PERMANENT ARBITRATOR, FILM LABORATORY INDUSTRY

In the Matter of the Arbitration between

Motion Picture Laboratory Technicians, Local 702 Welfare Fund;
Motion Picture Laboratory Technicians, Local 702 Pension Fund

and

AFC Laboratories, Inc.

The Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of Local 702 Welfare Fund and Local 702 Pension Fund; and AFC Laboratories, Inc. having failed to appear after due notice, makes the following AWARD:

For the months of June, July and August, 1972 AFC Laboratories, Inc. owes the Motion Picture Laboratory Technicians Local 702 Welfare Fund the sum of $3280.00.

For the months of June, July and August, 1972 AFC Laboratories, Inc. owes the Motion Picture Laboratory Technicians Local 702 Pension Fund the sum of $3280.00.

Accordingly AFC Laboratories, Inc. is directed to make payment of said sums to said Funds forthwith with interest, plus a penalty of 1% of the unpaid balance after the 10th of each month pursuant to prior notice of the Trustees of said Funds.

Eric J. Schmertz
Permanent Arbitrator

DATED: September 1972
STATE OF New York )ss.: COUNTY OF New York)

On this day of September, 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.
In the Matter of the Arbitration between

Motion Picture Laboratory Technicians, Local 702 Welfare Fund;
Motion Picture Laboratory Technicians, Local 702 Pension Fund

and

AFC Laboratories, Inc.

The Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of Local 702 Welfare Fund and Local 702 Pension Fund; and AFC Laboratories, Inc. having failed to appear after due notice, makes the following AWARD:

For the months of June, July and August, 1972 AFC Laboratories, Inc. owes the Motion Picture Laboratory Technicians Local 702 Welfare Fund the sum of $3230.00.

For the months of June, July and August, 1972 AFC Laboratories, Inc. owes the Motion Picture Laboratory Technicians Local 702 Pension Fund the sum of $3280.00.

Accordingly AFC Laboratories, Inc. is directed to make payment of said sums to said Funds forthwith with interest, plus a penalty of 1% of the unpaid balance after the 10th of each month pursuant to prior notice of the Trustees of said Funds.

DATED: September 1972
STATE OF New York )ss.: COUNTY OF New York)

On this day of September, 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.
In accordance with Article V of the Collective Bargaining Agreement dated January 31, 1972, the Undersigned was designated as the Arbitrator to hear and decide certain disputes between the above named parties.

A hearing was held on October 4, 1972 in Buena, New Jersey at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived. Having duly heard the proofs and allegations of the parties, the Undersigned makes the following AWARD:

**Issue #1**

The Union's grievances dated May 9, 1972 (Step 2) and May 4, 1972, (identified as Union Exhibit #1 and #2 respectively in the record,) regarding Material Stock Department employees and two clerk/typists in the Shipping & Receiving Department are granted as to the remedy sought.

It is undisputed that the Company did not respond to these within the time limit prescribed in Step 4 of the grievance procedure. Section 5.2 of the contract provides in pertinent part that any grievance not an-
swered by the Company within the time limits "shall be sustained." It goes on to provide that "time is of the essence."

Accordingly, pursuant to the clear intent of Section 5.2, these grievances, not having been answered by the Company at Step 4 within the contractually mandated time limit, must be sustained. In each grievance the Union seeks as its remedy a re-evaluation of the jobs in question. Hence the Company is directed to re-evaluate those jobs.

As stipulated by the parties, the Undersigned retains jurisdiction over these grievances. In the event that the re-evaluation of the jobs in question do not resolve the disputes, the matters may be referred back to me, with the procedural and substantive rights of the parties expressly reserved.

**Issue #2**

The Union's grievance dated August 16, 1971 involving William Montana and Joseph Moats is denied. The stipulated issue is:

Were the two employees, William Montana and Joseph Moats entitled to move to permanent day shift?

The relevant contract sections are Section 8, Shift Transfers, paragraphs 6.81 and 6.82. Contrary to the Union's assertion, I find that the reference to "senior employee(s)" in both paragraphs are related and refer to the same class of employees, namely those who were sen-
ior employees when the contract dated February 1, 1969 (joint exhibit #2) became effective.

Paragraph 6.81 gave those "senior employees" the right to select their desired shift. Under paragraph 6.82 such senior employees who work on the night shift may transfer to the day shift when a new hire is placed on or transferred to the night shift. In either event the grievants do not qualify. They were not in the Company's employ as of the effective date of the contract in question and therefore were not "senior employees" within the meaning of paragraphs 6.81 and 6.82.

The Union contends that Article 6 Section 8 of Addendum #5, negotiated subsequently by the parties, places a different interpretation on paragraphs 6.81 and 6.82. It asserts that the agreement to "post for a steady night shift," and to fill jobs on the night shift from any other source if it could not be filled from in-plant bids, was intended, because the night shift would thereby be staffed with bidders, junior employees and new hires, to permit any employee who had greater seniority to move to the day shift. And that therefore the Company erred when, following the employment of certain new hires on the night shift, it transferred the more senior grievants to the "swing shift." In short, the Union contends that under Adden-
dum #5, when new hires are placed on the night shift, any employee on that shift who enjoys greater seniority (though he may not be a "senior employee" within the original meaning of Sections 6.81 and 6.82) has the right to transfer to the day shift.

The testimony of the Union and Company witnesses as to what took place in the course of the negotiation of Article 6 Section 8 of Addendum #5 is sharply conflicting and not determinative one way or the other. The clause in question does not expressly accord the rights which the Union asserts. It seems to me that had the parties intended to extend to employees with greater seniority the same rights which Sections 6.81 and 6.82 accord to those "senior employees" who were in the Company's employ on the effective date of the contract, the Addendum clause would and should have explicitly so provided.

To accept the Union's version, which would establish a new and independent benefit for more senior employees who were not on the payroll when the contract became effective, the subsequently negotiated Addendum should clearly and explicitly legislate that additional benefit. Because the Addendum does not and because the other evidence on this question is inconclusive, said benefit can neither be read into nor inferred from the present language of Article 6 Section 8 of Addendum #5.
Accordingly the transfer of the grievants from the night shift to the swing shift rather than to the day shift, was not in violation of the contract.

**Issue #3**

The Union's grievance dated April 27, 1972 seeking a re-evaluation of the classification Accessory Mechanic in the Accessory Department is denied.

In March 1972 the parties completed the most recent contract negotiations including negotiating the rate of pay for the Accessory Mechanics. As of that time, the agreed upon rate of pay was acceptable to the Union for the duties which the employees so classified were then performing.

The Union's grievance was filed with the Company approximately 50 days later. The question then is whether between the time that the parties agreed upon the pay rate for the Accessory Mechanic and the date of the grievance, there were such significant and substantial changes in the job duties as to constitute the "establish(ment) (of) a new classification" within the meaning of Section 34.4 of the contract. Section 34.4 is the only contract clause which requires the Company to negotiate a wage rate with the Union during the contract term and which makes a disagreement over the rate grievable and arbitrable. But that section is limited to the establishment of a "new classification."
(In the instant case the Company concedes that an existing classification can become a new classification within the meaning of Section 34.4, if its duties are "drastically changed.") The Union has not shown a "drastic change" or even changes of a substantial nature within the period of time from the negotiated wage rate to the date of the grievance. The airplane engines which the mechanic now works on is larger than those they previously handled. And there is a difference in the accessory work attendant thereto. But the Accessory Mechanic who testified on behalf of the Union stated that the new duties can be learned in a matter of hours or at most within a few days. To my mind that does not represent the kind of significant or substantial change in the duties of a classification which would transform that classification, constructively, into a "new job" for the purpose of re-evaluation or negotiation of a new wage rate under Section 34.4 of the contract.

Section 18.1 of the contract does not change the foregoing. That section does not require the Company to grant increases. Rather, by its express terms, the Company may at its discretion review a classification and grant increases where a change of work or other conditions warrant. This permissive, rather than mandatory, language of Section 18.1 means that the Union may not rely upon that section to gri

tration over a claim for a job re-evaluation or a change in an existing wage rate.

**Issue #4**

The Union's grievance on behalf of Lynford Meischke, dated April 10, 1972, is denied.

I do not find that the Company improperly denied the grievant a promotion to Lead Man. The evidence clearly establishes that roughly 50% of the Lead Man's work was to be electrical in nature and that the grievant did not possess the requisite ability or knowledge to perform or lead men in the performance of this type of work. Unless an arbitrary or capricious reason can be shown, the Company has the right to re-arrange or change the emphasis of the work to be performed by a Lead Man, so long as that work is within the Lead Man job classification. That the previous Lead man performed less electrical work does not mean that the Company cannot require his successor to perform and be qualified to perform more electrical work so long as those assignments are part of the Lead Man's job. Though certain allegations were raised I do not find probative evidence in support of any conclusion that the Company changed the Lead Man's job emphasis to discriminatorily foreclose the grievant from the promotion. Rather, based on the evidence I am satisfied that the Company did so for legitimate business reasons. Hence its selection of a less senior employee who is
qualified to do the electrical work, instead of the grievant who lacked such qualifications, was not violative of Section 10.1 of the Collective Bargaining Agreement.

Eric J. Schmertz
Arbitrator

DATED: November 27, 1972
STATE OF New York ) ss.
COUNTY OF New York)

On this 27th day of November, 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. 1830 0175 72 S
In the Matter of the Arbitration between
Local 553, International Brotherhood of Teamsters and
Allied New York Service, 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:

For the reason set forth in the attached Opinion the five day suspension of Lorenzo Romero is reduced to a suspension of two days. His pay and records shall be adjusted accordingly.

DATED: April 1972

STATE OF New York
COUNTY OF New York)

On this day of April, 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.
In the matter of the Arbitration between
Local 553, International Brotherhood of Teamsters
and
Allied New York Service, Inc.

The stipulated issue is:
Was there just cause for the five day suspension of Lorenzo Romero? If not what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on February 25, 1972 at which time Mr. Romero, hereinafter referred to as the "grievant," and representatives of the above named Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

Based on the record before me, I find reasonable grounds to conclude that the grievant did not wilfully fail to comply with the instructions of Supervisor Sullivan to report for a later fueling assignment. The instructions given him that night were ambiguous if not inconsistent. I am satisfied that Supervisor Sullivan told him to report to a specific location for a subsequent fueling assignment after he finished his first fueling jobs. This the grievant failed to do. And this together with his unavailability thereafter for virtually the balance of his shift prompted the disciplinary suspension. Yet
the record also discloses that leadman Norman, later that night, told the grievant that his first fueling assignment was his "complete assignment" that night and that when completed he was "not needed any more." Obviously this is not to suggest that Norman actually countermanded or superceded Sullivan's instructions, but rather because Norman's instruction was the last in sequence, it could be so construed (or misconstrued) by the grievant. Whether such interpretation was reasonable depends on whether Norman had authority, actual or apparent, to assign men to work and to relieve them of any further responsibility during the course of a regular shift.

I find that at least to the grievant, Norman had the requisite apparent authority. By practice, a leadman gives out the work assignments and work tickets to the employees working with him. From time to time a leadman assumes supervisory functions where no supervisor is present. Norman had served in that supervisory capacity before and apparently the grievant had worked with him under that arrangement. On the night in question at the National Airlines Terminal there was no authorized supervisor in attendance. Norman testified without contradiction that he was told by the Company's Dispatcher that he (Norman) "was in charge."

Therefore, though I think the grievant should have known better, I am not prepared to conclude definitively that he wilfully absented himself during the balance of his shift to avoid the subsequent fueling assignment. Rather I think he concluded, albeit erroneously and perhaps negligently, that
Norman had relieved him of any further work and that Norman had the authority to do so.

What the grievant did thereafter I cannot excuse. For a significant period of his shift he was "incommunicado" - totally out of reach to supervision and the office, while he "worked his way back" to the point and time of clock out at the office. Consequently, for a period of time for which he was being paid he performed no work for the Company and could not be reached for additional work assignments. In fact, when the Company looked for him in an effort to specifically assign him to the subsequent fueling job (which to my mind would have cured any ambiguity or inconsistency between the statements of Sullivan and Norman), it could not find him because he was out of touch. So, though I am prepared to give him the benefit of the doubt regarding any inconsistency of instructions over a subsequent job assignment I cannot excuse his total inaccessibility during regular working hours when the Company sought to make that subsequent assignment unequivocal.

Moreover, assuming the accuracy of his testimony that as he "worked his way back to the office" he became ill and spent much of the time in rest rooms of various terminals, I think he had a responsibility to report his condition to the Company office or at least to maintain communication. He candidly explained that he did not want to do so, because he would be required to clock out and thereby lose pay for the duration of the shift. Though I understand his reluctance I cannot condone it. The Company is entitled to a full day's work for a day's pay and if an employee is out of touch for further assignments,
or is unable to work because of illness and hides himself away in order to protect his full pay for that shift, the Company does not get either actually or potentially what it is paying for.

As I have absolved the grievant from wilful disregard of a supervisor's order, but have not excused him from other improper actions on the night in question, I conclude that there should be some penalty but less than the penalty which the Company imposed.

Accordingly I reduce the five day suspension to a suspension of two days and the grievant's pay and records shall be adjusted accordingly.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
Trustees Taxicab Industry Pension Fund;
Trustees Taxicab Industry Health & Welfare Fund
and
Ardee Operating Corp.

The Undersigned, as Impartial Chairman under the Collective Bargaining Agreement between the above named parties and having duly heard the proofs and allegations of the Trustees; the above named Company having failed to appear after due notice, makes the following AWARD:

For the period March 2, 1971 to June 30, 1972 Ardee Operating Corp. owes the Taxicab Industry Pension Fund the sum of $2842.66.

For the period March 2, 1971 to June 30, 1972 Ardee Operating Corp. owes the Taxicab Industry Health & Welfare Fund the sum of $6632.86.

Said sums are past due. Therefore Ardee Operating Corp. is directed to pay the foregoing sums to said Funds forthwith with interest.

Eric J. Schmertz
Impartial Chairman

DATED: July 1972
STATE OF New York )ss.:
COUNTY OF New York)

On this day of July, 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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Anita Zakin and

Board of Higher Education of the City of New York

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 15, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The matter of the denial of the reappointment of Anita Zakin is remanded for compliance with established procedures. I direct that the procedure applicable to her case be commenced de novo and fully utilized, namely from the lowest committee level upward through the full scope of the established procedure. I also direct, so far as practicable, that the Board staff the various committees which will consider her qualifications with faculty and personnel different from those who previously considered her case.

All other remedies requested by Miss Zakin are denied.

DATED: June 1972
STATE OF New York )ss.: COUNTY OF New York)

On this day of June, 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. 1339 0732 70
In the Matter of the Arbitration between
Anita Zakin and Board of Higher Education of the City of New York

Opinion

My Award of December 6, 1971 held:

"Within the meaning of Noda Bene there was an arbitrary use of procedure in connection with the denial of the reappointment of Anita Zakin..."

Before me now is the matter of remedy. On that question a hearing was held on March 30, 1972. Thereafter written statements were filed by the parties.

I have considered the entire record before me including the record of the hearings leading up to my Award of December 6, 1971, the evidence and contentions of the parties submitted at the hearing on March 30, 1972, the statements filed subsequent to that latter hearing, the cited Awards of other arbitrators, and pertinent court cases including the decision of the New York State Supreme Court, New York County in the Perlin case (Legislative Conference of the City University of New York v. Board of Higher Education of the City of New York.)

I conclude that the Arbitrator's authority to fashion a remedy, when, as in the instant case he has found an arbitrary use of procedure, cannot go beyond the express remedy negotiated by the parties in the Noda Bene, namely that:

"In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures."

In short I find that by express contract provision the parties have legislated the specific remedy in such cases, and
thereby have divested the arbitrator from authority to fashion any other remedy.

