In The Matter of the Arbitration:

between

Local 841, IATSE

and

American Broadcasting Company

The stipulated issue is:

Is the Company violating Sections 1 and 18 of the contract? If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on November 20, 1974 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.

The Union complains that certain graphic art work is being subcontracted by the Company in violation of Sections 1 and 18 of the collective bargaining agreement.

Those Sections read in pertinent part, respectively:

1. ...we hereby recognize you as the representative of such employees and agree that all graphic art work executed by employees of the Company for television broadcasting will be executed by employees hereunder. We agree that in no event will such work be subcontracted for the purpose of evading the provisions of this agreement.

18. It is the intention of the Company on Company produced shows to channel all Title Graphic Art intended for television broadcasting through the Graphic Art Department, except where the exigencies of time make this impracticable or impossible....
I find no contract violation. Certain significant facts are either stipulated or undisputed. The Company has been and is subcontracting graphic work used on several of its regular news and documentary programs, most significantly the Reasoner Report, Directions, People Places Things. This work has been subcontracted for several years, and was not objected to by the Union until recently, when the quantity of overtime work available to the bargaining unit was sharply reduced. (The Union explains that the reduction in overtime opportunities for the bargaining unit impelled it to formally object to what previously it was willing to overlook.) There has been no increase in the quantity of the work subcontracted. Indeed the record indicates that there has been some diminution. The number of bargaining unit employees employed in the Graphic Arts Department has increased despite the subcontracting.

Considering the foregoing I find no violation of Section 1 of the contract. It is undisputed that all graphic art work executed by employees of the Company are executed by members of the Union within the bargaining unit covered by this contract. In view of the fact that there has been no increase in the amount of the subcontracting and that the bargaining unit has been increased, together with the undisputed fact that overtime work is not guaranteed, I cannot conclude that the subcontracting of the disputed work, a practice of long standing, constitutes an evasion of the contract.
Even assuming, as the Union argues that the phrase in Section 18, "to channel all Title and Graphic Art... through the Graphic Art Department" means that bargaining unit employees of the Graphic Art Department are to perform that work, the balance of the first sentence of Section 18 allows the Company to subcontract where the exigencies of time make assignment of the work to the Graphic Art Department impracticable or impossible. The Company has offered sufficient evidence in the instant case to show that the disputed work was subcontracted because insufficient time was available in the production of the television programs involved, for the work to be done on time by the Graphic Art Department. (Also, in at least one situation the Company demonstrated it did not have the necessary equipment to perform the work but has since ordered or received such equipment and plans hereafter to assign the work to bargaining unit employees of the Graphic Art Department.)

The Company's case with regard to the exigencies of time and the impracticability of assigning the disputed work to the Graphic Art Department stands basically unrefuted by the Union. Instead, the Union argues that with better planning, more time would be available and the Graphic Art Department would thus be able to perform the work rather than have it subcontracted. This may be so, but it remains a matter of argument. The unrefuted fact is there are time exigencies
covering virtually all of the disputed work and hence circumstances are present which permit the Company to subcontract the work within the exception set forth in Section 18. Additionally, as previously indicated with reference to Section 1, the disputed work is not new to subcontracting, has been subcontracted for an extended period of time; has not increased in quantity; and there is indication that more of it will remain inside with the acquisition of new and necessary equipment. Considering all of this, I fail to see any violation of Section 18. An absolute prohibition on subcontracting or the elimination of "exigencies of time" as an exception to a subcontract bar, are matters for collective bargaining and not arbitration.

The Undersigned, duly designated as the Arbitrator, and having been duly sworn, and having duly heard the proofs and allegations of the above named Parties makes the following AWARD:

The Company is not violating Sections 1 and 18 of the Contract.

DATED: December 26, 1974
STATE OF: New York
COUNTY OF: New York

On this twenty sixth day of December, 1974, 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 - 0859 - 74
The stipulated issue is:

Is the grievance over the discharge of Gwendolyn Purcell arbitrable?

A hearing was held in Washington, D.C. on July 8, 1974 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to present their respective cases. The Arbitrator's oath and the contract provision for a tri-partite Board of Arbitration were waived.

The Company argues that the grievance should be deemed non-arbitrable because it was submitted to arbitration some three and one-half months after the Company's last step answer. It contends that three and one-half months constitutes an unreasonable delay; and makes the traditional arguments that during that period of time the Company's potential liability for back pay has been "running" and that witnesses may no longer be available or their memories of the event may have faded.

