two.

Whether Mr. McMahon was correct is immaterial. His Award is binding unless the parties by mutual agreement reject or change it, or unless by contract negotiations or other agreement its effect is amended, changed or nullified.

None of this was done. Following the McMahon Award, no change, expansion or modification in the NOTE was made, nor was there any other contract provision or agreement entered into covering color reversal development.

So, the McMahon decision remains as the "definitive word" on color reversal development performed on the Pako machine.

The issue before me involves color reversal development on the Photomec machine. Though the Photomec is different from the Pako, the process or "type of work" (which Mr. McMahon said was the "crux" of the earlier case) is still color reversal development. I fail to see how, in the face of the McMahon ruling on the nature of the process of color reversal develop-
ing, and in the absence of any subsequent contract provision or any other agreement to deal with that process, I can now hold that color reversal development on the Photomec machine is color negative developing within the meaning of the NOTE. As I see it, the question still remains a matter for bargaining between the parties and not for arbitration.

Nor can I presently consider the question of the man of the Photomec machine on operational grounds. As yet that machine has not run enough to determine its complexities, difficulties, and its demands on its operators. It ran for short period in 1970, which obviously cannot be used as a contemporary experience, and then again for only a few days this month. The number and frequency of breaks, if any; the physical, mental and other operating demands on the operator assigned cannot yet be determined, and must await the passage of a reasonable running time.

The Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above named part and having duly heard the proofs and allegations of said parties makes the following AWARD:

The NOTE referred to in the contract at the end of the reference to the Negative Developing Department in Schedule A does not apply to color reversal developing performed by the Photomec machine. That process is not "Color Negative Developing" within the meaning of the NOTE. Therefore the Employer is not in violation of the Agreement by operating the Photomec 16mm color reversal process with a crew of less than three. It may operate the machine with a crew of two.
The Arbitrator's fee shall be borned by the Union.

DATED: August 17, 1977
STATE OF New York )ss.:
COUNTY OF New York )

On the seventeenth day of August, 1977, 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 acknowled to me that he executed the same.
In The Matter of The Arbitration between
Local 702, Motion Picture Laboratory Technicians, IATSE
and
DuArt Film Laboratories, Inc.

At the first hearing on October 13, 1976 the parties stipulated the issue as:

Whether the Employer violated Section 16(e) of the collective bargaining agreement by failing to pay proper wages to John Gazaway, and if so what shall be the remedy?

Thereafter, on May 24, 1977 I rendered an Opinion and Award in the case between Local 702, Motion Picture Laboratory Technicians, IATSE and Radiant - Technicolor Laboratory. That Opinion and Award dealt with the calculation of pay for working foremen and subforemen under Section 16(e) of the industry-wide contract.

At the request of the Employer, the instant case was reopened and a second hearing held on August 1, 1977 at which, based on the evidence and argument of the parties the issue was narrowed to whether the rates of pay for employees operating the New Eastman Color Negative II Processor (ECN II) under the separate agreement between Local 702 and DuArt dated September 17, 1975 are "base rates" within the meaning of my Opinion and Award in Radiant - Technicolor. (Presumably the parties felt that with a determination on that they would be able to calculate the pay of working
foreman John Gazaway under Section 16(e) of the contract and under
the formula established by my Award in Radiant - Technicolor.
However, that remains unclear because as the Employer (DuArt)
points out in its brief, the parties have yet to fully litigate,
and I have not decided whether "merit increases" are part of "base
rates" within the meaning of Section 16(e), and also unlitigated
is the question, apparently involved in the instant case, of whether
the pay of a working foreman may be compared with an employee within
his Department but who works a different shift.)

In Radiant - Technicolor I stated inter alia:

"The parties must have meant that there be
a difference between regular pay and base
rate, because they used two different terms;"
and
"...I must conclude that "base rates" are
more often, and probably most often, the
rates found in Schedule A of the contract."