When the Nota Bene was negotiated a variety of possible remedies for procedural defects were well within the contemplation of the parties. Reinstatement, reappointment with or without tenure, back pay and the payment of the expenses of the arbitration including counsel fees were among those reasonably within the knowledge of the parties when the language of the Nota Bene was agreed to. Yet none were included. In my view that means that the parties intended that none of these remedies were to be awarded or fashioned by the arbitrator. Indeed, when by mutually negotiated contract language the power of the arbitrator is expressly limited as set forth in the Nota Bene, he would exceed his authority if he failed to heed the limitation, no matter how inadequate or illusory he may think the contract remedy to be, and no matter how much more of a remedy he thought was necessary to make his Award meaningful.

Therefore in the instant case I have no choice but to remand Miss Zakin's grievance back to the established procedures for compliance with those established procedures.

In doing so, I deem it within my limited remedial power and consistent with my Award and Opinion of December 6, 1971 to direct the Board to reconsider Miss Zakin's reappointment ab initio, ie. through all the steps of the established procedures. I am satisfied that because of the numerous arbitrary uses of procedures which I found at various procedural levels, Miss Zakin is entitled to a full procedural review of her qualifications.
Moreover, consistent with my Opinion of December 6, 1971 in which I expressed doubt that procedural defects of a lower level could be effectively cured at an appeal level, a de novo and freshly objective evaluation of her qualifications is warranted, right from the beginning. Therefore I direct the Board to staff the various committees with different faculty and personnel than those who previously served, as far as is practicable.

[Signature]

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Council of Supervisory Associations of the Public Schools of New York City and

Board of Education of the City of New York

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated October 1, 1969 to October 1, 1972 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The Board of Education has calculated correctly the sabbatical leave of absence record of Max J. Weiss.

Eric J. Schmertz
Arbitrator

DATED: July 17, 1972
STATE OF New York )ss.: COUNTY OF New York)

On this 17th day of July, 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. 13 39 1220 71
In accordance with Article IX Section C of the Collective Bargaining Agreement dated October 1, 1969 to October 1, 1972 between the Board of Education of the City of New York, hereinafter referred to as the "Board" and Council of Supervisory Associations of the Public Schools of New York City, hereinafter referred to as the "Council," the Undersigned was selected as the Arbitrator to hear and render an advisory decision on the following stipulated issue:

Has the Board correctly calculated the sabbatical leave of absence record of Mr. Max Weiss?

A hearing was held on April 10, 1972 at which time Mr. Weiss, hereinafter referred to as the "grievant," and representatives of the Council and Board appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The dispute centers on whether sabbatical leaves between the periods February 8, 1932 and August 30, 1932; and again from September 1, 1933 to January 31, 1934 constitute two sabbatical leaves of absences as recorded by the Board, or whether as contended by the Council both periods of time should be treated as a single sabbatical leave of absence.

The precise fact situation, though apparently unique to
this grievant, is of consequence because it affects his retirement-leave-in-lieu of sabbatical benefit under Article VI Section C of the contract. (i.e. that benefit plus retirement pay would be higher if the grievant's contentions are upheld.)

Both parties agree that there is a paucity of evidence on the intent and practices of the Board regarding sabbatical leaves of absences for the years 1932 to 1934. Based on what was presented in this proceeding there is no record of any one but the grievant having received two different periods of time off, separated by a full academic year of active employment under the Board's then sabbatical leave policy. Only one other somewhat similar case was referred to, namely that of a Mr. Jack Cohn who was granted 12 consecutive months off between 1934 and 1935; and was charged by the Board with two sabbatical leaves of absence covering that period. Unlike the grievant's case Cohn's total leave(s) was not broken into two segments, separated by a period of active employment. Though Cohn is not a grievant in this proceeding the Council contends that his leave record, like that of the grievant's was erroneously calculated by the Board.

Absent persuasive evidence to the contrary, the normal and logical interpretation of the facts applicable to the grievant's situation - namely two specific periods of time off separated by a full year of active employment - is to deem those two periods as two separate and distinct leaves of absence. In my view an interpretation that treats two six month periods of time separated by a full year of active employment as the same leave of absence, is both unorthodox and
untraditional. Normally, a leave of absence is a continuous period of time during which an employee is in inactive status. And that period of time is not severed into unconnected parts by a resumption of full employment. Rather, full time active employment is resumed when the leave of absence comes to an end. Here, absent other evidence, a normal interpretation of the facts leads to only one conclusion - that the grievant received a leave of absence for six months in 1932 which came to an end with his return to active teaching on September 1, 1932. And that he received a second leave of absence a year later commencing September 1, 1933.

With the foregoing traditional interpretation, together with the fact that for the first time these many years later the grievant challenges the method by which the Board recorded his sabbatical leaves in 1932 and 1933, the burden is on the grievant and the Council to demonstrate that a radically different interpretation is proper. In short, it is the grievant's burden to show that by policy, intent and practice, the leaves which the Board granted him for the two separate six month periods in question should be treated as a single sabbatical leave of absence for retirement purposes.

I do not find that that burden has been met.

The by-laws of the Board of Education effective in the year 1932 do not support the grievant's position in this case. The relevant section of those by-laws reads:

Under regulations approved by the Board of Education, the Board of Superintendents may recommend to the Board of Education for approval sabbatical leaves of absence with pay for a period of one or two school terms to members of the teaching and supervising staff...
(Emphasis added)
The foregoing wording is subject to only one interpretation, and that is that the length of a leave of absence may be either for one school term or two school terms. Or in other words for one six month period or for one 12 month period. Clearly, it would be erroneous to argue or conclude that until two school terms or a full year had been used, a teacher had not received a full leave of absence. Any such argument or conclusion would manifestly be inconsistent with the foregoing by-law which authorizes leaves of absence of either one term or two terms.

Nor was this unfair to a teacher or staff member who applied for a one rather than a two term leave of absence. At that time, in the midst of the Depression, leaves of absence were not especially attractive economically. The employee did not receive his full pay. Rather he received his pay less what it cost the Board to hire a replacement. So it is not surprising that some employees would select a leave of absence of a single term rather than two terms. Hence I find it neither unfair nor discriminatory, when, for purposes of calculating the total number of sabbatical leaves granted, a six month leave was treated in those years as a full rather than as a part of a leave of absence.

The Council contends that the amended by-laws of the Board of Education in October, 1932 established the measurement of a sabbatical leave of absence, as one year; and that the grant to the grievant of a second six months period as set forth in list "C" promulgated in May of 1933 simply accorded him a "second
section" of the leave he previously received in order to bring him up to a full and single one year sabbatical leave pursuant to the amended by-laws.

While there is some logic to this argument and though the amended regulation of October, 1932 and list "C" of May 1933 setting forth names of teachers receiving another six month leave might be interpreted as the Council suggests, there is too much in both documents which, on balance, negates any such definitive interpretation. The May 24, 1933 list of employees granted sabbatical leaves provides that list "C" (on which the grievant appears) are those "who have had a previous sabbatical leave for one term" and who are "granted an additional sabbatical leave of absence for the school term beginning September 8, 1933." (Emphasis added).

Hence by the very terms of the document relied on by the Council, the grievant explicitly fell into the category of those who have had a previous sabbatical leave and were being granted an additional sabbatical leave. Accordingly the Board's calculation of the two disputed periods of time as two sabbatical leaves of absence is consistent with the express provisions of the May 1933 document.

I do not find that the October 1932 amended regulations regarding sabbatical leaves of absence constitute a measurement of any single leave as no less than one year. The amended regulation provides in substance that at least seven years of active employment must elapse before a teacher who has received a year leave of absence is again entitled to a subsequent...
sabbatical leave. As I see it this amended regulation sets up a specific period of minimum eligibility of active employment before a teacher who has enjoyed a sabbatical leave of one year can apply for another.

In short it defines eligibility for a subsequent sabbatical leave but does not, especially in the face of the wording of the later May, 1933 sabbatical leave schedule, define the length of a sabbatical leave. Rather, viewed as it must be in conjunction with the other relevant documents, it means to me that once a teacher has received a total of a year off, he may not seek any additional sabbatical time until he has put in seven or more years of subsequent active employment. But it does not mean that sabbatical leaves of absence granted for less than a year are to be calculated as other than a sabbatical leave for the purposes of Article VII Section C of the present contract.

It seems to me that any disagreement with the foregoing interpretation of the October 1932 amended regulation is dispelled by the Board's 1955 by-laws. In pertinent part these by-laws provide:

Under regulations approved by the Board of Education the Superintendent of Schools may grant ... sabbatical leaves of absences with pay for six months covering a period from August 1 to January 31 inclusive or from February 1 to July 31 inclusive ......

As I see it this is a codification of the prior practices and "regulations approved by the Board." At least there is no evidence that this by-law, specifically defining the length of a leave of absence as "six months," represents any change in
the policy or practice of the Board from the earlier years. And absent any such evidence I am constrained to conclude that it represents nothing more than a reiteration of the Board's prior policy and practice.

Finally, it is undisputed that at present, a sabbatical leave of absence is of six months duration. Though standing alone I would not consider the 1955 by-law or the present policy to be determinative of a set of facts arising in 1933 and 1934. But, in the absence of significant evidence showing that the practices and policies of the former years were different than the years 1955 on, the more specific policies of the latter years serve to clarify how sabbatical leaves of absence were and should have been counted during the earlier period. And that is what I think we have here. The Council has not advanced sufficient evidence to show that the policies and practices between 1932 and 1934 as they affected the grievant, were different from the explicit policy from 1955 on. Accordingly the grievance must be denied.

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

Boston Edison Company

and

Utility Workers of America

Ruling of Chairman

Case No.1130 0548 70

The Undersigned, as Chairman of the Board of Arbitration, and having duly heard the proofs and allegations of the parties in the above matter, makes the following RULING:

The issue(s) in dispute in this case shall be resolved either by direct negotiations between the Company and the Union at the next contract negotiations in or around May, 1973, or by an Arbitration Award by this Board of Arbitration.

Accordingly, the rendition of an Award in this case shall be held in abeyance pending the outcome of the next contract negotiations. If those negotiations resolve the issue(s) in dispute no Arbitration Award will be rendered. If the issue(s) are not so resolved, the Board of Arbitration in the instant case will render its Award within ten days of a request to do so from either or both parties.

Pending the foregoing the Company shall not make any of the schedule changes which are the subject of the issue(s) in this case.

Eric J. Schmertz
Chairman

DATED: November 27, 1972
STATE OF New York )ss.: COUNTY OF New York)

On this 27th day of November, 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.
In the Matter of the Arbitration between

West Virginia Union Mutuel Clerks Local 553
Service Employees International Union, AFL-CIO

and

Charles Town Turf Club, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated November 27, 1967 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Issue #1

The Union's grievance is denied. The Mutuel employees of Charles Town Turf Club who handle the multiple pool wagering for four pools are not entitled to an additional $1.00. The limitation of $3.00 contained in the Shenandoah contract is incorporated in the Charles Town Turf Club contract thereby effectively limiting the maximum to $3.00 per day.

Issue #2

The Union's grievance is granted. The Employer is required to limit the number of machines to be supervised by any seller-supervisor to eight machines even if some of the machines supervised are trizacta machines.

Issue #3

The Union's grievance is granted. The grievants who are trizacta machine sellers are entitled to $2.00 per night over their base pay as "three-way sellers."

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

West Virginia Union Mutuel Clerks
Local 553
Service Employees International
Union, AFL-CIO

and

Charles Town Turf Club, Inc.

In accordance with Article XIV of the Collective Bargaining Agreement dated November 27, 1967 between West Virginia Union Mutuel Clerks Local 553, Service Employees International Union, AFL-CIO, hereinafter referred to as the "Union," and Charles Town Turf Club, Inc., hereinafter referred to as the "Employer," the Undersigned was selected as the Arbitrator to hear and decide the following three stipulated issues:

1. The Collective Bargaining Agreement between Charles Town Turf Club and Local 553 has appended to it a letter agreement, executed by the President of the Local Union and the President of the Company, confirming that notwithstanding the terms and conditions contained in the Collective Bargaining Agreement between Charles Town Turf Club and the Union, "All terms and conditions contained in the contract between this Union and Charles Town Racing Association (Shenandoah Downs) (an adjoining race track which abuts the property of this race track) and which were not specifically made a part of the contract between this Union and Charles Town Turf Club, Inc., will apply and become part of such contract with Charles Town Turf Club, Inc., as if the same had been fully set forth therein."

The Collective Bargaining Agreement for both race tracks provide that the mutuel employees shall receive $1.00 extra for handling multiple pool wagering. The Shenandoah Downs contract, then, specifically provides that this additional pay for such work shall "not exceed $3.00 per day." The Charles Town Turf Club contract does not contain that express limitation in Schedule "A", but the employer relies on the letter agreement incorporating all
terms of the Shenandoah contract into the Charles Town Turf Club contract.

The issue is whether the employees at Charles Town Turf Club are entitled to an additional $1.00 for the mutuel employees who handle the multiple pool wagering for four pools, or whether the limitation of $3.00 contained in the Shenandoah contract is incorporated into the Charles Town Turf Club contract thereby effectively limiting the maximum to $3.00 per day.

2. Schedule "A" of the contract presently in force and effect, provides that the number of machines to be handled by seller-supervisors on "win...place...show" shall be limited to 8 machines per seller-supervisors. The Union claims that the seller-supervisors for the trizacta come under this limitation. The Company contends that the limitation applies only to "straight wagering" betting and not for multiple pool wagering.

The issue presented is whether management is required to limit the number of machines to be supervised by any seller-supervisor to 8 machines, even though some of the machines supervised are trizacta machines.

3. The Union claims that trizacta machine sellers are entitled to $2.00 per night over their base pay, alleging that they are "three-way sellers," as provided for in the contract. The Company contends that trizacta wagering is a multiple pool type of wager, similar to the exacta and is, therefore, not included for such additional benefit.

Hearings were held in Charles Town, West Virginia on September 7 and September 30, 1972 at which time representatives of the Union and Employer 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. Post hearing statements and memoranda of law were filed by the Union and Employer.
Determination of this issue turns on whether a "letter agreement" or "side letter" dated January 31, 1968, executed by Mr. Irvin Kovens, the then President of the Employer and Mr. Samuel J. Hoffman, the then President of the Union, is binding on the Union. The pertinent part of that letter is set forth in the foregoing stipulated issue #1.

If the terms of said letter are binding on the Union, the relevant provision of the Shenandoah contract is controlling and the Union's grievance seeking an additional $1.00 for Mutuel employees who handle multiple pool wagering for four pools must be denied. On the other hand if the terms of said letter are not binding on the Union, the provisions of the Employer's contract with the Union providing for the additional $1.00 without a $3.00 maximum limit should be enforced.

The enforceability of the January 31, 1968 letter, not its authenticity, is what the Union challenges.

The Union asserts that Mr. Hoffman, the then Union President, was not authorized to enter into any such agreement with the Employer; that he did so without knowledge or consent of the Union's bargaining committee or its other officers; that the January 31, 1968 letter was not submitted to the Union membership for ratification as required by the Union constitution; and that it did not come to the attention of the present Union leadership until about a year before the instant arbitration hearing, following which the Union grieved. In short, the Union contends that Hoffman acted ultra vires and that his action did not and cannot bind the Union.
The Employer contends that said letter was negotiated with Hoffman in a manner similar to the negotiations of the basic Collective Bargaining Agreement and other "side letters" which are not disputed; that it had no reason to doubt Hoffman's authority; that it had no reason to doubt that the terms of the letter would be presented to the Union membership any differently than any other contract provisions; that the Employer's request for Hoffman's agreement to the content of said letter was both logical and reasonable considering the circumstances of the negotiations (between the Union and the two adjacent but differently owned race tracks -- this Employer and Shenandoah); and that therefore the terms of the letter should now be binding on the Union as part of the Collective Bargaining Agreement.

I have no reason to question the Union's contention that its bargaining committee and its officers were unaware of the letter agreement between its President and the Employer; nor do I doubt its assertion that neither the letter nor its content was submitted to the Union membership for ratification. Also I accept the testimony of Union representatives that they first learned about the letter and its content several years after its execution.