The grievance and arbitration provisions of the contract (Article XVIII) contain no express time limit within which a grievance is to be referred to arbitration after the steps of the grievance procedure have been completed. The contract does require the Union to give notice of its intention to contest a
discharge or disciplinary action within 30 days. Or in other words there is an express contractual time limit within which the Union must grieve but no express time limit within which it must go to arbitration after the grievance steps have been completed.

Clearly the parties knew how to impose a time limit. They did so in connection with filing the grievance. That they did not with regard to submitting an unresolved grievance to arbitration, means, to my mind, that no such express time limit was intended.

This is not to say that I reject the Company's argument that a reasonable time limit to submit a grievance to arbitration should be implied. I agree that grievances must be submitted to arbitration within a reasonable time after the grievance procedure has been completed to protect the Company from the obligation to arbitrate stale or abandoned grievances, or grievances which because they have not been submitted to arbitration for an extended period of time are appropriately deemed by the Company to be dropped. But under the circumstances of this case, I do not find the period of three and one-half months from the Company's final answer to the date that the Union referred the grievance to arbitration to have reached the point of unreasonableness. I need not in this proceeding determine what the point of unreasonableness is, except to hold that under the circumstances of this case, and in the absence of a contract time limit which the parties could have but did not negotiate, three and one-half months does not reach that point.
The fact is that though the Company advanced the classical argument that witnesses may be unavailable and memories may fade, no evidence was offered to show that these disabilities are present in the instant case. Additionally, the question of potential back pay liability is always a matter which an Arbitrator may consider (if he decides the merits of the case against the Company) in light of any unusual delay between the completion of the grievance procedure and the referral of the case to arbitration. And the Company's right to argue to an Arbitrator that because of the three and one-half month period of time which elapsed, its back pay liability should be reduced or otherwise mitigated if the discharge of the grievant is to be reversed, is expressly reserved.

Accordingly the Undersigned having been duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties, makes the following Award:

The grievance over the discharge of Gwendolyn Purcell is arbitrable.

Eric J. Schmertz
Arbitrator

DATED: July 1974
STATE OF New York )
COUNTY OF New York) ss.:

On this day of July, 1974, 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. 1630 0058 74
OFFICE OF COLLECTIVE BARGAINING, ADMINISTRATOR

IMPARTIAL CHAIRMAN, UNIFORMED FIRE OFFICERS ASSOCIATION:
UNIFORMED FIREFIGHTERS ASSOCIATION - and - THE CITY OF
NEW YORK (FIRE DEPARTMENT)

In the Matter of the Arbitration between
Uniformed Fire Officers Association,
Uniformed Firefighters Association
and
The City of New York (Fire Department):

The Undersigned as Impartial Chairman under the Collect-
ive Bargaining Agreements between the above named parties and
having heard the proofs and allegations of the parties at
hearings on January 7th and 8th, 1974, makes the following AWARD:

The Unions have not offered or adduced sufficient evidence to show that the transfers set forth in Departmental Order No. 3 dated January 4, 1974 were for the reason or reasons for which two weeks notice is required under Article XXV Section 4 D 1 of the UFOA contract and Article XXVII-A Section 4 D 1 of the UFA contract. Therefore the grievance is denied.

Eric J. Schmertz
Impartial Chairman

DATED: January 14, 1974
STATE OF New York )ss.:
COUNTY OF New York)

On this 14th day of January, 1974, 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

Uniformed Firefighters Association, Local 94

and

City of New York

The Union and City are in disagreement over the precise scope of the "productivity" Recommendations of the Impasse Panel Report and Recommendations (I-105-73) dated November 11, 1973. They have agreed to submit their disagreement to me, as sole Arbitrator for final and binding determination.

The parties waived an oral hearing and submitted their respective positions by briefs.

Having duly considered the entire record before me I render the following Opinion and Award.

The productivity Recommendations of the Impasse Panel dealt with the manning of companies equipped with "rapid water," and with the manning of the "second vehicle" referred to in Article XXVII Section 6 of the prior contract.

The Union contends that the Impasse Panel Recommendations regarding the manning of companies equipped with rapid water is confined to the 53 companies (49 engine companies and 4 squads) which were equipped with rapid water at the time of the Impasse Panel hearing and Recommendations. The City asserts that the Recommendations are ongoing, and apply not only to those 53 companies but prospectively to any companies which in the future are similarly equipped with rapid water.