Though I gave some examples of circumstances under which
a "base rate" would be higher than the rates set forth in Schedule
A, I stated that a base rate "does not include incentive earnings,
premium pay, shift differentials or fringe benefits."

In the instant case I do not find that the rates of pay
for the Color Wet Developer Type 3 and the Dry End Man Color Type
3 on the ECN II machine, as set forth in the agreement between the
parties of September 17, 1975, fit within the categories of ex-
ceptions to which I referred in Radiant - Technicolor. Rather I
conclude that the instant disputed rates constitute Schedule A
"base rates" plus a bonus of $.45 and $.30 an hour respectively
when the machine is operated by a crew complement of two.

The separate agreement of September 17, 1975 uses the phrase "special rate." As in Radiant - Technicolor, I must conclude that the parties meant those rates to be different from the "base rates" because they used a different identifying phrase. Had they intended the rate for the two operators, made up of the Schedule A rate for a negative developing machine plus $.45 and $.30 per hour respectively, to constitute the "base rate", they could and should have said so. But they did not. Instead they referred to it as a "special rate", which in my judgement, meant a base rate to which something else is added, in this case a bonus or an incentive of $.45 and $.30 per hour respectively, as a quid pro quo for a willingness to run the machine with only two operators.

The memorandum itself is also supportive of a conclusion that the rates of pay are in excess of a contractual "base rate." It expressly provides for the circumstance under which the "special rate" is cancelled. So long as the machine is operated with a complement of two men the special rate is applicable, but when the machine is run on a continuous basis, the crew complement is then increased to either three or five in accordance with the manning provisions of the Negative Developing Department as set forth in the contract, and the "special rate" is cancelled. To my mind that means that under circumstances where the crew complement coincides with the contractual manning requirement for negative
developing, the operators receive the Schedule A base rate. When the crew is reduced to two, those operators are paid more than the base rate i.e. a bonus or an incentive for the extra work or attention required by the reduction in complement. Because they are demonstrably different, I am unable to conclude that the higher "special rate" for two operators, and the lesser Schedule A rate for a complement of three or five operators are both synonymous with "base rate."

Because it is not certain that with this determination Gazaway's pay can be calculated under Section 16(e), it is my ruling that the Arbiterator's fee for this proceeding thus far be shared equally by the parties.

**AWARD**

The "special rates" set forth in the separate agreement between Local 702 and DuArt dated September 17, 1975 are not "base rates" within the meaning of Section 16(e) of the contract or my Award in the Radiant-Technicolor case dated May 24, 1977.

The Arbitrator's fee shall be shared equally by the parties.

DATED: December 1, 1977
STATE OF New York )ss:
COUNTY OF New York )

Eric J. Schmertz
Arbitrator

On this first day of December, 1977, 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.

Valerie R. Hansen
Notary Public, State of New York
No. 35-1593
Qualified in Nassau County
Term Expires March 30, 1983.
September 17, 1975

AN AGREEMENT BETWEEN DU ART FILM LABORATORIES, INC. AND MOTION PICTURE LABORATORY TECHNICIANS LOCAL 702 I.A.T.S.E. CONCERNING THE COMPLEMENT OF THE CREW FOR THE NEW EASTMAN COLOR NEGATIVE II PROCESSOR AS INSTALLED BY DU ART FILM LABORATORIES, INC.: 

This letter will serve as an Agreement between Du Art Film Laboratories, Inc. and the Motion Picture Laboratory Technicians Local 702 I.A.T.S.E., whereas Du Art Film Laboratories, Inc. has installed the new Eastman Color Negative II (ECN II) process. It is agreed that Du Art Film Laboratories, Inc. will pay a special rate to the assigned personnel on this machine and will pay an override pay per hour in the event other replacement personnel are used on this machine when a two man complement is used on this processor.

Classification - Color Wet Developer, Type 3 - Rate as outlined in the current Contract under Schedule A plus .45 per hour.

Classification - Dry End Man Color, Type 3 - Rate as outlined in current Contract under Schedule A plus .30 per hour.