Yet I find these factors immaterial to determination of the basic question. I conclude, these factors notwithstanding, that the letter of January 31, 1968 setting forth an agreement reached between the then respective Presidents of the Employer and the Union is now binding on the Union and enforceable as a contract term.
Manifestly, Hoffman had "apparent authority" to reach such agreement. He was the President of the Union. On behalf of the Union he was the sole signatory to the basic Collective Bargaining Agreement. Also he was the sole signatory to a different and undisputed "letter agreement" which is attached to and made part of the basic agreement and which was similarly signed by Kovens. Under those circumstances the Employer had no reason to believe that Hoffman had any less authority to agree to and sign on behalf of the Union the January 31, 1968 letter, than he had in agreeing to and signing the basic contract and a different letter agreement.

Moreover, there is no evidence that the Employer had any reason to believe or know that the January 31, 1968 understanding would not be or was not ratified by the Union membership pursuant to the provisions of the Union constitution. Indeed I find no evidence of notice to the Employer that the terms of the basic agreement or any of the "letter agreements" would not be binding until or unless the Union membership ratified it, or until notice of such ratification was given to the Employer. Rather I am satisfied that the Employer was not involved in nor advised of the internal Union procedures or constitutional requirements of ratification and that the Employer had reasonable grounds to believe that the basic contract and the "letter agreements" were contractually binding on both parties and/or ratified by the membership if necessary, unless the Union expressly advised otherwise, (i.e. for example, that a ratification vote failed.) No such express notice was conveyed by the Union to the Employer. Hence the Em-
ployer had legitimate grounds to believe that the basic agree-
ment and the letters, including the letter of January 31, 1968, 
were accepted by the Union and enforceable. 

Moreover the Employer's request for and subsequent reliance 
on the January 31, 1968 understanding was founded on a logical 
and bonafide business need. At the time that the Employer 
agreed to the contract terms, a few months yet remained on its 
predecessor contract with the Union. At the same time the Union 
was on strike against the adjacent and then separately owned 
Shenandoah race track. It is clear that among other reasons, 
the Employer agreed to a new contract with the Union earlier 
than the expiration of his predecessor contract, in the expect-
ation that it would be instrumental in bringing about a settle-
ment of the strike between the Union and Shenandoah. But having 
agreed to terms earlier than was necessary, the Employer wished 
to protect himself from a competitive disadvantage which might 
 arise if a subsequently negotiated contract between the Union 
and Shenandoah contained provisions more favorable to Shenandoah 
than similar substantive provisions in the Union's contract with 
this Employer. Hence the obvious logic for, and explanation of 
Koven's request of Hoffman for the January 31, 1968 understand-
ing, which undisputedly was meant to require that a provision 
in the Shenandoah contract more favorable than a provision cov-
ering the same subject in the Employer's contract, would prevail 
as to both, thereby maintaining a competitive parity between the 
two race tracks. (Similarly a provision in the subsequently 
negotiated Shenandoah contract, more favorable to the Union than 
a contract clause with the Employer covering the same subject,
shall be applicable to the contractual relationship between the Union and the Employer.)

But it is the former -- namely a Shenandoah contract term which is more favorable to the Employer than his own contract clause on the same subject -- that is involved in the instant grievance.

I have carefully considered the memoranda of law submitted by counsel for the Union and the Employer and I am persuaded that under the foregoing circumstances, the weight of current legal authority supports the Employer's contention that the January 31, 1968 letter and the agreement set forth therein is contractually binding on both the Union and the Employer for the term of the present Collective Bargaining Agreement.

Both the Statute and the cases point inexorably to the conclusion that when the chief Union negotiator had apparent authority; when the Employer had no reason to believe or suspect that he was acting outside the scope of his authority; where the agreement reached is within the scope of subjects for collective bargaining; and where the Employer has not been expressly notified that the agreement is subject to membership ratification or, in the alternative, notified that the membership has failed to ratify the agreement, the Union negotiator's action is binding on the Union even if it is later shown that he acted beyond the authority the Union gave him and his agreement was not submitted to the Union membership for ratification.

Sections 301 (b) and 301 (e) of the National Labor Relations Act read:

Any labor organization which represents employees in an industry affecting commerce as defined in
this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (Emphasis added)

Section 2(13) of the amended NLRA provides that in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

CCH explains that the importance of this provision arises from the fact that alleged union and employer unfair labor practices, under Section 8, will originally be committed, not by the unions or employers themselves, but rather, by persons acting for them: supervisory personnel, in the case of employers; and organizers or local union officers or agents, in the case of unions.

The agency provision is important also in connection with the definition of the term "employer" in Section 2(2) (P.1625). That definition states the term "employer" includes any person acting as an agent of an employer, directly or indirectly.

The provision of Section 2 (13) adopts the common-law rules of agency. At common law, persons are held responsible for acts
committed by agents within the scope of their general authority.

Adoption of the common-law rule makes it clear that the
agency rule provided for in the Norris-LaGuardia Act, requiring
actual participation in or authorization or ratification of
particular acts, is not applicable under the present Act. The
Board, in Int'l Longshoremen's Union (Sunset Line and Twine Co.)
(1948), 79 NLRB 1487, held the following principles controlling:

1. Consent of the parties to an agency relationship
need not be express and overt but may be manifested by
conduct from which it may be inferred that the principal
actually intended to confer authority.

2. Where a principal has empowered an agent to act for
him in a general area, the principal is responsible for
all acts of the agent within the scope of his general
authority, even though the principal has not specifically
authorized or indeed may have specifically forbidden the
acts in question. (Emphasis added)

The House-Senate conference agreement, in defining the term
"employer," struck out the vague phrase in the Wagner Act 'any-
one acting in the interest of an employer' and inserted in lieu
thereof the word "agent." The term agent is defined in section
2(13) and section 301(e), since it is used throughout the unfair
labor practice sections of title I and in sections 301 and 303
of title III...

...Of course, the definition applies equally in the
responsibility imputed to both employers and labor
organizations for the acts of their officers or rep-
resentatives in the scope of their employment.

"It is true that this definition was written to avoid
the construction which the Supreme Court in the recent
case of United States against United Brotherhood of
Carpenters placed upon section 6 of the Norris-La
Guardia Act which exempts organizations from liabil-
ity for illegal acts committed in labor disputes un-
less proof of actual instigation, participation, or
ratification can be shown. The construction the
Supreme Court placed on this special exemption was
so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such, engages in intimidating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless whether or not the Company officials approved or were even aware of his actions. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action had been taken by the union to authorize such conduct."


Cases before the National Labor Relations Board on questions of agency and the responsibility of labor unions for the acts of individual officers, are generally in regard to violations of Section 8 of the National Labor Relations Act. The facts usually involve strike situations or incidents of refusal to bargain collectively.

An early case, International Longshoremen's and Warehousemen's Union, CIO, Local 6, etc.; Petulma Unit, etc. and Sunset Line and Twine Company, 79 NLRB 207 (1948) came before the Board soon after the Labor Management Relations Act of 1947 went into effect.

The complaint against the union alleged that during a mass picketing demonstration, an officer and an agent of the union restrained and coerced employees of the company, who were attempting to go to work, by intimidating and threatening them with bodily
harm. The trial examiner found that the International and two of its Locals, by the acts of their agents, had engaged in unfair labor practices, within the meaning of the Act.

The question presented was whether or not the conduct of individuals could be properly imputed to one or both of the respondent unions "for unless the record justifies that imputation, there was no violation of the Act in this case."

In pertinent part the trial examiner said:

"we are to treat labor organizations as legal entities, like corporations, which act and can only act through their duly appointed agents, as distinguished from their individual members... We have rarely had occasion to examine the relationships between a labor organization and its officers or other persons allegedly representing it, especially for the purpose of deciding whether or not the officer or other person was acting, in a particular instance, as the agent of the labor organization...(F)undamental rules of the law and agency ... must control our decision on the issue of responsibility.

1. The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. In this case, for example, it was incumbent upon the General Counsel to prove, not only that the acts of restraint and coercion alleged in the complaint were committed, but also that those acts were committed by agents of the Respondent Unions, acting in their representative capacity. The Respondents' failure to introduce evidence negating the imputations in the complaint did not relieve the General Counsel of that burden.

2. Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.
3. A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the 'scope of his employment' if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.

The Examiner then considered the question of the business agent and the vice president of the local who had allegedly performed the coercive acts.

"The record does not otherwise show how Vail's duties are defined, or what are the limitations of his authority; but neither is there any evidence to rebut the inference, which we might well draw from his title alone, that he was, at the time of the events involved in this case, vested with the powers of a general agent to conduct the Local's business in the Petaluma area." That business consisted, necessarily, of collective bargaining and concerted activities of the membership in furtherance of the Local's objectives in collective bargaining. The strike against the Company in this case was in that sense, the Local's business.

"It follows that the Local was responsible for the wrongful acts of Vail and individuals under his direction which were performed in furtherance of those same purposes and were of the same general character as, or incidental to, the peaceful picketing, and substantially within the area of this labor dispute in space and time. Of course, the record is barren of evidence showing that Local 6 specifically authorized or ratified Vail's assault on Sousa, for example, but the absence of such proof is immaterial so long as there is evidence that Vail was on that occasion, acting within the scope of his general authority to direct this strike and picketing."

Enterprise Association of Steamfitters, Local 638 AND HV & AC Contractors Association, Inc., 170 NLRB No. 44, (1968), concerned a complaint that the union had refused to sign an agreement with the HV & AC Contractors Association (hereinafter "Association") embodying terms and conditions of employment.
agreed on by the parties. There was no history of collective bargaining between them. Negotiations began with representatives of both parties stating that they had full authority to negotiate.

Previously, the union had a collective bargaining agreement with the Mechanical Contractors Association (hereinafter "Contractors") with whom they were also negotiating a new contract. It was agreed between the union and the Association that the latter would accept the same contract reached by the union and the Contractors. The parties shook hands on that arrangement. An agreement was negotiated between the union and the Contractors and a copy of the memorandum of agreement was sent to the Association who signed it and returned it to the union together with letters from each of the Association members authorizing it to negotiate a collective bargaining agreement with the union.

The union continually delayed signing, and then insisted that each of the Association members sign an individual working agreement. The Association protested. The union called a work stoppage. This was enjoined. The entire procedure of new negotiations was repeated and a new memorandum of agreement was reached. The union again refused to sign and contended that its representatives had no authority at any time to meet and negotiate a contract with the Association's representatives. It relied upon a motion approved at a union meeting that no action should be taken "until discussed and approved by the body."
The NLRB found that the union's representatives reached a binding agreement with the Association on behalf of the union. The Board affirmed the trial examiner's findings that the union refused to bargain collectively, thereby violating Section 8(b)(3) of the NLRA.

_NLRB v. Brotherhood of Painters, Decorators, Paperhangers, etc._, 334 F 2d 729 (7th Cir. 1964) also concerned a refusal by the union to sign a written collective bargaining agreement containing provisions upon which the union and the employers involved had agreed upon following a series of negotiation meetings between union and employer representatives.

The union claimed that its membership had not ratified the agreement as required by the union constitution. It further asserted that the cause was moot because the agreement in question had expired and the union was currently bargaining a new contract with the employers. The Court said:

"We are not impressed with the union's contention that membership ratification was an additional prerequisite. The representations made by the Union's president and negotiation representative and the history of the 30 years of contract negotiation and execution between the parties, are inconsistent with the Union's belated resurrection and reliance on the long dormant provision of its constitution." (Emphasis added).

It was held that the union was guilty of an unfair labor practice by refusing to sign the formal contract document.

_Sheet Metal Workers Union, Local 63 and Inland Steel Products Company, 120 NLRB Wo. 216 (1958)_ concerned collective bargaining that took place between the parties in 1956. The union refused to sign the contract whose terms had been agreed upon.
The union claimed that in 1955 it had adopted by-laws empowering its executive board to act as a negotiations committee and requiring that all agreements be submitted to its membership for approval. The union further claimed that these by-laws therefore lessened the authority of its business representatives to conclude binding agreements.

The NLRB three-member panel found that the union's negotiators "acted as if they had full authority to reach and execute a binding agreement, and exercised their apparent authority during the 1956 bargaining in the manner displayed during the 1954 and 1955 course of negotiations."

"It is not at all clear whether this provision of the by-laws represented a modification of the Respondent's bargaining procedures or was merely a written codification of its past practice; nor is it clear whether the provision was intended to apply to bargaining between the Respondent and the small number of so-called manufacturing employers, of whom the Company was one, or only to the multiemployer associations in the construction industry with whom the Respondent had more extensive dealings. But whatever the 1955 by-laws were meant to accomplish, we are satisfied that the Trial Examiner was correct in concluding that Desch and his fellow negotiators did not alert the Company to the possibility that their right to bind the Respondent had been diminished." (Emphasis added).

Operating Engineers Local Union No. 3 AND California Association of Employers, 123 NLRB No. 114, involved a stormy series of bargaining sessions and strikes involving the Association and the union. An agreement was reached, and the membership voted by secret ballot to accept its terms. The union representative then announced to the Association that the union would no longer negotiate on a local basis but only on an industry basis at its regional headquarters; that local representatives were authorized
only to negotiate and administer contracts -- not to sign them.

This was rejected by the Association on the grounds that (1) there had been no prior notice of such limitation on the representative's authority, (2) agreement on contract terms had been reached, (3) in view of the history of bargaining, the union was out of order in refusing to sign it, and (4) such refusal would be a violation of the Act.

The NLRB found from the bargaining history between the parties, that the business agents of the union had clearly established their apparent authority to conclude and execute agreements on behalf of the union and that the Association was justified in relying upon this apparent authority.

See also UAW, and its Local 453 AND Maremount Automotive Products, Inc., 134 NLRB No. 128, where the union negotiated an agreement which was settled on final terms, ratified by the membership and the document executed. The union then disclaimed the authority of its bargaining agent, demanded further provisions, and refused to sign the formal agreement.

The Board found that the Company was justified in relying on the apparent authority of the union bargaining agents, and observed that the letter insisting on new provisions was by its wording an affirmation of the continuing authority of the agent rather than an intent to limit his authority.

Two recent cases affirm the preceding case. First is International Union of Elevator Operators, Local 8 AND National Elevator Industry, Inc. 185 NLRB No. 112 (1970)

The Board therein observed that while there was no con-
stitutional requirement of membership ratification herein, the Board and the courts had held that even though the constitution of a union may require ratification by the membership, an employer may rely upon the apparent authority of the union representative to conclude an agreement where there is a basis for such reliance. (Emphasis added)

It was therefore held that the union's refusal to sign an agreement reached by the negotiators, because of the subsequent failure of ratification by the membership, was a violation of Section 8(b) (3) of the Act.

And in Glass Workers Union, Local 1220, AND Industrial Conference Board, 162 NLRB 168, the Board held that the union violated Section 8(b) (3) by refusing to sign a fully-agreed-upon contract notwithstanding a failure to meet the union's constitutional requirement of ratification by the local's membership. 1.

A 1972 California case reaffirms the preceding case law: Pharmaseal Laboratories, Irwindale, Calif. and Carl Smith, an individual (United Metaltronics and Hospital Supply Employees, Local 955, United Brick and Clay Workers of America, AFL-CIO, and Miscellaneous Warehousemen, Drivers and Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

1. Note that George Meany was quoted in an article "Labor Leaders" in the Catholic Standard, Washington, D.C., of March 5, 1970, by Msgr. George C. Higgins "urging that unions empower their negotiating committees to conclude binding agreements without the need for subsequent ratification."
In 1965, Local 955 and Local 986 were certified by the Board as the joint representatives for the bargaining unit and thereafter entered into a three-year contract with the employer. In 1968 negotiations for a renewal contract began. Local 986 refused to participate on the ground that its petition was then pending before the NLRB seeking to sever the warehousemen from the unit.

The 1968 negotiations resulted in a new three-year contract signed by the employer and agents of Local 955 on behalf of the joint representatives. Neither Local 986 nor its agent signed, but said local accepted the benefits of the contract, abided by its terms and never questioned its validity.