As to the Impasse Panel Recommendation regarding the
manning of companies consisting of two pieces of equipment, or in other words the question of what has been colloquially referred to as "Schmertzmen," the Union contends that it is confined to the 6 of such companies in operation at the time that the Impasse Panel hearings were held and the Recommendations made. The City argues that the Recommendation is applicable to all those two-piece companies which operated during the life of the prior Collective Bargaining Agreement and which are and were covered by the provisions of Article XXVII Section 6. The City states that there were and have been 12 such companies. (Apparently for operational reasons, 6 of the original 12 were discontinued some time after the negotiation of the prior contract and before the Recommendations of the Impasse Panel.)

"Rapid Water" Companies

Based on a review of the stenographic record of the Impasse Panel hearings, I conclude that the City's presentation on this issue was limited to the 53 companies which then, and now, are equipped with rapid water. That presentation, together with a reading of the Impasse Panel Recommendation, which recommended a reduction in the "present manning," which calculated the specific total sum of money to be saved, which calculated the savings per fireman, and which stated the number of firemen positions affected, lead to the compelling conclusion that the Impasse Panel exercised its authority over only those 53 companies which then and now are equipped with rapid water.
Accordingly the Recommendations were not intended to cover the prospective possibility of equipping additional companies with rapid water, and the manning of those companies when and if they become so equipped. The Union's position on this issue is therefore sustained.

(However it should be clear that the foregoing answers only the narrow question presented to me. It is not despositive of other possible related questions, such as the rights of the parties under the contract and in upcoming bargaining in case of technological changes affecting companies beyond the 53 covered.)

"Schmertzmen"

The Impasse Panel Recommendation on this issue is directly related to and expressly modifies Article XXVII Section 6 of the prior contract. As such it was obviously intended to change the manning requirements in all circumstances previously covered by that Article.

Therefore the reduction in the manning of two-vehicle companies from 7 (5 on the primary vehicle and 2 on the secondary vehicle,) to a total complement of 5, applies to the manning of any and all companies which now operate or have at any time during the life of the prior contract operated under the coverage of Article XXVII Section 6.

In other words the Impasse Panel Recommendation covers not only the 6 companies which were in operation at the time that
those Recommendations were made, but the additional 6 companies which had been subject to said Article when the prior contract was negotiated, even though their operation was discontinued thereafter. Hence the operation of any or all of said 12 companies during the present contract shall be subject to that manning Recommendation, namely that the City be permitted to operate the two vehicles of each said company with a total complement of 5 men.

Accordingly the City's position on this issue is sustained.

Eric J. Schmertz
Arbitrator

DATED: March 18, 1974
STATE OF New York )
COUNTY OF New York )

On this 18th day of March, 1974, 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 the executed the same.
The stipulated issue is:

Should the Superpumper differential of $600. be included in determining the night shift differential of Fireman First Grade Franklin Kreisl, and if so as of when?

At a duly noticed hearing Mr. Kreisl and representatives of the Union and City appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The contract language upon which the Union relies was first negotiated in 1968 and the night shift differential became effective January 1, 1969. The provision for a night shift differential has been perpetuated in each Collective Bargaining Agreement since.

It is undisputed that only a few months ago did a fireman's pay check first indicate or "break out" from his total pay the amount of the night shift differential. Hence the Union argues that it was not until then that the grievant or the Union knew that the $600. Superpumper differential was not included in the night shift differential for first grade firemen working on the Superpumper. I accept that explanation as a defense to the City's claim that the issue is procedurally non-arbitrable.
There was testimony concerning the original 1968 negotiations and specifically the negotiation of the night shift differential clause and stipulations regarding the inclusion of $600. differential in figuring other benefits. However, I find that the best evidence in the instant issue is the apparent undisputed fact that subsequent to the negotiation of the night shift differential clause, a representative of the City's Office of Labor Relations met with certain of the then leaders of the Union for the express purpose of arranging the application of the night shift differential to the various grades of firemen. None of the Union witnesses at this arbitration case were at that meeting and therefore none was able to testify as to what arrangements were made with regard to a first grade fireman assigned to the Superpumper. However, the City offered the testimony of Mr. Thomas Laura who was the City's representative at that meeting. Mr. Laura testified unequivocally that not only did he and the then leadership of the Union (which has since changed) agree on the apportionment of the night shift differential amongst the grades of firemen, but that there was explicit agreement that the $600. Superpumper differential would not be utilized in calculating the night shift differential for firemen assigned to the Superpumper.