It is our understanding that this processor will continue to operate as it does now on a non continuous basis. This special pay to the assigned personnel will remain in effect as long as this type processor is operating with a complement of two men.

(Cont’d.)
In the event, however, that it becomes necessary to operate this machine on a continuous basis, i.e., without interruption for leader, etc., the foregoing Agreement re special rates is cancelled, and the complement will be as specified in the Collective Agreement.

Agreed To: Robert M. Smith, Executive Vice President

Agreed To: Chuck Vitello, Business Agent
Local 702 I.A.T.S.E.
[In open court; jury present:]

CARMEN OLF, resumed.

THE COURT: Mr. Jackson, continue.

DIRECT EXAMINATION [continued]

BY MR. JACOBSON:

Q Mr. Olff, you were testifying yesterday about having done certain work in the negative room that didn't have production tickets attached to it. Did that work carry identification of any kind?

A Yes.

Q What type of identification?

A Many times I worked on film that had Film Chateau's identification.

Q Film Chateau. Is that the company located upstairs?

A Correct.
MR. ROSENFELD: Roberto Cruz, Ismael Medina.

No further questions.

REDIRECT EXAMINATION

BY MR. JACOBSON.

Q As far as you recall, were all of the people whose names you checked here on the afternoon shift with Mr. Temple?

A No. That is in all three shifts throughout the lab.

Q Of all the 110 to 130 employees?

A Correct.

Q If I was to hand you a list of the balance of employees, the white employees, the 100 or so of them, would you recognize all of those names and what shift they were on?

A No.

MR. JACOBSON: No further questions.

THE COURT: Thank you very much, Mr. Olff.

THE WITNESS: You are quite welcome.

[Witness excused.]

MR. JACOBSON: Plaintiff rests, your Honor.

THE COURT: Ladies and gentlemen, at this time the plaintiff has rested, which means that he has finished the presentation of their direct case, and I have
legal matters of law I have to take up with the attorneys as a result of that fact.

If you retire to the jury room we will be with you shortly.

[Jury excused.]

THE COURT: Mr. Rosenfeld, I assume you want to move to dismiss at the end of plaintiff’s case.

MR. ROSENFELD: I do, your Honor.

THE COURT: I would like to have -- as I said to both sides yesterday -- a complete argument on the motion because I think there is a serious possibility of my granting it and I therefore would like to have each side present, as fully as it can, the position which it believes we are in at the moment.

MR. ROSENFELD: Shall I proceed?

THE COURT: Yes. I think you will do yourself the most good by getting to the heart of what the plaintiff has proved and not -- giving him the benefit of all doubts, as we must.

MR. ROSENFELD: Your Honor, plaintiff has the burden at this point of establishing a prima facie case of discrimination in the discharge of Mr. Temple.

THE COURT: Right.

MR. ROSENFELD: Plaintiff is attempting to
carry that burden by offering evidence of discrimination in two areas, as I understand: The first area involves statements, and perhaps related conduct, by Mr. Stroud, who was Mr. Temple's supervisor for the last two or three weeks of Temple's employment only, and who didn't make the decision to discharge Mr. Temple, and who had --

THE COURT: I think a more accurate way of saying it, is the record doesn't indicate who made the decision, but there is no evidence that he did; merely that he was pleased that it occurred.

MR. ROSENFIELD: The record has testimony that on July -- on the night of July 1, when Mr. Temple got back to the laboratory and Stroud was waiting for them at the time clock, Stroud said "Elio said to dismiss you."

The second area, as I understand plaintiff's case, in which they are trying to carry their burden of establishing discrimination on this point is that Mr. Temple was required to punch out before lunch and punch back in after lunch. This is alleged to be a singling out on the ground of race.

I think that plaintiff has succeeded in neither of those two areas of establishing a prima facie case of discrimination.
table and said here they are, the company nevertheless knew or should have known the practice that was going on in the plant of men taking 45 minutes or more for lunch.

If they used Mr. Temple's lateness as an excuse for firing him, I think that's all it was was an excuse because they would have had to clean out the entire plant.