In 1971 the employer was notified that the joint representatives wished to negotiate another renewal contract. Local 955 and Local 986 were named as local agents and co-chairmen of a bargaining committee. Numerous bargaining sessions took place and agreement was reached. Although formerly concurring in the proposals, Local 986 now questioned the final agreement and notified the employer and Local 955 that the agreement was invalid because Local 955 had no authority to sign on behalf of the unit.

The Board found:

1. that the contract contained no provision that it was to be subject to employee ratification or to signature by any agents of Local 955 or 986 as such.

2. Local 986 left the negotiating responsibility almost entirely to Local 955.
(3) Both locals had the obligation to bargain on behalf of the unit employees on a joint basis and with one voice.

(4) Once the employer had relied in good faith upon the authority of Local 955 as a bargaining agent the validity of the consummated agreement could not be disputed.

* * * *

Accordingly the Union's grievance on Issue #1 is denied. The limitation of $3.00 contained in the Shenandoah contract is incorporated into the Charles Town Turf Club contract, thereby effectively limiting the maximum to $3.00 per day.

Issue #2

Based on its position regarding Issue #1, the Employer stated at the hearing that if Issue #1 was decided in its favor, an Award on Issue #2 in favor of the Union would automatically follow.

Under the Shenandoah contract the number of machines to be handled by a seller-supervisor on "win...place...show" is limited to eight machines per seller-supervisor without defining the type of machines involved.

The Company concedes that that provision under the Shenandoah agreement, is more favorable to the Union than the Employer's interpretation of its own contract clause on that subject. (Which the Employer interprets to apply only to straight wagering and not to multiple pool wagering, such as the trizacta. The Employer asserts that under its contract a limitation of eight machines does not include the trizacta machine.)
In view of the Employer's concession that he is bound to the Shenandoah provision which is more favorable to the Union, I see no need to decide whether a trizacta machine is or was intended to be a machine included within the eight machine limitation under the terms of the contract between the Union and the Employer. Rather, based on the concession, and the consequential preemptive status of the Shenandoah clause covering the same subject the trizacta machine is included within the eight machine limitation per seller-supervisor.

Accordingly the Union's grievance in Issue #2 is granted. The Employer is required to limit the number of machines to be supervised by any seller-supervisor to eight machines, even though some of the machines supervised are trizacta machines.

**Issue #3**

The question here is whether the trizacta machine sellers became "three-way sellers" after February 15, 1972 when they were added to the bargaining unit and covered by the provisions of the February 15, 1972 agreement and the basic Collective Bargaining Agreement of November 27, 1967.

The Union contends that because trizacta wagering was first instituted after the February 15, 1972 agreement, the employees covered by this grievance, when assigned that work became "three-way sellers" within the meaning of Schedule A of the basic agreement. And that by operation of Article VIII of the February 15, 1972 agreement, those grievants are entitled to an additional $2.00 per night over their base pay for handling trizacta wagering pursuant to Schedule A of the basic contract.
The Employer contends that the wages of the grievants were fixed for the balance of the contract term under the Agreement of February 15, 1972. It asserts that when added to the bargaining unit those employees were granted wage increases of 50¢ per day for the work they were then performing which included the exacta and superfecta, both "exotic" types of wagering. The Employer argues that the subsequently introduced trizacta wagering is basically no different than the exacta; that each time a trizacta was introduced, an exacta race was eliminated; and that consequently not only is there no significant difference in the handling of an exacta or trizacta bet, but that with the elimination of the former in exchange for the latter the total work load and responsibility of the affected employees did not change.

I reject the Employer's argument. Schedule A of the basic Collective Bargaining Agreement applies, under the instant issue, to the type of work an employee performs, not to its quantity, or to whether it is a lateral substitution for or change from the type of work previously performed.

It may well be that trizacta wagering requires no more effort or responsibility than exacta wagering. Yet Schedule A makes no such express distinction. It requires a wage differential between the two types of selling without any exception or limitation.

When the grievants became part of the bargaining unit they handled exacta and superfecta betting. As such they were not then "three-way sellers." Trizacta wagering was not at that time contemplated by both parties. Hence the 50¢ a day wage
increase could not have been intended to cover trizacta wagering. Instead, it was a wage increase applicable to exacta and superfecta selling which the grievants were then performing, and additionally, as the Union asserts, a wage increase commensurate with what others received by virtue of coverage under the Collective Bargaining Agreement.

Sometime later (apparently in April 1972) the trizacta was introduced. Trizacta is a "three-way sale" machine. Its operators perforce became "three-way sellers." At that point, for the first time, the grievants acquired new contractual characteristics which they did not possess when they became part of the bargaining unit. Whether or not their new assignment was any more demanding than what they previously performed, it was nonetheless different in type. They became "three-way sellers," rather than exclusively "two-way sellers," and because the contract does not exempt any three-way sellers from the wage payments set forth in Schedule A, the grievants are entitled to the pay contractually accorded that type of employee.

Accordingly, the grievants under this issue who are trizacta machine sellers are entitled to $2.00 per night over their base pay as "three-way sellers." The Union's grievance is granted.
DATED: December 13, 1972
STATE of New York ) ss.:
COUNTY of New York)

On this 13 day of December, 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.

FRANK T. ZOTTO  
Notary Public, State of New York  
No. 41-9911400  
Qualified in Orange County  
Commission Expires March 30, 1974
December 11, 1972

Harold Israelson, Esq.
Israelson & Streit
521 Fifth Avenue
New York, N.Y.

- and -

John Finneran, Esq.
Mark Grossman, Esq.
Office of Labor Relations
City of New York
250 Broadway
New York, N.Y. 10007

Re: Case #I-92-72
City of N.Y. & Civil Service
Bar Association

Gentlemen:


Very truly yours,

Eric J. Schmertz
Chairman

cc: George Marlin
Eva Robins
OCB - George Bennett
IN THE MATTER OF THE IMPASSE

- Between-

CITY OF NEW YORK

-and-

CIVIL SERVICE BAR ASSOCIATION

BEFORE: ERIC SCHMERTZ, Chairman
EVA ROBINS, Member
GEORGE MARLIN, Member

On August 3, 1972, the above panel was named by joint request of the parties to resolve the impasse between them pursuant to Section 1173-7.0 of the New York City Collective Bargaining Law.

ISSUES PRESENTED

1. Term of Contract

2. Reclassification of Titles

3. Salaries
This Fact-Finding proceeding involves approximately 450 attorneys employed by the City in various departments and agencies. The Association represents employees with the titles of Attorney-Trainee, Assistant Attorney, Attorney, Senior Attorney, and Supervising Attorney.

The previous agreement expired December 31, 1970, and the Panel is asked to make recommendations for a new agreement effective January 1, 1971.

The Association desired to present additional issues to the Panel. However, the City challenged the Panel's authority to hear and make recommendations on such issues because the issues were either City-wide in scope or non-mandatory subjects of bargaining. The Panel advised the Association that any issues other than those mutually agreed upon, would have to be submitted to the Board of Collective Bargaining to determine their bargainability.

The Association reserved its right to raise those issues held bargainable by the Board at a future date, and with this reservation, the parties agreed to proceed with the hearings on the three issues above.

1. **TERM OF CONTRACT**

   The Association has proposed a contract term of twenty seven months for the period commencing January 1, 1971 and terminating March 31, 1973. The City has proposed a contract term of three years, from January 1, 1971 to December 31, 1973.

   The Panel is of the opinion that a three year contract term is justified, based on the pattern of settlements for other Career and Salary Plan employees as well as a desire to encourage harmonious relations between the parties. It is now December 1972, and little purpose would be served by a contract that would expire in three months. Neither the public interest nor the interest of the parties would be served by a contract term of shorter duration.

2. **RECLASSIFICATION OF TITLES**

   Under the existing statutes, this Panel is limited to making recommendations to the New York City Civil Service Commission concerning reclassification of titles.

   Both parties have recommended a reduction in the number of the attorney titles. Presently there exists in addition to Attorney Trainee and the managerial attorney classifications, the following titles:

   Assistant Attorney, Attorney, Senior Attorney and Supervising Attorney.
On the basis of the thorough presentation of both parties, the Panel is persuaded that some type of reclassification of titles is warranted.

In essence, both parties urge that there be a single title encompassing the duties of the current Assistant Attorney and Attorney titles, and likewise, a single title encompassing the duties of Senior Attorney and Supervising Attorney.

However, the method chosen by the parties to effectuate this change differs.

The Association has proposed that in each instance, the lower title be eliminated, the incumbents in said titles be advanced to the higher level, so that all attorneys are paid at the higher level. The effect of this proposal is that the incumbents of the lower title would move to the higher level and newly hired attorneys would be hired at the minimum of the higher title.

The City proposes consolidation of heretofore separate classifications rather than the elimination of either lower title. The result of the consolidation would be a salary range spanning the minimum of the lower titles to the maximum of the higher titles.

The City proposes that incumbents of the lower titles receive a promotional increase as a result of the consolidation. Newly hired attorneys would be hired at the minimum of the range.

The Panel will recommend that the four titles be consolidated into two titles with certain salary adjustments to flow as a consequence of the consolidation. Clearly, a consolidation of duties will allow more flexibility of assignment and maximize the performance of attorneys, and at the same time facilitate promotional opportunity.

The Panel's recommendation of the salary adjustment to flow as a consequence of the proposed consolidation is discussed in Section 3—Salaries, below.

3. SALARIES

It is undisputed that salary increases are warranted for the attorneys represented by the Civil Service Bar Association. Clearly, the pre-1971 salary levels are far below the present salaries of attorneys of comparable competence and experience in the public and private sectors.

While it is true that the job opportunities for lawyers have narrowed in recent years and that recruitment may or may not be as significant a problem in the future, there has been a considerable turnover of attorneys employed by the City.
Both parties have expressed dissatisfaction with the present structure of salaries for attorneys. The City argues that there is no apparent structure within the present salary scale, with attorneys "haphazardly" located in the ranges.

The City has argued that its lump sum proposal is the only "practicable" way of creating a rational wage structure. It argues that its effects are "beneficial" and doesn't deny any monies to the attorneys.

The Association adamantly opposed the lump sum payments arguing the monies should be reflected in the rate, so as not to deprive attorneys of pension benefits as well as the going-out rate for the next round of collective bargaining.

The Panel notes that attorneys employed by the State and Federal governments did not receive uniform salary increases. The increase was not uniform because the increases were dependent upon the position of the attorneys in their respective increment structures. Those attorneys who did not receive increments received significantly smaller increases than those who received increments.

In order to establish the structure proposed by both parties, from different viewpoints, with the Association requesting Salaries and Structures of the State Pay Plan and the City advancing a structure with a limited number of rates, we propose to establish a structure by slotting employees at a fixed rate in the structure.

The Panel feels that this situation should be remedied to bring order to the salary scale. We agree that a rational salary structure is essential and that a finite number of rates should be recommended.

Additionally, the City's position that the Managerial Pay Plan should be considered for the purposes of establishing maximum salaries is valid. If the Panel were to do otherwise, it would create a disruptive effect on the established Career and Salary Plan for the entire program.

The Panel's recommendations will grant an equitable adjustment to this issue. It provides that every City Attorney shall receive the same amount of dollars during each contract year as other Attorneys in the same title.

The Association has ably demonstrated that the City's salary proposals are inconsistent with action the City has taken with regard to other Career and Salary Plan employees.

The City's proposal for the first year is consistent with the pattern of settlement alleged, but not for the second and third year increases because of concern for Pay Board guidelines. The Association has justified larger increases for the second and third years for two reasons: first, internal comparisons, i.e. negotiated increases for other Career and Salary Plan Employees, and second, external comparisons with other governmental jurisdictions.
INTERNAL COMPARISONS

First, and most important, other Career and Salary Plan employees received higher increases. The Accountants, Clerical Employees, Hospital Employees, Investigators, Public Health Nurses and Social Services Employees all received higher negotiated increases in the later year of their contracts than the City has offered the Attorneys in the second and third years.

The Panel feels that disparate treatment of the attorneys as compared with the other Career and Salary Plan Employees would have a deleterious effect on the labor policies of the City. Additionally, the Panel seeks to avoid any "whipsaw" effect engendered by disparate increases.

The Panel has made its recommendations notwithstanding the City's concern for Pay Board action. Our recommendation is properly in line with the pattern of negotiated settlements for the other Career and Salary Plan Employees.

EXTERNAL COMPARISONS

The Panel agrees that it is helpful to note comparisons with the State and Federal governments. The City's proposals for the second and third year are not comparable with the treatment of attorneys in other governmental jurisdictions.

During the hearings, the parties were agreed as to the appropriate equivalent State titles for comparison purposes except for the Supervising Attorney title. The City argued that the Panel must compare non-managerial titles. The Association's witnesses testified that individuals with the State Supervising Attorney title were upgraded into the managerial level.

In another proceeding, the Association established that the City Supervising Attorney was not a managerial title, thereby retaining the right to bargain for it. Accordingly, since there is no one in the State performing legal work at Grade 30, the comparison sought by the Association, the appropriate grade for comparison purposes is Grade 28.

The appropriate State equations for comparison purposes are:

<table>
<thead>
<tr>
<th>City Title</th>
<th>State Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assistant Attorney</td>
<td>Attorney</td>
</tr>
<tr>
<td>Attorney</td>
<td>Senior Attorney</td>
</tr>
<tr>
<td>Senior Attorney</td>
<td>Associate Attorney</td>
</tr>
<tr>
<td>Supervising Attorney</td>
<td>Associate Attorney</td>
</tr>
</tbody>
</table>
The parties also disputed the appropriate comparisons with the Federal government. The Association sought to link the Assistant Attorney with an entrance level of GS 11. The City sought an entrance level comparison of GS 9.

In 1971 State and Federal Attorneys received across-the-board increases of 6%. In 1972 the increases were 4% and 5.5% respectively. The Association correctly noted that some employees received increments as well. Neither the Federal nor State Attorneys received a uniform monetary increase. The monetary increase for the City Attorney will be uniform, and each Attorney will receive the full amount of the increase recommended.

The Panel has recommended an entrance salary which it believes is competitive with that of other Attorneys employed in the public sector.

Perforce, recommendations of increases in salary for incumbents, and a salary structure within which those increases are placed, must have some application to entrance salaries as well. Additionally, we find a change in entrance salary warranted in comparison to entrance salaries of other attorneys employed in the public sector. We do so within the format proposed by the City in its brief.

CONSEQUENCES OF THE PROPOSED CONSOLIDATION OF TITLES

The consolidation of titles recommended supra necessitate salary adjustments to flow as a consequence of the proposed consolidation.

The proposed consolidation of titles will increase the duties and responsibilities of the incumbents in the Assistant Attorney and Senior Attorney titles. Upon consolidation a promotional increase is warranted. We have recommended that this increase be granted according to the schedule set forth in the recommendation.

Similarly, incumbents in the titles of Attorney and Supervising Attorney will assume added responsibilities of instruction for a period of about one year. We have recommended that the Attorneys in these titles receive additional remuneration for that year according to the schedule set forth in our recommendation.

The Panel also recommends that a promotional guarantee be provided for in the proposed rate structure. If an Attorney is promoted from the consolidated Assistant Attorney - Attorney title to the consolidated Senior Attorney - Supervising Attorney title, he shall be granted a promotional increase of $1100 plus whatever additional sums would be required to move him to the next highest rate in the structure in the consolidated Senior Attorney - Supervising Attorney title.
PRODUCTIVITY

Finally with respect to the productivity language suggested, we recommend the adoption of the City's productivity proposal.

The Panel notes that the testimony of the Association is replete with the fact that they have been already meeting the standards of the productivity language which shall be recommended in the contract and should, therefore, be no additional burden to the Association to adopt the City's productivity language. Productivity bargaining is an essential element in collective negotiations of the City of New York, as well as an important criterion for Pay Board determinations.
RECOMMENDATIONS

1. The term of the agreement shall be for a period of three (3) years commencing January 1, 1971 and terminating December 31, 1973.

RECOMMENDATIONS TO THE NEW YORK CITY CIVIL SERVICE COMMISSION

2. The Panel recommends that the titles of Assistant Attorney and Attorney be consolidated into a single title encompassing the duties of the former titles. The Panel recommends the consolidation of the titles of Senior Attorney and Supervising Attorney in the same manner.