Mr. Laura's testimony stands unrebutted and hence, in my judgment, is determinative of the instant issue.

The Undersigned, as Impartial Chairman under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of said parties...
makes the following Award:

The Superpumper differential of $600. shall not be included in determining the night shift differential of Fireman First Grade Franklin Kreisl. The Union's grievance is denied.

Eric J. Schmertz
Impartial Chairman

DATED: March 18, 1974
STATE OF New York )ss.:  
COUNTY OF New York)

On this 18th day of March, 1974, 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.
The stipulated issue is:

The issue is the Union's allegation that under Department Order 225 the City has violated or inequitably applied the existing policy of the Fire Department not to transfer members of the Fire Department for punitive reasons or arbitrary and capricious reasons.

Also implicit within the stipulated issue is that the Order, or any part thereof not be violative of the collective bargaining agreement.

Hearings were duly held at which representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and to cross-examine witnesses. The parties filed post-hearing briefs.

I conclude that several different, divergent and overlapping reasons brought about the planning, promulgation and implementation of Department Order 225. Some of those reasons and results were fully proper under the collective bargaining agreement and Department policy as managerial prerogatives. Others however, were violative of the collective agreement or contrary to Department policy as set forth in the stipulated issue, and hence improper. In short the propriety of Department Order 225 is a "mixed bag", partially in accordance with the contract and Department policy and partially inconsistent therewith within the meaning of the stipulated issue.
Specifically as I see it, the reasons and results of Department Order 225 can be summarized in pertinent part as follows:

1. The disputed transfers in each instance made room for a newly appointed probationary fireman. Though in previous similar situations probationary firemen were introduced into active service by assignment to existing vacancies, thereby making transfers of veteran firemen unnecessary, I find nothing in the contract or Department policy that prohibits the Department from effectuating transfers to create openings for probationary firemen. So long as the transfers creating the vacancies do not constitute violations or inequitable application of existing Department policy not to transfer for punitive, arbitrary or capricious reasons, and are not in violation of the contract, the Department may make use of the transfer method to create vacancies for probationary firemen as a proper exercise of its managerial function. Neither the Union nor the Arbitrator has the authority to substitute their judgements for that of the Department in determining to which Companies the probationary firemen will be assigned and in what numbers. Those determinations
are clearly managerial prerogatives, and again unless they
generate punitive, arbitrary or capricious
transfers, are not reviewable in arbitration.

2. The transfers and Department Order 225 were an
implementation by the new Fire Commissioner of
a policy he long advocated as Chief of Depart-
ment, namely a regular program to transfer men
from existing locations to other work locations;
for the legitimate needs and good of the Department.
And that lower level officers, such as Company
Commanders would for the first time play more
significant roles in developing and carrying out
that program. Though that transfer program was
much broader in scope, more on a preplanned and
scheduled basis, and would involve many more in-
voluntary transfers than previously undertaken by
the Department, I conclude it was and is a proper
exercise of the Department's managerial authority,
provided the transfers involved did not violate
Fire Department policy as recited in the stipulated
issue.

3. Companion to No.2 above, some of the transfers under
Order 225 were designed to give relief to veteran
firefighters who had been working in heavy running areas and were deemed overworked, by transferring them to less demanding locations. Involuntary transfers for this reason are a proper exercise of the Department's managerial prerogatives. Similarly, some of the transfers were for the bona fide purpose of giving firemen new and different fire fighting experiences, such as for example moving them from multiple dwelling areas to office building locations and/or to areas dominated by private frame dwellings. Inasmuch as different or varied fire fighting techniques are required in these different types of locations, transfers for this purpose were and are proper.

4. Some of the transfers under Order 225 were not involuntary but rather voluntary. Firemen were transferred pursuant to transfer requests on file to locations they requested. It is undisputed that those transfers under Order 225 were proper and they are not challenged by the Union.

5. However some of the transfers were contrary to criteria laid down by the Commissioner or the Department. For example in some cases the most junior, most inexperienced firemen were transferred rather than those who by age, length of service and heavy work schedules deserved or needed relocation to less demanding areas. Where junior firemen
were transferred not for new work experiences and/or not to more demanding locations, but rather only to make room for probationary firemen contrary to criteria laid down by the Commissioner or the Department, those transfers were arbitrary, violative of Department policy and hence improper under the stipulated issue.