THE COURT: I understand that, Mr. Jacobson.

I have really heard enough. I am prepared to consider the matter. I want to retire to the robing room and review the evidence myself with my law clerk, and I will be with you shortly to let you know what my conclusion is.

MR. ROSENFIELD: Do you want the exhibits, Judge?

THE COURT: If I want any I will ask you for them.

(RECESS.)

(In open court; jury absent.)

THE COURT: Gentlemen, I am ready to rule on the motion.

I should point out that although I have taken a short period of time since the end of argument, and have considered some factors that I couldn't consider in open court, in the sense that I have reviewed matters in my own mind and in discussion with my clerk, that there was very
little testimony this morning, and I have, of course, been aware of the fact that the motion was going to be made this morning and I have reviewed in my mind the testimony of the past days before the end of the argument this morning.

I am prepared to grant the motion. I am aware of the fact that such a motion, that is, a motion for a directed verdict at the end of the plaintiff's case, requires the defendant to meet a high threshold.

I thoroughly understand the arguments made by Mr. Temple's counsel, who have been complete and zealous in their presentation of the case. Nevertheless, I find that the evidence establishes that the decision to discharge here was made by Mr. Pesato; that the witnesses for the plaintiff readily admitted that Mr. Pesato's reputation with regard to race, racial matters, was good. I don't doubt that Mr. Stroud had contemptible attitudes for racial minorities, including the minority of which I am a member.

I don't doubt that Mr. Stroud was pleased when Mr. Temple was discharged, but I find that the plaintiff has not established or borne his burden to establish that Mr. Stroud's authority was such as to have brought the discharge about on his own.
simply advise them that the case has been concluded.

(Pause.)

THE COURT: Because of my determination of course it becomes unnecessary to decide whether Section 1981 applies or not, although I must say that the recitation given this morning by Mr. Schoolman and Mr. Rosenfeld raises more doubts than I had thought might have existed.

(Jury present.)

(Jury discharged with the thanks of the Court.)

MR. JACOBSON: Of course, Judge, I don't think we have to put it on the record, but I will do so anyway. We of course take exception to the ruling. While it is not necessary --

THE COURT: I would expect you to, and I understand. If you decide that you want to appeal the verdict I would understand it.

I don't think there are any other motions that are necessary at this time. If there are, you are granted whatever time you need to make them.
Moreover, and very much to the point, this record is like a battlefield pockmarked with the shells which have dropped as to Mr. Temple's own undependability.

Indeed, I was struck by the fact that half of his testimony related to a narration of his own previous offenses which had brought on discipline, not only in the case of the defendant here, but of his previous employer.

Objective determiners of the facts in the past have found that he was away from his post on numerous occasions and he came perilously close to discharge at Du Art on two occasions, and one has a right to infer that the work habits which existed at Du Art were not substantially changed at Technicolor.

I share with all the people in this room a sense of revulsion at matters involving discrimination of race. For whatever it is worth, I assure Mr. Temple that had I for a moment believed that a jury here could conscientiously decide in your favor, I would not have ruled as I have.

For all the reasons I have stated, I direct a verdict in this matter, in this case, in the defendant's favor and I will now so advise the jury.

Call the jury, please.

I won't advise them of the result. I will
On August 24, 1977 Shale Dworan was discharged from his position with Technicolor, Inc. (the "Employer"). Dworan's union, Motion Picture Laboratory Technicians Local 702, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada (the "Union") refused until February 1978 to demand arbitration of Dworan's discharge. When the Union finally demanded arbitration, the employer refused. Dworan brought this action in November 1978 against the Union, its President (Vitello) and the Employer, alleging breaches of the Union's duty of fair representation and two breaches of the collective bargaining agreement on the Employer's part, discharge without just cause and refusal to arbitrate.
The Union and Vitello now move for summary judgment. The uncontroverted facts are these:

Dworan was employed by the Employer at its plant at 321 West 44th St., N.Y., N.Y. from 1971 until his discharge in August 1977. Dworan was represented in his employment by the Union.\(^1\)

The Employer had regularly complained to the Union about Dworan's performance and behavior while he was employed.\(^2\)

\(^1\)The collective bargaining agreement between the Employer and the Union provided for binding arbitration following unsuccessful adjustment of "any dispute arising under this contract."