SALARIES

3. a) Salaries and Ranges

The Panel has recommended the adoption of the format suggested by the City in its brief.

(1) Salary Increases

The salary increases recommended are as follows:

<table>
<thead>
<tr>
<th>Title</th>
<th>Effective Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1/1/71</td>
</tr>
<tr>
<td>Assistant Attorney</td>
<td>$1200</td>
</tr>
<tr>
<td>Attorney</td>
<td>1300</td>
</tr>
<tr>
<td>Senior Attorney</td>
<td>1400</td>
</tr>
<tr>
<td>Supervising Attorney</td>
<td>1500</td>
</tr>
</tbody>
</table>

The full amount of the increase will not necessarily be reflected in the rate of the individual attorney. The increase may in whole or part be reflected in the rate, with the balance in a lump sum cash payment dependent upon the position of the individual attorney in the rate structure (See part (b) below).

(2) Ranges

The new minimums and maximums recommended are as follows:

ASSISTANT ATTORNEY

<table>
<thead>
<tr>
<th>Minimums</th>
<th>Effective Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>$12,000 - $15,600</td>
<td>1/1/71</td>
</tr>
<tr>
<td>12,600 - 16,400</td>
<td>&quot; 1/1/72</td>
</tr>
<tr>
<td>13,200 - 17,100</td>
<td>&quot; 1/1/73*</td>
</tr>
</tbody>
</table>

* If the proposed consolidation takes place, the new range will be $13,200 - $19,800.
ATTORNEY

$14,200 - $18,300  Effective 1/1/71
14,900 - 19,000  "  1/1/72
15,600 - 19,800  "  1/1/73*

* The proposed consolidation will have no effect on the Attorney range effective 1/1/73.

SENIOR ATTORNEY

$16,650 - $20,800  Effective 1/1/71
17,450 - 21,600  "  1/1/72
18,000 - 22,300  "  1/1/73*

* If the proposed consolidation takes place, the new range will be $18,000 - $25,200.

SUPERVISING ATTORNEY

$19,000 - $23,600  Effective 1/1/71
20,000 - 24,600  "  1/1/72
21,000 - 25,200  "  1/1/73*

* The proposed consolidation will have no effect on the Supervising Attorney range effective 1/1/73.

b. Structure of the Increase

The structure of the increases is set forth in the Appendix annexed to the Panel's report. The range for each title has been divided into "subgroups". The individual's subgroup shall be determined by his rate and title as of December 31 in each year. The amount and form of the increase he shall receive is determined by moving laterally along the line for his subgroup. Under no circumstances can the rate payable exceed the fixed rate for the particular subgroup. In the event that the increase recommended would result in a rate exceeding the fixed rate for the subgroup, the attorney shall receive the fixed rate for the subgroup and the balance of the scheduled increase in the form of a lump sum payment in cash.

The lump sum payment shall not be considered as part of the rate for pension purposes and under no circumstances is it to be construed as a continuing obligation.

c. Increases for Attorneys hired at the minimum rate after December 31, 1970

The hiring or minimum rates for the respective titles are set forth in the annexed Appendix. Under no circumstances shall the increases recommended result in a rate exceeding the fixed rate established for the respective effective date. In the event that
the scheduled increase for Attorneys hired at the minimum rate results in a rate exceeding the fixed rate, the Attorney shall receive the fixed rate and the balance of the scheduled increase in the form of a lump sum payment in cash.

For example, the minimum rate for an Assistant Attorney, hired after January 1, 1972 but prior to December 31, 1972, is $12,600. The scheduled increase effective January 1, 1973 is $1,300. This individual will receive a $900 increase to the fixed rate (to $13,500) and $400 in the form of a lump sum cash payment.

d. Salary Adjustments Due to Consolidation of Titles

The Panel has recommended that upon consolidation, attorneys in the titles of Assistant Attorney and Senior Attorney shall receive an increase of $900 and $1,100 respectively.

In the case of an Assistant Attorney hired at the minimum after January 1, 1973, he shall receive upon consolidation a rate increase of $600 and a lump sum cash payment of $300, for a total of $900.

In the case of a Senior Attorney at the minimum rate after January 1, 1973, he shall receive an increase of $600 to his rate and a lump sum cash payment of $500, for a total of $1,100.

Upon consolidation, incumbents in the title of Attorney and Supervising Attorney shall receive cash payments of $900 and $1,100 respectively, as compensation for instruction for the upgraded attorneys in the consolidated titles.

The cash payments shall be paid in accordance with the following schedule:

**ATTORNEYS**

$450 three months subsequent to the date on which the first Assistant Attorney is reclassified  
-and-  
$450 six months subsequent to the date on which the first six Assistant Attorneys are reclassified.

**SUPERVISING ATTORNEYS**

$550 three months subsequent to the date on which the first Senior Attorney is reclassified.  
-and-  
$550 six months subsequent to the date on which the first six Senior Attorneys are reclassified.

There is no dispute between the parties as to promotional guarantees for the period prior to consolidation. However, if an attorney is promoted from the consolidated Assistant Attorney-Attorney title to the consolidated Senior Attorney-Supervising Attorney title, he shall be granted a promotional increase of $1,100 plus whatever additional sums will be required to move him to the next highest rate in the structure of the consolidated Senior Attorney-Supervising Attorney title.
The Panel recommends that the parties adopt the following contract language:

"Delivery of municipal services in the most efficient, effective and courteous manner is of paramount importance to the City and the Union. Such achievement is recognized to be a mutual obligation of both parties within their respective roles and responsibilities. To achieve and maintain a high level of effectiveness, the parties hereby agree to the following terms:

Section 1. - Performance Levels

a. The Union recognizes the City's right under the New York City Collective Bargaining Law to establish and/or revise performance standards or norms notwithstanding the existence of prior performance levels, norms or standards. Such standards, developed by usual work measurement procedures, may be used to determine acceptable performance levels, prepare work schedules and to measure the performance of each employee or group of employees. For the purpose of this Section, the Union may, under Section 1173-4.3b of the New York City Collective Bargaining Law, assert to the City and/or the Board of Collective Bargaining during the term of this agreement that the City's decisions on the foregoing matters have a practical impact on employees, within the meaning of the Board of Collective Bargaining's Decision No. B-9-68. The City will give the Union prior notice of the establishment and/or revision of performance standards or norms hereunder.

b. Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law.

Section 2. - Supervisory Responsibility

The Union recognizes the City's right under the New York City Collective Bargaining Law to establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employees for employees in supervisory positions listed in Article III, Section 3 of this contract. For the purposes of this Section, the Union may, under Section 1173-4.3b of the New York City Collective Bargaining Law, assert to the City and/or the Board of Collective Bargaining during the term of this agreement that the City's decisions on the foregoing matters have a practical impact on employees, within the meaning of the Board of Collective Bargaining's Decision No. B-9-68. The City will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility hereunder. Employees who fail to meet such standards may be subject to disciplinary measures in accordance with applicable law."
Dated: New York, New York
December 11, 1972

ERIC J. SCHMERTZ, Chairman

EVA ROBINS, Member

GEORGE MARLIN, Member
<table>
<thead>
<tr>
<th>Rate区间</th>
<th>Increased Rates</th>
<th>Increased Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>000-2999</td>
<td>(a) 000940</td>
<td>(a) 000940</td>
</tr>
<tr>
<td>3000-5999</td>
<td>(b) 008712</td>
<td>(b) 008712</td>
</tr>
<tr>
<td>6000-8999</td>
<td>(c) 000472</td>
<td>(c) 000472</td>
</tr>
<tr>
<td>9000-10999</td>
<td>(d) 000282</td>
<td>(d) 000282</td>
</tr>
<tr>
<td>11000-12999</td>
<td>(e) 000022</td>
<td>(e) 000022</td>
</tr>
<tr>
<td>13000-14999</td>
<td>(f) 000000</td>
<td>(f) 000000</td>
</tr>
<tr>
<td>15000-16999</td>
<td>(g) 000000</td>
<td>(g) 000000</td>
</tr>
<tr>
<td>17000-18999</td>
<td>(h) 000000</td>
<td>(h) 000000</td>
</tr>
<tr>
<td>19000-20999</td>
<td>(i) 000000</td>
<td>(i) 000000</td>
</tr>
<tr>
<td>21000-22999</td>
<td>(j) 000000</td>
<td>(j) 000000</td>
</tr>
<tr>
<td>23000-24999</td>
<td>(k) 000000</td>
<td>(k) 000000</td>
</tr>
<tr>
<td>25000-26999</td>
<td>(l) 000000</td>
<td>(l) 000000</td>
</tr>
<tr>
<td>27000-28999</td>
<td>(m) 000000</td>
<td>(m) 000000</td>
</tr>
<tr>
<td>29000-30999</td>
<td>(n) 000000</td>
<td>(n) 000000</td>
</tr>
<tr>
<td>31000-32999</td>
<td>(o) 000000</td>
<td>(o) 000000</td>
</tr>
<tr>
<td>33000-34999</td>
<td>(p) 000000</td>
<td>(p) 000000</td>
</tr>
<tr>
<td>35000-36999</td>
<td>(q) 000000</td>
<td>(q) 000000</td>
</tr>
<tr>
<td>37000-38999</td>
<td>(r) 000000</td>
<td>(r) 000000</td>
</tr>
<tr>
<td>39000-40999</td>
<td>(s) 000000</td>
<td>(s) 000000</td>
</tr>
<tr>
<td>41000-42999</td>
<td>(t) 000000</td>
<td>(t) 000000</td>
</tr>
<tr>
<td>43000-44999</td>
<td>(u) 000000</td>
<td>(u) 000000</td>
</tr>
<tr>
<td>45000-46999</td>
<td>(v) 000000</td>
<td>(v) 000000</td>
</tr>
<tr>
<td>47000-48999</td>
<td>(w) 000000</td>
<td>(w) 000000</td>
</tr>
<tr>
<td>49000-50999</td>
<td>(x) 000000</td>
<td>(x) 000000</td>
</tr>
<tr>
<td>51000-52999</td>
<td>(y) 000000</td>
<td>(y) 000000</td>
</tr>
<tr>
<td>53000-54999</td>
<td>(z) 000000</td>
<td>(z) 000000</td>
</tr>
</tbody>
</table>

*Except where modified by schedule, in which case the difference will be made up by lump sum.*
In the Matter of the Arbitration

between

Local 210 International Brotherhood
of Teamsters

and

Continental Connector Corporation

Award

and

Opinion

The stipulated issue is:

Was there just cause for the discharge of Marion
Smith? If not, what shall be the remedy?

A hearing was held at the offices of the American Arbi-
tration Association on December 30, 1971 at which time Mrs.
Smith, hereinafter referred to as the "grievant," and repre-
sentatives of the above named Union and Company, hereinafter
referred to jointly as the "parties," appeared, and were
afforded full opportunity to offer evidence and argument and
to examine and cross examine witnesses. The parties express-
ly waived the Arbitrator's oath.

The grievant was discharged for excessive absenteeism.
The rule in such cases is well settled. Discharge is proper
where an employee continues a record of excessive absenteeism
following warnings and/or lesser penalties; where the absentee-
ism is chronic and due to conditions or circumstances which
appear unlikely to change, even if beyond the employee's con-
trol. This rule is based on the equally well settled principle
that an employer, in order to maintain production schedules or
to perform his services, is entitled to the prompt and regu-
lar attendance of his employees; and that where an employee
cannot meet that obligation for whatever reason, his employ-
ment may be terminated.

The facts in the instant case meet the foregoing test. There is no serious dispute over the excessive nature of the grievant's record of absenteeism, so it need not be detailed here. The evidence indicates that her absences were due primarily to illness, especially an arthritic condition. Though it does not appear that that record was due to any willful or neglect of her job/that the illnesses were false or misrepresented, there is nevertheless no real indication that her physical condition has or will improve. Hence I must conclude that because her condition is chronic, her record of absenteeism, if she returns to work, will continue excessive and unsatisfactory. In short, though the circumstances appear to be beyond her control and though she cannot be found at fault or guilty of misconduct, there is no reasonable basis upon which to assume that she will be able to give the Company the kind of attendance it may properly require.

Also the discharge in this case was the end result of the application of "progressive discipline" as required in such matters. The grievant received a series of warnings over a period of more than three years; and was clearly told that her job was in jeopardy if her absentee record failed to improve. Though a short term improvement was recorded at one point, her overall record despite and following the warnings failed of improvement on a significant or permanent basis.

Accordingly, inasmuch as the facts in this case square with the traditional rule upholding the propriety of discharge
for excessive absenteeism, I must sustain the Company's action. 
Mitigation of that penalty, either because the grievant's absences were beyond her control or fault; or for any other reason upon which she might be given another chance, are for matters for the consideration of the Company - not the Arbitrator.

Accordingly the Undersigned having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

The discharge of Marion Smith is upheld.

[Signature]
Eric J. Schmertz
Arbitrator

DATED: February 2, 1972
STATE OF New York )
COUNTY OF New York )

On this 2nd day of February, 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.
In the Matter of the Arbitration between
Local 210 IBT and Continental Connector Corp.

The stipulated issue is:

Was there just cause for the discharge of Golfo Tsoulos? If not what shall be the remedy?

A hearing was held on July 14, 1972 at which time Miss Tsoulos, 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.

I am not persuaded that the grievant did not or could not understand, from the instructions and demonstrations of her foreman, that she was not to move the fan and pre-heater during the course of production on June 6, 1972. And even if because of an alleged language barrier there be some doubt whether she understood what he meant, I believe she must have understood what was expected of her, when later that day, she received a written warning from the Personnel Manager, at a formal meeting in his office, for failing or refusing to comply with the foreman's instructions. At that meeting an interpreter was used to tell her what she was doing wrong and though there is dispute over whether the interpreter was precise, the use of an interpreter must have impressed the grievant with the seriousness of the situation. That she again
without inquiring further, failed to comply with these instructions after receiving the written warning can only be construed as an act of defiance.

However the grievant has been employed 4-1/2 years without any prior blemish on her record. The absence of any prior discipline leads me to believe that what took place on June 6, 1972, though not excused, may have been an isolated incident. Accordingly I think it appropriate to give the grievant the mitigating benefit of her prior spotless record, and in this instance to reduce the penalty from discharge to a suspension.

Accordingly the Undersigned Arbitrator, having been duly designated in accordance with the Arbitration Agreement between the above named parties, dated April 9, 1971, and having been duly sworn, and having duly heard the proofs and allegations of the parties makes the following AWARD:

The discharge of Golfo Tsoulos is reduced to a disciplinary suspension. She shall be reinstated without back pay and the period of time from her discharge to her reinstatement shall be deemed a disciplinary suspension for refusing to comply with instructions of her foreman and failing to heed a formal warning. Any further such offense would be grounds for her discharge.

DATED: August 7, 1972  
STATE OF New York )ss.:
COUNTY OF New York)

On this 7 day of August, 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. 1330 0633 72
In the Matter of the Arbitration between
Local 210 International Brotherhood of Teamsters and
Continental Connector Corporation

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 discharge of Dorothy Lee Brown Walley is reduced to a disciplinary suspension. She shall be reinstated but without back pay. The period from discharge to reinstatement shall be deemed a disciplinary suspension for an unsatisfactory attendance record. She is on notice that unless that record shows immediate improvement and becomes and remains satisfactory, she would be subject to summary discharge.

Eric J. Schmertz
Arbitrator

DATED: April 6, 1972
STATE OF New York ) ss.
COUNTY OF New York)

On this day of April, 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,
In the Matter of the Arbitration
between
Local 210 International Brotherhood
of Teamsters
and
Continental Collector Corporation

The stipulated issue is:

Was there just cause for the discharge of
Dorothy Lee Brown Walley? If not what shall
be the remedy?

A hearing was held at the offices of the American Arbi-
tration Association on February 18, 1972 at which time Mrs.
Walley, hereinafter referred to as the "grievant," and repre-
sentatives of the above named Union and Company, hereinafter
referred to jointly as the "parties," appeared. All concern-
ed were afforded full opportunity to offer evidence and argu-
ment and to examine and cross examine witnesses. The parties
expressly waived the Arbitrator's oath.