6. The unilateral, precipitous transfer of some union delegates among the approximately one hundred and forty eight men transferred under Order 225 constituted a breach by the Department of the Union's representation rights under the collective bargaining agreement. Union delegates are recognized representational agents of the Union not only under the Union's constitution and by-laws but under the collective bargaining agreement. For the Department to unilaterally and precipitously transfer a delegate without reasonable prior notice to the Union, effectively terminates the Union's right of representation at the delegate level. It is not for the Department to judge the authority or prestige of the delegates as Union representatives. It is sufficient that the delegates play a recognized role in administering the contract on behalf of the Union and its members. Hence it is not for the Department to make a unilateral distinction between delegates and members of the Union's executive board, by transferring the former with little or no notice
while exempting the latter group from inclusion in the transfer order. As both are official Union representatives their relative authorities and need in carrying out the contract on behalf of the Union are matters for the Union to decide or are at least for mutual decision of the parties. This is not to say that delegates are immune from transfer. That would freeze a relatively large group of individuals and thereby hamper any legitimate transfer program of the Department. A rule of reason must be applied between the Union's right to maintain its contractual representation at the delegate level and the Department's right to effectuate legitimate transfers. Therefore, though the Department may transfer delegates, before it does so it must give reasonable notice to the Union to afford the Union reasonable time to replace that delegate without loss of continuity of representation or to attempt to dissuade the Department from transferring that particular delegate. Order 225 as it applied to the delegates, did not give the Union this reasonable notice, and its effect was to improperly deny the Union the delegate representation to which it was contractually entitled in those situations. And I deem that improper whether the inconclusion of delegates in Order 225 was inadvertent, unknowing or willful.
7. Some of the transfers under Order 225 were for reasons of "attitude". Some firemen who were deemed to have the "wrong attitude" or "a poor attitude" about the area in which they worked; about the citizens of that area; about the officers over them; about the discipline, routine or duties assigned them; or who were suspected of some misconduct or of setting "poor" examples for other men in their companies; or who showed less than satisfactory dedication to their work, were involuntarily transferred for those reasons. The question before me is not whether the Department should have the right and power to transfer for these reasons but whether transfers for those reasons are violative of Department policy within the meaning of the stipulated issue. Frankly I can see circumstances where the Department should be able to use its transfer power to attempt to cure or rehabilitate a fireman with any of those "attitude" problems. But no matter how viewed, transfers for those reasons, in my judgement constitute punishment for an unsatisfactory or troublesome attitude, and hence are punitive in nature within the meaning of the stipulated issue. In the face of the Department's assertion that its existing policy is not to transfer for punitive reasons, and that none of the transfers under Order 225 were punitive, I must find that those transfers based on attitudinal inadequacies,
suspected misconduct, and/or an inadequate level of dedication to duty were inconsistent with the stated policy and therefore improper. This of course is without prejudice to the right of the Department to discipline under the prescribed disciplinary procedures.

8. Finally, based on the record, I consider it a logical and reasonable inference that Order 225 was, in part at least, the Department's retaliatory response to the November sixth strike. Though the record does not contain "smoking pistol" evidence in clear support of the Union's charge of retaliation there are too many unusual and circumstantial factors, which taken together cannot be brushed off as innocent, coincidental or meaningless. Order 225 followed the strike by less than three weeks. It was announced at the end of one week effective at the beginning of the next, without any other notice to the affected employees or the Union. The order was conceived, planned, and structured in unprecedented secrecy. Though Department officials met, formulated the plan, set forth standards and criteria for transfers, and ordered Company Commanders to produce lists of possible transferees, no memoranda, written instructions, meeting minutes or journal book entries of any of these transactions were made prior to the formal issuance of the order. The order was the
broadest in scope and covered more firemen than any prior involuntary transfer order, and for the first time a number of Union delegates were included. In some instances Company Commanders were ordered to produce names for transfers within a matter of hours or less, and in some cases were directly ordered to do so or unceremoniously overruled when they protested. Again this is not to say that the Department should not have the right to respond, indeed to retaliate against an unlawful strike, by using its transfer power to break up cliques; to restore discipline; to restructure companies in such a way as to reduce the chances of future unlawful acts and to serve notice on the employees that future misconduct may result in transfers. Rather it is to say that such reasons and purposes are obviously punitive in nature, and in light of the stipulated issue and the stipulated Department policy not to transfer for punitive reasons, an order retaliatory in nature is contrary to that existing Department policy and improper. In short I infer that one reason or one use of Order 225 was to make clear to firemen that future unlawful acts or breaches of Departmental discipline will be sternly dealt with including the use by Company Commanders of their newly acquired power to recommend transfers. Again, while I can see circumstances otherwise justifying
the use of the transfer "weapon" in this manner, the Department's existing policy as stipulated by the Department presently forecloses that use and it is to that existing policy and the stipulated issue that I am bound.