\(^2\)In their answer the Union and Vitello alleged Dworan had been the subject of "regular and continuous employer complaints both with respect to his work performance and his behavior." \(^1\)12. Ten 'negligence reports' concerning Dworan, most of which show that they are addressed to a Union representative, are annexed as part of Exhibit A to the answer. Whether Dworan's affidavit in opposition to the motion intends to controvert these allegations is unclear. (See \(^4\)6 of Dworan's affidavit dated November 20, 1978 in opposition to Union Defendants' Motion for Summary Judgment.) Dworan apparently contends these complaints or reports are immaterial. But insofar as the Union is aware of them they are certainly material to its assessment of the likelihood of success at arbitration and thus to the questions of arbitrariness, capriciousness and lack of good faith, which are at the heart of an action for unfair representation. See Vaca v. Sipes infra. Dworan's argument of immateriality is unpersuasive if not frivolous. When confronted with a motion for summary judgment one cannot rest on mere conclusory denials. S.E.C. v. Research Automation Corp, 585 F.2d 31 (2d Cir. 1978). Dworan's affidavit does so. For this reason I may treat the allegations as uncontroverted.

In his deposition Dworan himself admitted the Union had intervened on his behalf to resolve problems that he had with management from eight to a dozen times. Dworan deposition at 127.
In February 1976 Dworan was suspended pending discharge for carelessness. Dworan filed a grievance and his grievance was pursued by the Union to arbitration. In May 1976 the arbitrator rendered his award, reinstating Dworan without back pay and adding:

He [Dworan] should note that he has been given some benefit of the doubt in this case, and therefore he is warned that future acts of negligence on his part, other violations or misconduct, would be grounds for his dismissal.

Exhibit B to Defendants Union and Vitello's Answer.

On August 4 or 5, 1977, Dworan was suspended for taking an excessive coffee break, but at the Union's instance was reinstated. (Dworan deposition at 119).

On August 24, 1977 Dworan was suspended pending discharge for taking an excessive coffee break. The next day representatives of the Union and the Employer met with Dworan to discuss his discharge. Following this meeting the union representative (Vitello) met with Dworan. At this meeting Dworan insisted upon full reinstatement without loss of pay. (Dworan deposition at 29-30).

Vitello then consulted with the Union's Shop Steward and with the Union Vice-President to determine

---

3 On August 10, Dworan wrote Vitello, thanking him for his efforts, "Dear Brother Vitello: Once again I wish to thank you for your continued support and invaluable assistance in the matter of my most recent 'suspension' at Technicolor Laboratories. ..." Exhibit F to Defendants Union and Vitello's Answer.
the validity of Dworan's defense (a pervasive practice of excessive coffee breaks) and was told there was no practice of taking breaks of the length to which Dworan had admitted (35 minutes). Vitello later consulted with Union counsel Schilian, who advised Vitello that there would be little chance of success at arbitration. During this period, Vitello also approached the Employer to propose reinstatement. The Employer was adamant.

Vitello concluded arbitration would not be appropriate but Dworan was given the opportunity to appear before the Union's Executive Board to present his case for decision.

Dworan met with the Executive Board September 9, 1977. The Board determined that arbitration was not advisable.

After Dworan won an unemployment insurance award in October 1977, his lawyer requested the Union to reconsider its decision not to demand arbitration. The Union's position remained unchanged. However, Dworan's request for an opportunity to appeal the original decision to a meeting of the Local's general membership was granted.

In January, 1978 Dworan appeared before the membership, which denied Dworan's request for reconsideration.
A167

In February 1978 Dworan appealed this decision to an International body with which Local 702 is affiliated. Counsel for the International then contacted the local Union's counsel to ask whether something could be done to avoid litigation. At counsel's urging Vitello agreed to demand arbitration.