The grievant was discharged because of excessive tardi-
ness and absenteeism.

It is clear and well settled, as I stated in an earlier
Award between the parties, that the Company is not required
to indefinitely tolerate excessive absenteeism or other irreg-
ular attendance by an employee.

However, in the instant case, though over a three year
period from 1969 until May of 1970 the grievant's record of
attendance and punctuality has not been satisfactory, I am
persuaded that there are mitigating circumstances which warrant
a reduction in the penalty.
The grievant's principal offense for the total period has been tardiness in reporting to work. Her absentee record showed some discernible improvement in 1971. But for her continuing inability to report to work on time I think she may not have been discharged.

Chronic excessive tardiness, standing alone, is also grounds for termination if it continues following imposition of lesser penalties pursuant to a progressive discipline formula. However, in the instant case I conclude that some of the circumstances surrounding the grievant's tardiness were not only beyond her control, but were due to a temporary condition, namely pregnancy, no longer present. I am satisfied that this condition and its attendant illnesses were responsible for a portion of her tardiness. Hence there is reason to believe that her record should and can improve. Also, many of her latenesses were a matter of minutes, which though not excused or excusable, are not as serious or disruptive to the Company's operation as if they had been of greater duration or if she had not reported to work at all.

Finally, and perhaps most important at least to my mind, is that offenses of this type should be subjected to a disciplinary suspension step within a progressive discipline formula. By losing time from work without pay, an employee is impressed with the seriousness of the offense and the Company's dissatisfaction with his record. Subjected to a temporary removal from the payroll, an offending employee is given the most unequivocal notice short of discharge that he must re-
habilitate himself to retain his job. I am not persuaded that a warning notice alone, not matter how many, can impress an employee that his job is in jeopardy if his record does not markedly improve. And that is why most arbitrators require an intermediate step between warnings and discharge, namely a disciplinary suspension - in cases where summary discharge is not warranted.

In my judgment this case, which involves primarily tardiness rather than absenteeism, and where the tardiness in many instances was for short periods of time, and conceivably in some others the result of pregnancy, falls within that general rule.

Accordingly I shall reduce the grievant's penalty of discharge to a suspension. She shall be reinstated but without back pay, and the period of time from discharge to reinstatement shall be deemed a disciplinary suspension. She is on notice that unless her attendance record shows immediate improvement and becomes and remains satisfactory, she would be subject to summary discharge.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Has the Company violated Section 8(e) of the contract dated November 11, 1972 to November 11, 1973 by distributing milk in the Metropolitan area which was processed by employees who were not working under the contract in the said Metropolitan area? If so what shall be the remedy?

A hearing was held on July 24, 1972 at which time 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.

Section 8(e) of the contract reads:

In order to protect the job opportunities and labor standards of all employees covered by the Milk Industry Collective Bargaining Agreement, it is agreed that all whole fluid milk distributed in the Metropolitan Area by the Employers covered by this Agreement (including whole fluid milk delivered to or picked up by any other dealer or person for ultimate distribution within the Metropolitan Area, whether or not the point of sale or delivery by the Employer is within the Metropolitan Area) must be bottled, packaged, pasteurized and processed (herein referred to as "processed") by employees working under this Agreement in the said Metropolitan Area....

The evidence discloses that in order to obtain milk packaged in gallon plastic containers to service a particular customer in the Metropolitan Area, the Company has been purchas-
ing milk processed and so packaged from Johanna Farms, a New Jersey enterprise not covered by the Collective Bargaining Agreement between the parties herein and whose employees are not working under said Collective Agreement.

Therefore, irrespective of the Company's business needs to obtain milk in plastic containers, its distribution in the Metropolitan Area of milk bought or obtained from Johanna Farms is and has been violative of Section 8(e) of the contract. The Arbitrator's authority is limited to interpreting and enforcing the contract.

Accordingly having been duly designated in accordance with the contract, and having been duly sworn and having duly heard the proofs and allegations of the parties, I make the following AWARD:

The Company is in violation of Section 8(e) of the contract by distributing milk in the Metropolitan area which was processed by employees who were not working under the contract in the said Metropolitan Area. The Company is directed to forthwith cease and desist from distributing in the Metropolitan Area milk obtained from Johanna Farms of New Jersey.

DATED: August 23, 1972

STATE OF New York )
COUNTY OF New York)

On this 23rd day of August 23, 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. 1330 0620 72
In the Matter of the Arbitration between
Local 3036 New York City Taxi Drivers Union
and
Essex Garage

The Undersigned as Impartial Chairman between the above named parties and having duly heard the proofs and allegations of the Union, the Employer having failed to appear at the hearing on August 3, 1972 after due notice, makes the following Award:

Essex Garage owes those employees whose names appear on Schedule A attached hereto and made a part hereof, vacation and severance pay in the amounts listed on said Schedule.

Essex Garage is directed to forthwith pay said amounts to said employees, or to the Union on behalf of said employees.

Eric J. Schmertz
Impartial Chairman

DATED: August 1972
STATE OF New York ) ss.: COUNTLY OF New York)

On this day of August, 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.
FEDERAL MEDIATION & CONCILIATION SERVICE, ADMINISTRATOR

In the Matter of the Arbitration between

International Union of Elevator Constructors, Local #1

and

Kiesling Elevator Company

The Undersigned, having been duly designated as the Arbitrator, and having been duly sworn, and having duly heard the proofs and allegations of the Union, and the Company having failed to appear after due notice, makes the following AWARD:

For the period May 2 through July 25, 1971, Kiesling Elevator Company owes Edward Kamperman vacation pay in the amount of $150.64. Kiesling Elevator Company is directed to pay said amount to Edward Kamperman or to the Union on his behalf, forthwith.

For ten days in June 1971 and nine days in July 1971 Kiesling Elevator owes the Union's Annuity Fund for employee Edward Kamperman the sum of $123.00. Kiesling Elevator Company is directed to pay said sum to the Union forthwith.

The Arbitrator's fee of $200.00 shall be shared equally by the parties. Therefore Kiesling Elevator Company shall pay to the Union the additional sum of $100.00 representing its share of the Arbitrator's fee paid by the Union.

DATED: November 27, 1972
STATE OF New York )ss.: COUNTY OF New York)

On this 27th day of November, 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. 73K 00929
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

In the Matter of the Arbitration between
Local 3036 New York City Taxi Drivers Union

and

Essex Garage

The Undersigned as Impartial Chairman between the above named parties and having duly heard the proofs and allegations of the Union, the Employer having failed to appear at the hearing on August 3, 1972 after due notice, makes the following AWARD:

Essex Garage owes those employees whose names appear on Schedule A attached hereto and made a part hereof, vacation pay in the amounts listed on said Schedule.

Essex Garage owes those employees whose names appear on Schedule B attached hereto and made a part hereof, severance pay in the amounts listed on said Schedule.

Essex Garage is directed to forthwith pay said amounts to said employees, or to the Union on behalf of said employees.

DATED: September 1972
STATE OF New York ) ss.
COUNTY OF New York)

On this day of September, 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.
<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abromovici, M.</td>
<td>$127.29</td>
</tr>
<tr>
<td>Andreotti, E.</td>
<td>414.22</td>
</tr>
<tr>
<td>Ashkenas, M.</td>
<td>164.22</td>
</tr>
<tr>
<td>Beauregard, J.</td>
<td>29.77</td>
</tr>
<tr>
<td>Behar, L.</td>
<td>64.45</td>
</tr>
<tr>
<td>Bills, F.</td>
<td>181.74</td>
</tr>
<tr>
<td>Black, B.</td>
<td>228.75</td>
</tr>
<tr>
<td>Burger, P.</td>
<td>62.57</td>
</tr>
<tr>
<td>Butler, J.</td>
<td>227.67</td>
</tr>
<tr>
<td>Callen, T.</td>
<td>445.35</td>
</tr>
<tr>
<td>Carmona</td>
<td>224.44</td>
</tr>
<tr>
<td>Chinea, A.</td>
<td>217.50</td>
</tr>
<tr>
<td>Clunie, C.</td>
<td>86.23</td>
</tr>
<tr>
<td>Cohen, B.</td>
<td>74.79</td>
</tr>
<tr>
<td>Cohen, R.</td>
<td>199.35</td>
</tr>
<tr>
<td>Colon, F.</td>
<td>89.31</td>
</tr>
<tr>
<td>DeMaio, G.</td>
<td>176.04</td>
</tr>
<tr>
<td>Epstein, N.</td>
<td>182.62</td>
</tr>
<tr>
<td>Fisher, L.</td>
<td>243.58</td>
</tr>
<tr>
<td>Friedman, L.</td>
<td>117.27</td>
</tr>
<tr>
<td>Galarza, J.</td>
<td>174.02</td>
</tr>
<tr>
<td>Gambino, J.</td>
<td>54.94</td>
</tr>
<tr>
<td>Garry A.</td>
<td>79.50</td>
</tr>
<tr>
<td>Gatanio, G.</td>
<td>79.99</td>
</tr>
<tr>
<td>Glantz, N.</td>
<td>171.12</td>
</tr>
<tr>
<td>Gomberg, M.</td>
<td>141.90</td>
</tr>
<tr>
<td>Gonzaloz, Jose</td>
<td>37.19</td>
</tr>
<tr>
<td>Gonzalez, J.</td>
<td>118.05</td>
</tr>
<tr>
<td>Greenberg, B.</td>
<td>164.69</td>
</tr>
<tr>
<td>Gorkin</td>
<td>31.20</td>
</tr>
<tr>
<td>Henning, R.</td>
<td>194.42</td>
</tr>
<tr>
<td>Herzfeld, M.</td>
<td>173.73</td>
</tr>
<tr>
<td>Hirsch, H.</td>
<td>145.96</td>
</tr>
<tr>
<td>Hoffman, L.</td>
<td>87.70</td>
</tr>
<tr>
<td>Hymson, H.</td>
<td>303.72</td>
</tr>
<tr>
<td>Jacobs, S.</td>
<td>74.23</td>
</tr>
<tr>
<td>Johnson, A.</td>
<td>241.62</td>
</tr>
<tr>
<td>Kerrigan, J.</td>
<td>190.34</td>
</tr>
<tr>
<td>Kerman, D.</td>
<td>143.36</td>
</tr>
<tr>
<td>Krupnik, P.</td>
<td>113.96</td>
</tr>
<tr>
<td>Kutner, J.</td>
<td>257.16</td>
</tr>
<tr>
<td>Latampo, N.</td>
<td>65.42</td>
</tr>
<tr>
<td>Lawrence, M.</td>
<td>302.67</td>
</tr>
<tr>
<td>Lefevre, F.</td>
<td>112.87</td>
</tr>
<tr>
<td>Lenz, A.</td>
<td>54.46</td>
</tr>
<tr>
<td>Littman, I.</td>
<td>285.24</td>
</tr>
<tr>
<td>Name</td>
<td>Hours</td>
</tr>
<tr>
<td>----------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Lombardo, M.</td>
<td>75.33</td>
</tr>
<tr>
<td>London, S.</td>
<td>211.02</td>
</tr>
<tr>
<td>McHale, C.</td>
<td>77.50</td>
</tr>
<tr>
<td>McDonnell, M.</td>
<td>193.72</td>
</tr>
<tr>
<td>McLaughlin, J.</td>
<td>128.92</td>
</tr>
<tr>
<td>Meisner, W.</td>
<td>177.80</td>
</tr>
<tr>
<td>Mendola, N.</td>
<td>165.22</td>
</tr>
<tr>
<td>Novstropovias, J.</td>
<td>73.99</td>
</tr>
<tr>
<td>Nardone, A.</td>
<td>172.18</td>
</tr>
<tr>
<td>Negrow, L.</td>
<td>144.96</td>
</tr>
<tr>
<td>Nestel, H.</td>
<td>238.30</td>
</tr>
<tr>
<td>Newman, J.</td>
<td>185.72</td>
</tr>
<tr>
<td>Oppenheim, R.</td>
<td>70.64</td>
</tr>
<tr>
<td>Poppadoupoulas, H.</td>
<td>124.76</td>
</tr>
<tr>
<td>Parker, A.</td>
<td>156.80</td>
</tr>
<tr>
<td>Perkarsky, J.</td>
<td>206.70</td>
</tr>
<tr>
<td>Perle, R.</td>
<td>136.45</td>
</tr>
<tr>
<td>Piwet, R.</td>
<td>94.13</td>
</tr>
<tr>
<td>Pittel, M.</td>
<td>180.56</td>
</tr>
<tr>
<td>Pryor, C.</td>
<td>167.16</td>
</tr>
<tr>
<td>Rachelson, H.</td>
<td>160.05</td>
</tr>
<tr>
<td>Ramirez, H.</td>
<td>155.70</td>
</tr>
<tr>
<td>Rindsberg, E.</td>
<td>198.18</td>
</tr>
<tr>
<td>Rivera, A.</td>
<td>82.91</td>
</tr>
<tr>
<td>Robinson, A.</td>
<td>203.26</td>
</tr>
<tr>
<td>Rolon, A.</td>
<td>148.94</td>
</tr>
<tr>
<td>Rosado, J.</td>
<td>67.76</td>
</tr>
<tr>
<td>Rosen, A.</td>
<td>64.03</td>
</tr>
<tr>
<td>Rothfeld, B.</td>
<td>269.22</td>
</tr>
<tr>
<td>Salzman, B.</td>
<td>263.58</td>
</tr>
<tr>
<td>Schneider, S.</td>
<td>70.95</td>
</tr>
<tr>
<td>Schumer, J.</td>
<td>410.01</td>
</tr>
<tr>
<td>Schwartz, A.</td>
<td>151.74</td>
</tr>
<tr>
<td>Segall, C.</td>
<td>320.46</td>
</tr>
<tr>
<td>Shindler, M.</td>
<td>164.32</td>
</tr>
<tr>
<td>Sierra, I.</td>
<td>99.12</td>
</tr>
<tr>
<td>Slater, H.</td>
<td>75.21</td>
</tr>
<tr>
<td>Speck, A.</td>
<td>137.78</td>
</tr>
<tr>
<td>Steinhauer, D.</td>
<td>196.62</td>
</tr>
<tr>
<td>Strauss, P.</td>
<td>179.66</td>
</tr>
<tr>
<td>Sunshine, A.</td>
<td>75.20</td>
</tr>
<tr>
<td>Sussman, J.</td>
<td>291.45</td>
</tr>
<tr>
<td>Sussman, M.</td>
<td>51.24</td>
</tr>
<tr>
<td>Tandlich, H.</td>
<td>117.37</td>
</tr>
<tr>
<td>Thomas, C.</td>
<td>136.72</td>
</tr>
<tr>
<td>Trager, L.</td>
<td>192.06</td>
</tr>
<tr>
<td>Name</td>
<td>Amount</td>
</tr>
<tr>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Trowers, E.</td>
<td>41.75</td>
</tr>
<tr>
<td>Velezbaloy, C.</td>
<td>33.84</td>
</tr>
<tr>
<td>Vendis, C.</td>
<td>71.28</td>
</tr>
<tr>
<td>Vicker, J.</td>
<td>139.68</td>
</tr>
<tr>
<td>Viscovic, E.</td>
<td>155.92</td>
</tr>
<tr>
<td>Wasserman, B.</td>
<td>279.39</td>
</tr>
<tr>
<td>Way, J.</td>
<td>39.32</td>
</tr>
<tr>
<td>Weinstein, H.</td>
<td>243.93</td>
</tr>
<tr>
<td>Weinstein, S.</td>
<td>182.22</td>
</tr>
<tr>
<td>Williams, D.</td>
<td>196.10</td>
</tr>
<tr>
<td>Williams, R.</td>
<td>30.76</td>
</tr>
<tr>
<td>Young A.</td>
<td>210.60</td>
</tr>
<tr>
<td>Zeidman, D.</td>
<td>70.83</td>
</tr>
<tr>
<td>Zudiker S.</td>
<td>130.14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colon, M.</td>
<td>210.00</td>
</tr>
<tr>
<td>Heller, F.</td>
<td>300.00</td>
</tr>
<tr>
<td>Luces, A.</td>
<td>300.00</td>
</tr>
<tr>
<td>Benjamin, S.</td>
<td>270.00</td>
</tr>
<tr>
<td>Figueroa, J.</td>
<td>384.00</td>
</tr>
<tr>
<td>Smith, R.</td>
<td>260.00</td>
</tr>
<tr>
<td>Davis, J.</td>
<td>260.00</td>
</tr>
<tr>
<td>Miller, J.</td>
<td>170.00</td>
</tr>
<tr>
<td>Name</td>
<td>Amount</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Abromovici, M.</td>
<td>$50.00</td>
</tr>
<tr>
<td>Andreotti, E.</td>
<td>125.00</td>
</tr>
<tr>
<td>Ashkenas, M.</td>
<td>125.00</td>
</tr>
<tr>
<td>Beauregard, J.</td>
<td>75.00</td>
</tr>
<tr>
<td>Behar, L.</td>
<td>125.00</td>
</tr>
<tr>
<td>Bills, F.</td>
<td>350.00</td>
</tr>
<tr>
<td>Black, B.</td>
<td>1050.00</td>
</tr>
<tr>
<td>Burger, P.</td>
<td>100.00</td>
</tr>
<tr>
<td>Butler, J.</td>
<td>600.00</td>
</tr>
<tr>
<td>Callen, I.</td>
<td>650.00</td>
</tr>
<tr>
<td>Carmona</td>
<td>100.00</td>
</tr>
<tr>
<td>Chinea, A.</td>
<td>375.00</td>
</tr>
<tr>
<td>Clunie, C.</td>
<td>125.00</td>
</tr>
<tr>
<td>Cohen, B.</td>
<td>75.00</td>
</tr>
<tr>
<td>Cohen, R.</td>
<td>775.00</td>
</tr>
<tr>
<td>Colon, F.</td>
<td>25.00</td>
</tr>
<tr>
<td>DeMaio, G.</td>
<td>450.00</td>
</tr>
<tr>
<td>Epstein, N.</td>
<td>225.00</td>
</tr>
<tr>
<td>Fisher, L.</td>
<td>175.00</td>
</tr>
<tr>
<td>Friedman, L.</td>
<td>350.00</td>
</tr>
<tr>
<td>Galarza, J.</td>
<td>75.00</td>
</tr>
<tr>
<td>Gambino, J.</td>
<td>125.00</td>
</tr>
<tr>
<td>Garry, A.</td>
<td>50.00</td>
</tr>
<tr>
<td>Gatanio, G.</td>
<td>550.00</td>
</tr>
<tr>
<td>Glantz, N.</td>
<td>325.00</td>
</tr>
<tr>
<td>Gomberg, M.</td>
<td>100.00</td>
</tr>
<tr>
<td>Gonzalez, Jose</td>
<td>100.00</td>
</tr>
<tr>
<td>Negrun, L.</td>
<td>125.00</td>
</tr>
<tr>
<td>Nester, H.</td>
<td>1125.00</td>
</tr>
<tr>
<td>Newman, J.</td>
<td>200.00</td>
</tr>
<tr>
<td>Oppenheimer, R.</td>
<td>200.00</td>
</tr>
<tr>
<td>Pappadoupolas, H.</td>
<td>50.00</td>
</tr>
<tr>
<td>Parker, A.</td>
<td>175.00</td>
</tr>
<tr>
<td>Pekarsky, J.</td>
<td>350.00</td>
</tr>
<tr>
<td>Perle, R.</td>
<td>125.00</td>
</tr>
<tr>
<td>Pinet, R.</td>
<td>75.00</td>
</tr>
<tr>
<td>Pittel, M.</td>
<td>500.00</td>
</tr>
<tr>
<td>Pryor, C.</td>
<td>100.00</td>
</tr>
<tr>
<td>Rachelson, H.</td>
<td>675.00</td>
</tr>
<tr>
<td>Ramirez, H.</td>
<td>375.00</td>
</tr>
<tr>
<td>Rindsberg, E.</td>
<td>150.00</td>
</tr>
<tr>
<td>Rivera, A.</td>
<td>100.00</td>
</tr>
<tr>
<td>Robinson, A.</td>
<td>50.00</td>
</tr>
<tr>
<td>Rolon, A.</td>
<td>175.00</td>
</tr>
<tr>
<td>Name</td>
<td>Amount</td>
</tr>
<tr>
<td>---------------</td>
<td>--------</td>
</tr>
<tr>
<td>Rosado, J.</td>
<td>75.00</td>
</tr>
<tr>
<td>Rosen A.</td>
<td>100.00</td>
</tr>
<tr>
<td>Rothfeld, B.</td>
<td>350.00</td>
</tr>
<tr>
<td>Salzman, B.</td>
<td>700.00</td>
</tr>
<tr>
<td>Schneider, S.</td>
<td>100.00</td>
</tr>
<tr>
<td>Schumer, J.</td>
<td>650.00</td>
</tr>
<tr>
<td>Schwartz, A.</td>
<td>200.00</td>
</tr>
<tr>
<td>Segall, C.</td>
<td>425.00</td>
</tr>
<tr>
<td>Shindler, M.</td>
<td>400.00</td>
</tr>
<tr>
<td>Sierra, I.</td>
<td>75.00</td>
</tr>
<tr>
<td>Strauss, P.</td>
<td>100.00</td>
</tr>
<tr>
<td>Slater, H.</td>
<td>250.00</td>
</tr>
<tr>
<td>Speck, A.</td>
<td>175.00</td>
</tr>
<tr>
<td>Steinhaver, D.</td>
<td>50.00</td>
</tr>
<tr>
<td>Strauss, J.</td>
<td>50.00</td>
</tr>
<tr>
<td>Sunshine, H.</td>
<td>25.00</td>
</tr>
<tr>
<td>Sussman, J.</td>
<td>425.00</td>
</tr>
<tr>
<td>Sussman, M.</td>
<td>125.00</td>
</tr>
<tr>
<td>Tandlich</td>
<td>50.00</td>
</tr>
<tr>
<td>Thomas, C.</td>
<td>275.00</td>
</tr>
<tr>
<td>Trager, L.</td>
<td>125.00</td>
</tr>
<tr>
<td>Trowers, E.</td>
<td>100.00</td>
</tr>
<tr>
<td>Velez, B.</td>
<td>75.00</td>
</tr>
<tr>
<td>Venidis, C.</td>
<td>250.00</td>
</tr>
<tr>
<td>Vickers, J.</td>
<td>150.00</td>
</tr>
<tr>
<td>Viscovic, E.</td>
<td>125.00</td>
</tr>
<tr>
<td>Wasserman, B.</td>
<td>225.00</td>
</tr>
<tr>
<td>Way, J.</td>
<td>250.00</td>
</tr>
<tr>
<td>Weinstein, H.</td>
<td>425.00</td>
</tr>
<tr>
<td>Weinstein, S.</td>
<td>400.00</td>
</tr>
<tr>
<td>Williams, D.</td>
<td>175.00</td>
</tr>
<tr>
<td>Williams, R.</td>
<td>100.00</td>
</tr>
<tr>
<td>Young, A.</td>
<td>100.00</td>
</tr>
<tr>
<td>Zeidman, D.</td>
<td>25.00</td>
</tr>
<tr>
<td>Zudiker, Sam</td>
<td>750.00</td>
</tr>
<tr>
<td>Zeidman, J.</td>
<td>400.00</td>
</tr>
</tbody>
</table>

**Inside Men**

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colon, M.</td>
<td>100.00</td>
</tr>
<tr>
<td>Davis, J.</td>
<td>75.00</td>
</tr>
<tr>
<td>Benjamin, S.</td>
<td>100.00</td>
</tr>
<tr>
<td>Heller, F.</td>
<td>50.00</td>
</tr>
<tr>
<td>Luces, A.</td>
<td>100.00</td>
</tr>
<tr>
<td>Figueroa</td>
<td>75.00</td>
</tr>
<tr>
<td>Smith, R.</td>
<td>50.00</td>
</tr>
<tr>
<td>Miller, J.</td>
<td>75.00</td>
</tr>
</tbody>
</table>
In the Matter of the Arbitration
Between
Frank Palumbo and Joseph LaFemina,
as Members of the Board of Trustees
of Firemen's Variable Supplements Fund

and

Joseph J. Perrini and Richard C. Bluestine
as Members of the Board of Trustees of
said Fund

and

John J. O'Reilly and Joseph G. Phalen, Jr.,
as Members of the Board of Trustees of
Fire Office's Variable Supplements Fund

and

Joseph J. Perrini and Richard C. Bluestine
as Members of the Board of Trustees of
said Fund

The stipulated issue is:

The Trustees of the Funds having been deadlocked
on whether to adopt by resolution proposed regu-
lations marked as Exhibit A and Exhibit B in the
record. The Arbitrator is authorized pursuant
to Sections B 19-42.0d and B 19-62.0d of the Ad-
ministrative Code to decide which proposed regulation
is to be adopted by the Boards of Trustees of said
Funds.

A hearing was held on July 21, 1972 at which time repre-
sentatives of the above named parties 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. The parties filed post hearing
briefs.

For convenience, Messrs. Palumbo, LaFemina, O'Reilly and
Phalen will hereinafter be referred to as the Unions' Trustees;
and Messrs. Perrini and Bluestine will hereinafter be referred to as the City Trustees. The Firemen's and Fire Officer's Funds, shall hereinafter be referred to as "the Funds".

Exhibit A and Exhibit B, proposed respectively by the Unions' and City's Trustees, over which the Trustees are deadlocked, read:

**EXHIBIT A**

Section 11. STAFF AND FACILITIES. In addition to the staff provided pursuant to Subdivision f of Section B19-42.0 of the Code, by the Fire Commissioner, the Board shall employ such administrative, legal or expert assistance as it deems necessary, and further, the Board shall lease premises and purchase or lease materials, supplies and equipment as it shall deem necessary.

**EXHIBIT B**

Section 11. ADMINISTRATIVE STAFF. Pursuant to Subdivision f of Section B19-62.0 of the Code, the Fire Commissioner shall assign to the Variable Supplements Fund Board such number of clerical and other assistants as many be necessary for the performance of its functions. Clerical and other assistants assigned to such Board shall not receive, directly and indirectly, any pay or emolument from the Variable Supplements Fund for their services.

The Arbitrator's authority stems from the express provisions of the statutes referred to in the stipulated issue.

As to both Funds, said Sections read:

In the event that the votes of at least three members of such board are not cast in favor of any resolution proposed, such dispute shall be promptly referred to the arbitrator, designated, for the purpose of resolving such disputes, in the collective bargaining agreement then in effect between the city and the association. Such arbitrator shall determine such dispute as expeditiously as possible and his determination shall be adopted by the board.
At the end of the hearing, counsel for the parties stated that they viewed the dispute as a "legal matter", meaning as I see it that the Arbitrator was not to determine the wisdom or need, of the respective proposed regulations over which the Trustees deadlocked, but whether, as the City Trustees contend, the regulation proposed by the Union's Trustees should be rejected on the grounds of "illegality": (Indeed, the former considerations, namely whether a proposed resolution is improvident, wise or necessary, is and should be within the exclusive jurisdiction of the Trustees.)

A determination of the "legal question" turns on an interpretation of the statutes which established the Funds, namely Chapter 887, Articles 5 and 6 of the Laws of New York (Joint Exhibit #1).

To vest such authority in an Arbitrator is unusual. Ordinarily the Arbitrator's role is to interpret and apply a Collective Bargaining Agreement, and it is for the courts or an appropriate agency to interpret and apply legislation and statutes. But here, by legislative act, and by the express statutory provisions set forth in the stipulated issue, the Arbitrator is empowered to resolve the deadlocked disputes of the Trustees.

Manifestly, that means he is authorized to interpret the applicable statutory provisions. The issue as stipulated by the parties is confirmation of this authority.
Moreover, I conclude that a resolution of the deadlock is to be found within the four corners of the statutes establishing the Funds, and that the "legislative history", namely the collective bargaining negotiations is immaterial.

The statutes establishing the Funds are comprehensive. Clearly, the negotiations between the Unions and the City regarding the substantive aspects of the Funds were merged in the legislation.

The collective bargaining negotiations did not themselves create the Funds. What the Unions and the City did in collective bargaining was to agree to take the necessary steps to bring the Funds into existence. Thereafter legislation was necessary. The powers, purpose, and operation of the Funds are fixed and determined by the enabling legislation. Indeed this was clearly recognized and contemplated by the Unions and the City in collective bargaining. Sections 1 and 2 of Article VII of the then applicable Collective Bargaining Agreement between the City and the Uniformed Firefighters Association reads: (Emphasis added)

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

Section 2 - Notwithstanding the provisions of this Article the provisions of such legislation shall be deemed to have implemented and shall supersede the provisions of this Article, and no rights shall accrue under the provisions of this Article different from or in addition to the rights accruing under such legislation. If such legislation is adopted, any dispute concerning the interpretation and/or application of the provisions of this Article, shall not be subject to the disputes adjustment or grievance procedures set forth in this Contract.
Additionally, as a matter of law, the City and Unions' Trustees of the Fund are separate entities from the Union and City as parties to the Collective Bargaining Agreement. Therefore the Trustees cannot be unconditionally bound by what the City and the Unions negotiated or said to each other in the course of the negotiations for the collective agreement. The office of Trustee was not in existence when the contract was negotiated, nor was it established by those negotiations. Rather that office and the powers and duties attached to it first came into being as a result of the subsequent legislation.

Moreover, based on the record before me, I do not find much persuasive evidence on way or the other that in the course of the collective bargaining negotiations the Unions and the City discussed in detail, let alone agreed on the substance of either or both of the proposed regulations (Exhibits A and B) over which the Trustees are presently deadlocked.

Also, irrespective of what the collective negotiations might show, resort to what transpired therein, is unwarranted and unnecessary because I do not find the statutes to be ambiguous on the deadlocked issues.

Finally, the statutes expressly deem the Funds to be "corporations". In that regard the statutes creating them are preeminent and controlling:
"Corporations necessarily depend both for their powers and the mode of exercising them upon the construction of the statute which gives them life and being." (Lyons First National Bank v. Ocean National Bank 60 N.Y. 278, 19 Am. Rep. 181.)

Within the statutes creating the Funds, to which I rule I am limited and bound, and with the exception of the employment of an independent actuary, I find the proposed regulation of the Unions' Trustees to be legal.

By their terms, Chapter 877, Articles 5 and 6 of the Laws of New York and the identical legislation passed by the state legislature, are neither generally nor explicitly conditioned by or subject to any of the other provisions of the Administrative Code or City Charter referred to in the brief of the City Trustees. The enabling legislation and Chapter 877 post-dated most if not all of the Administrative Code and Charter provisions cited. It seems to be that had it been intended to condition or subject the statutes establishing these Funds on or to other provisions of the Code or Charter, they would and should have so provided explicitly. Such conditions and limitations were well within the contemplation of the drafters of the legislation establishing the Funds, and the possibility of a conflict between the legislation and any pre-existing part of the Administrative Code or Charter was similarly foreseeable. Hence as I see it, the laws establishing the Funds are entitled to stand on their own and are not subject to limitations not contained therein and not incorporated by reference.
Chapter 877, Articles 5 and 6, Sections 19-44.0 and B19-64.0 respectively established the Funds as "corporations". The pertinent part of these sections read:

The variable supplements Fund shall have the powers and privileges of a corporation.

I find this to be a broad, explicit and unrestricted statutory grant of authority to the Funds and to the Trustees thereof. The word "corporation" is in no way qualified. Had the drafters intended it be a "corporation" limited to the frame of a "city agency" they had ample opportunity to so provide, but did not. Had they intended the Funds, as "corporations", to have powers and privileges different from a traditional corporation whether public or private, they could have so provided, but did not.

At least in those Sections there is no condition, limitation or restraint on the traditional exercise of corporate power and privileges by the Funds.