The Employer refused to arbitrate.

The essence of plaintiff's claim is that his union arbitrarily, capriciously and in bad faith delayed taking his grievance to arbitration. An arbitrary, capricious or bad faith refusal to process a grievance is a breach of a union's duty of fair representation under the NLRA cognizable in the federal courts. Vaca v. Sipes, 87 S. Ct. 903 (1967).

It may be argued (with support from case law and commentators, see 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.16 at 56-668-669 and cases cited) that where motive and intent are at issue, as when bad faith is alleged, summary judgment is inappropriate.

Dworan claims a 1975 intra-union disciplinary proceeding in which he was charged with making accusations against fellow employees and which resulted in a $500 suspended fine, left a residue of ill will against him. Dworan Affidavit dated November 20, 1978 in opposition to Union Defendants' motion for summary judgment at ¶¶9, 15.
But the essential soundness of that proposition does not mean that there are no limits to its appropriateness. Where the uncontested record shows, as in this case, such persuasive abundance of apparent justification for the Union's refusal to demand arbitration, especially when coupled with conceded evidence that the Union made efforts on the plaintiff's behalf, both previously and in the instance called in question, is it reasonable to withhold summary judgment because of the theoretical possibility that the Union may have been motivated by bias, rather than by the valid factors? Indeed, when an admitted bad record and the correspondingly small likelihood of success at arbitration makes the Union's refusal so clearly objectively correct regardless of the motivation, the further question arises whether bias, malice or other motivation are even relevant. The correctness and justification for the decision are not diminished by the presence of malice. I conclude that, contrary to the usual rule, summary judgment may be granted against a claim of a union's malicious refusal to demand arbitration if the admitted facts demonstrate with clarity that the decision is objectively justifiable - all the more so when admitted facts show that the Union expended efforts in reaching the decision. Were this not so, the mere inclusion of a claim of malice would require unions to incur expensive litigation
for every refusal to demand arbitration, no matter how clearly justified.

The Union and Vitello's motion for summary judgment against the plaintiff is granted.

SO ORDERED:

Dated: New York, New York
June 27, 1979

Pierre N. Leval
U.S.D.J.
A177

MEMORANDUM ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION
DATED SEPTEMBER 18, 1979 (pp. A177-A178)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHALE DWORAN,
Plaintiff,

against-

MOTION PICTURE LABORATORY
TECHNICIANS LOCAL 702, INTER-
ATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PIC-
TURE MACHINE OPERATORS OF THE
UNITED STATES AND CANADA, an
unincorporated association, COSMO
VITELLO, as President of Motion
Pictures Laboratory Technicians,
Local 702, International Alliance
of Theatrical Stage Employees and
Moving Picture Machine Operators
of the United States and Canada, an
unincorporated association, and
TECHNICOLOR, INC.,

Defendants.

Pierre N. Leval, U.S.D.J.

Plaintiff moves for reconsideration of this court's
order of June 29, 1979 granting summary judgment to the
defendant union. He contests the validity of various suspensions
and complaints on his record which were referred to in the
opinion as an "admitted bad work record ...." Dworan v.
Motion Picture Laboratory Technicians Local 702, 78 Civ.
1181 (op. at 6)(S.D.N.Y. June 27, 1979.)
Plaintiff misconceives the significance of this reference. It implied no finding as to the facts underlying any blemish on the plaintiff's work record, but only a recognition of the fact of numerous suspensions and complaints. The use of the word "admitted" did not mean that plaintiff admitted having committed the infractions, but only that he did not contest that those suspensions and complaints appeared on his record. The union was entitled to give due weight to the "face value" of the plaintiff's work record in assessing the likelihood of success as a factor in the decision whether or not to demand arbitration.

The motion is denied.

SO ORDERED:

Dated: September 18, 1979
New York, New York

Pierre N. Leval