I do not think it can be seriously disputed that the traditional powers of a corporation include those things set forth in the proposed resolution of the Unions' Trustees (Exhibit A). In the furtherance of corporate purposes corporations may:

Elect or appoint officers, employees and other agents of the corporation, define their duties, fix their reasonable compensation, and the reasonable compensation of Directors and to indemnify corporate personnel. Such compensation shall be commensurate with services performed. (See McKinney's Consolidated Laws of New York annotated - Public Corporations.)
It is fundamental that a broad, unconditional grant of power and authority, such as set forth in Section B 19-44.0 and B 19-64.0 may be narrowed or limited only by explicit exceptions set forth or referred to in the same law. Chapter 877, Articles 5 and 6 are consistent with this fundamental rule of legislative intent and interpretation. The statutes do contain some explicit limitations on what the Funds can do as corporations. But these explicit exceptions do not include the exercise of the power sought by the Unions' Trustees. This is significant. The drafters of the legislation had the opportunity, and indeed took the opportunity to statutorily restrict the corporate powers of the Funds in certain specific areas. Yet, other powers, well within their knowledge and contemplation, which could have just as easily been included as exceptions to the powers of the Fund, were not. One can only conclude that the Funds were not to be restricted by the unspecified restrictions. Or in the alternative, based on fundamental statutory interpretation, unspecified restrictions cannot now be read into the statutes.

Specifically, and by example the statutes oust the Funds from selecting an independent actuary, by providing that the actuary of the Funds shall be the actuary appointed by the Board of Estimate. The statutes also preclude compensation to the Trustees and to "employees assigned to the Board of Trustees". The statutes name the Comptroller of the City as
the custodian of the Funds, so that an independent custodian is proscribed. There are other express changes in the general power of a "corporation", but I find none prohibiting what the Unions' Trustees seek by their proposed resolution. (Exhibit A).

The statutes do not prohibit the Funds, through the Trustees, from exercising the corporate power and privilege to employ "legal assistance". The contention of the City Trustees that the Corporation Counsel of the City of New York must be the Counsel to the Funds is nowhere found in the statutes. An independent actuary is barred; why does not the legislation expressly bar independent counsel? The City Trustees answer inferentially. They contend that the Funds are "City Agencies" because they are supported financially from the City Treasury and that the Charter mandates the Corporation Counsel as Counsel to all City agencies. Based on the fundamental rule of statutory constructions, namely that a broad statutory grant of unrestricted power may be limited only by an equally explicit exception, I cannot find that this multi-step inferential reasoning, unsupported by any explicit language in the statutes creating the Funds overturns, modifies or restricts the powers of the Trustees pursuant to sections B 19-44.0 and B 19-64.0 to employ legal counsel.

I find nothing in the statutes which prohibits the Trustees from employing administrative or expert assistants provided such reference in Exhibit A means persons of professional
or special skill. Sections B 19-42.0 f and B 19-62.0 f which read:

The Fire Commissioner shall assign to the Board such number of clerical and other assistants as may be necessary for the performance of its finances.

are not a bar.

I interpret the emphasis of the foregoing to be on the word **clerical**. The reference to "other assistants" means, in my judgement, persons on the same level, with the same basic standing as clerical employees. Had these sections been intended to foreclose employment of experts or professionals skilled in the management and/or administration of Funds, I am sure the drafters would have said so. Instead they used first the word "clerical" followed by the phrase "other assistants". Under the interpretive rule of *ejusdem generis*, the first word sets the class and type. General references thereafter are confined to that class and type. Hence the phrase "other assistants" cannot mean personnel of expert skill or professional standing who are employed in key policy implementing posts. In my view those sections were included so that, without expense, the Funds could be ministerially manned on the clerical level by persons assigned by the Fire Commissioner, but I do not find those sections, either by language or intent, to foreclose the Trustees from employing, for example, a professional administrator or other personnel or recognized professional skill.
Nor is such barred by Sections B 19-48.0 and B 19-68.0. Prohibition of payment for service therein applies to the Trustees (and that is undisputed) and to "employees assigned to the Boards". The latter reference obviously covers only those employees assigned to the Board by the Fire Commissioner under Sections B 19-42.0 f and B 19-62.0 f in order to foreclose the payment of double salaries.

For all the foregoing reasons and without again repeating them, I find no legal prohibition to the adoption of the balance of Exhibit A.

Accordingly, the Undersigned as the Arbitrator designated pursuant to Sections B 19-42.0d and B 19-62.0d of the Administrative Code and having duly heard the proofs and allegations of the above named parties, makes the following Award:

The resolution proposed by the Unions' Trustees and marked as Exhibit A, except as to the appointment of an "actuary", is a proper exercise of the corporate powers and privileges of the Funds within the meaning of Sections B 19-44.0 and B 19-64.0 of the Administrative Code.

Accordingly the proposed regulation as set forth in Exhibit A shall be adopted by the Boards of Trustees of said Funds.

Erie J. Schmertz
Arbitrator
DATED: October 2 1972
STATE OF: New York) ss.
COUNTY OF: New York)

On this 2 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.

MAURICE L. SCHOPENWALD
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-08-0075
Qualified in Nassau County
Expires March 30, 1973
Opinion and Award

Based on the record I cannot find that the Company contractually, constructively, or effectively changed the regular shift hours of the grievants during the period September 27 - 30, 1971. The Union was not notified; no formal or written change of schedule was promulgated; and the evidence on what the foreman and the grievants discussed orally does not support the Company's position. Accordingly the hours worked between 3:45 A.M. and 7:45 A.M. on the days in question were hours worked prior to the beginning of their regular day shift and are to be paid for at the rate of double time pursuant to Article V Paragraph 7 (a) (2) of the National Agreement.

I am persuaded that when the grievants' foreman sought approval from his superior to permit the grievants to work prior to the beginning of their regular shift, he did so because he knew that work during those hours (rather than at the end of a regular shift which he was authorized to arrange) carried more premium pay, and that specific authorization of a superior was necessary. Manifestly had the foreman intended to change the grievants' regular shift hours to commence at 3:45 A.M., approval of a work schedule commencing several hours before what had been the grievants' regular shift would be superfluous.

Moreover the fact that the foreman each day ascertained not only the rate of progress on the work but also whether the grievants would again report for work early on the following day, is obviously inconsistent
with any conclusion that the grievants' regular work schedule had been effectively changed to commence at 3:45 A.M.

Accordingly Messrs. Jack DeLong and Louis Fagnano are entitled to double time for the hours worked from 3:45 A.M. to 7:45 A.M. on the days in question and the Company is directed to make appropriate adjustments in their pay.

Eric J. Schmertz
Arbitrator

DATED: December 29 1972
STATE OF New York )ss.
COUNTY OF New York)

On this 29 day of December, 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. 1430 1412 72 H
The stipulated issue is:

Whether the Company violated Article VI Section 5 (c) (1) of the 1970-1973 G.E.-IUE National Agreement when E. Taylor was upgraded to Grade 7 Ordering Clerk rather than S. Greer?

A hearing was scheduled on July 20, 1972 under the expedited arbitration provisions of the Agreement between the above named Company and Union. Representatives of both sides and Miss Greer, hereinafter referred to as the "grievant," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs.

I find that employee E. Taylor who is junior in seniority to the grievant, was selected instead of the grievant because she occupied a job only one grade below the Grade 7, Ordering Clerk promotional opportunity. I find that the grievant was denied the promotion, not because she lacked the basic qualifications, but because she occupied a Grade 5 job, two steps below.

I find nothing in Article VI Section 5 (c) (1) which gives priority to employees one grade below the open position over
qualified and more senior employees more than one grade below. That contract section requires, to the extent practical, consideration to present employees, who are qualified and further, with consideration to their seniority. As I see it, the phrase "present employees" does not limit or accord priority to employees only one grade below the promotional opening. If the intent was to first screen the qualifications and seniority of employees only within the job grade immediately below, the contract would and should have so provided. That it does not, means in my judgment, that before the Company fills a vacancy with a new hire, it is to consider the qualifications and seniority of more than just those employees occupying jobs one step below the job opening.

In the instant case based on the evidence, and particularly the job description I find that the grievant who worked in the same department as Taylor, possessed at least the minimum qualifications to be given an opportunity to fill the job opening of Grade 7 Ordering Clerk. And with seniority greater than that of Taylor, she should have been awarded the upgrade.

Nor do I find that the foregoing conclusion is overturned by any acceptance of or acquiescence by the Union in any practice to the contrary. Based on the testimony, I am satisfied that the chart entitled "Salaried Job Classification Relationships" (Company Exhibit No.2), upon which the Company strongly relies in this proceeding, was negotiated with and accepted by the Union for layoffs, not for job promotions. Therefore, that it concededly is a negotiated "job or occupation track" does not mean that the Union agreed to it for the purpose for which
it was used in the instant case.

Accordingly the Undersigned, having been duly designated in accordance with the Arbitration Agreement between the parties dated July 29, 1971 (Expedited Procedures) and having duly heard the proofs and allegations of the parties makes the following Award:

The Company violated Article VI Section 5 (c) (1) of the contract when it selected E. Taylor rather than S. Greer for the job of Grade 7 Ordering Clerk. Miss Greer shall be upgraded to that job and made whole for the difference in wages.

Eric J. Schmertz
Arbitrator

August 7, 1972

Case No. 1430 0495 72
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union of Electrical, Radio & Machine Workers, Local 438 AFL-CIO

and

General Electric Company Springfield, New Jersey

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated 1970-1973 and having duly heard the proofs and allegations of the parties, Awards, as follows:

As to those of the 24 identified employees laid off for a two week period beginning August 30, 1971, who returned from that layoff to the job classification they held when the layoff commenced, the Company did not violate Article XI Section 5 of the 1970-1973 GE-IUE National Agreement.

As to those of the 24 identified employees who upon their return to active employment at the end of the aforesaid two week period did not resume the jobs they held at the time of the layoff, but were transferred or assigned to other job classifications, the Company violated Article XI Section 5 unless said employees were given "one week's notice and one week's work at the prevailing schedule," or one week's pay in lieu thereof. If they were not accorded the notice and work prescribed by Article XI Section 5, or not paid one week's pay in lieu thereof, the Company shall pay them one week's pay for the contract breach.

Eric J. Schmertz Arbitrator

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

On this day of 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. 1830 0057 72
In the Matter of the Arbitration between

International Union of Electrical, Radio & Machine Workers, Local 438 AFL-CIO

and

General Electric Company
Springfield, New Jersey

The stipulated issue is:

Did the Company violate Article XI Section 5 of the 1970-73 GE-IUE National Agreement when 24 identified employees were laid off for a two week period beginning August 30, 1971 without being given one week's advance notice? If so, what shall be the remedy?

A hearing was held in Union, New Jersey on June 6, 1972 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 expressly waived the Arbitrator's oath. Both sides filed post hearing briefs and the hearings were declared closed as of November 1, 1972.

Article XI Section 5 of the contract reads:

Employees will be given at least one week's notice and one week's work at the prevailing schedule before layoffs are made due to decreasing forces.

The narrow question in this arbitration is whether the layoff referred to in the stipulated issue was "due to decreasing forces" or constituted a "decrease in forces" within the meaning of Article XI Section 5. The Union contends that any layoff, whether temporary, permanent or of an indefinite period, is due to or results in a "decrease of forces," entitling the affected employees to the notice and work prescribed by the
The Company contends that Article XI Section 5 is not applicable to "temporary" layoffs of two weeks or less.

Under other circumstances I believe a case could be made out that a temporary layoff as well as one of a longer or permanent duration is "due to decreasing forces" or results in "a decrease in force." But the circumstances in the instant case compel a contrary conclusion, and support the Company's position.

Article XI Section 5 has been in successive contracts, unchanged, for a considerable number of years if not from the inception of the collective bargaining relationship. The record before me discloses that for upwards of 20 years there has been a consistent and unvaried practice, corporate-wide, to exclude layoffs of two weeks or less from the application of that contract provision. That practice has been followed at the Springfield plant as well. Two prior similar instances prompted grievances from the Union. But the Union did not pursue them to arbitration. Also between 1960 and 1966 a Local Supplemental Agreement entered into between this Local Union and the Company at the Springfield location provided expressly for the exclusion from Article XI Section 5 of "temporary layoffs" and defined a "temporary layoff" as "existing for a limited time only ... (not) in excess of two weeks (14 calendar days.)" This is not to say that the aforementioned practice, grievance disposition, or Local Supplemental Agreement are conclusive per se, but rather that they are con-
trolling in the absence of evidence of a contrary agreement or a different practice, interpretation or intent.

There is no such countervailing evidence. The Union has not pointed to a single instance in which a layoff of two weeks or less has been subject to the notice and work provisions of Article XI Section 5. The Union is correct when it asserts that the "corporate-wide" practice has been based on Local Supplemental Agreements entered into by other IUE local Unions at other Company installations to which this Local Union and this Company location are not parties. Yet the issue before me involves the interpretation of a particular section of the GE-IUE National Agreement. While this Local Union is not necessarily bound by what other locals negotiate on a Local Supplement basis, the Local Supplemental Agreements elsewhere are obviously relevant to a determination of what the International Union (and other constituent local Unions thereof) and the Company have agreed to, intended, or permitted with regard to the application and interpretation of Article XI Section 5. Hence that evidence is clearly material to how Article XI Section 5 of the National Agreement should be interpreted, especially where there is no applicable Local Supplemental Agreement.

A Local Supplemental Agreement between this local Union and the Company's Springfield installation which expressly provided for a different interpretation or application of Article XI Section 5 would preempt a bare interpretation of the Agreement on a National level and what other local Unions and the
Company are doing elsewhere. But at present there is no such effective Local Supplemental Agreement, and the last Local Supplemental Agreement effective between 1960 and 1966 was consistent with the Company's position in this case.

As I observed at the hearing the 1960-1966 Local Supplemental Agreement, having expired in 1966, is not now binding. But absent a different practice thereafter, or a different agreement, or some evidence of a different intent or interpretation of Article XI Section 5, there continues at least a presumption that the parties have not changed the way that clause is to be interpreted and administered. I find nothing in this record between the years 1966 and the present to rebut that presumption.

Accordingly I find and hold that a layoff of two weeks or less, with notice of that limited period of time at the outset of the layoff, is a "temporary layoff" and not a layoff "due to decreasing forces" within the meaning of Article XI Section 5 of the Collective Bargaining Agreement. Hence, affected employees are not entitled to the advance notice required under Article XI Section 5.

However, I am not persuaded that the layoffs of all of the 24 grievants were limited to two weeks within the foregoing interpretation. The Company concedes that if a layoff from a particular job classification is to be for a period longer than two weeks, the affected employee is not only given the notice and work prescribed by Article XI Section 5, but may exercise his seniority rights to bump into some other job
classification. Based on the evidence I am satisfied that some of the grievants fell into this latter category. At the initiation of the layoff the Company knew that a lack of work in that particular job classification might well last up to one month. The cut-back in work was due to a directive from a customer that the schedule of his work be held up one month. In my judgment that created a strong probability that some of the grievants would not be able to return from the layoff at the end of two weeks to the job classification they previously held. Subsequent events bore this out. It appears that some of the 24 grievants, upon return from the two week layoff, were transferred to other job classifications because there was not enough work for all of them in the jobs from which they were laid off. As a result, those grievants were laid off from their original job classifications for more than two weeks - two weeks out of the plant plus a period of time thereafter when transferred or assigned to a different job.

As I see it the Company knew or should have known that those employees would be laid off and/or displaced from their regular job classification for more than two weeks, and hence their layoffs, even under the Company's interpretation, exceeded fourteen calendar days. They should have been afforded the notice and work benefits of Article XI Section 5.

The record is unclear as to whether those particular grievants were accorded the benefits of Article XI Section 5 at the time they returned to active employment after fourteen days and when transferred to other jobs. If they were, there
has been no breach of Article XI Section 5. If not, those particular grievants are entitled to the remedy which the Union seeks, namely one week's pay in lieu of one week's notice and one week's work at the prevailing schedule.

Eric J. Schmertz
Arbitrator
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.

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

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