It should be clear that I make no determination of whether the Department committed an "improper practice" within the meaning of the Taylor Act or the New York City Collective Bargaining Law. Nor do I determine whether because the Union's strike was not a "protected activity" the Department's retaliatory intent is exempt from any improper practice characterization. These are matters within the exclusive jurisdiction of another forum, and are not before me or within my authority in this arbitration.

What remains is the question of what is to be done. Or in other words, if some directive or remedy is to be fashioned by this Arbitrator, how can the improper reasons and results of Order 225 be un-scrambled from those that were legitimate.

The issue as to the delegates is severable however. Only are involved, and based on the record none wish to remain at the locations to which they were transferred. Additionally there is the institutional
right of the Union to delegate representation as previously enunciated in detail. Therefore within twenty days from receipt of this Award the Union delegates transferred under Order 225 shall be transferred back to the Companies and locations from which they were transferred under that Order.

As for the remaining transferees under Order 225 it would be manifestly wrong to reverse all of them inasmuch as many were based on proper and bona fide grounds. Also I deem it neither practicable nor remedial to attempt to pick out those particular transfers that were based in whole or in part on the improper grounds delineated above. Not only is the record not complete on that but the problem might well be exacerbated by again dislocating an employee who has adjusted to his new assignment and does not wish to return to his original work location despite the impropriety of his transfer.

An appropriate "unscrambling" and an appropriate decision to my mind is to direct a representative partial reversal of Order 225 equivalent as far as possible to those improper reasons on which Order 225 was based; and to uphold the Order partially to an extent equivalent to those proper reasons on which the Order was founded.
During the course of the hearings in this matter and in an effort to work out a settlement of the dispute (an attempt that failed) I asked the Union to make a survey of all the transferees of Order 225 (as well as those covered by another order not at issue herein) to determine which and how many wish to return to their original companies. At my request the Union made such a survey and submitted it to me and to the City.

I do not have the precise figures before me at this distance, but my recollection is that under Order 225 approximately thirty-five transferees including the delegates, out of the one hundred and forty-eight transferred want to return to the Companies from which they were transferred. If that figure is correct I consider it to be reasonably equivalent to that part of Order 225 which I have found was based on improper grounds. Therefore in addition to the foregoing Award regarding the delegates I shall direct that between the date this Award is received and my return to the United States (on September 2) the Union and the City meet and
attempt, within the intent and holding of this decision to arrange the return of those and that number of firemen to their original Companies within a forty-five day period subsequent to the receipt of this Award. If those figures are incorrect and/or if the parties cannot work out the retransfers as aforementioned, I will make a final ruling on that remaining question within a matter of days after my return.

Eric J. Schmertz
Impartial Chairman

DATED: August 25, 1974
REPUBLIC of the PHILIPPINES)
ISLAND OF MINDANAO )ss:
CITY OF DAVAO )

On this twenty-fifth day of August, 1974 came before me Eric J. Schmertz known to me to be the person who executed the foregoing document and who acknowledged to me that he executed the same in my presence.

Notary Public
The stipulated issue is:

The issue is the Union's allegation that under Department Order 225 the City has violated or inequitably applied the existing policy of the Fire Department not to transfer members of the Fire Department for punitive reasons or arbitrary and capricious reasons.

Also implicit within the stipulated issue is that the Order, or any part thereof not be violative of the collective bargaining agreement.

Hearings were duly held at which representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and to cross-examine witnesses. The parties filed post-hearing briefs.

I conclude that several different, divergent and overlapping reasons brought about the planning, promulgation and implementation of Department Order 225. Some of those reasons and results were fully proper under the collective bargaining agreement and Department policy as managerial prerogatives. Others however, were violative of the collective agreement or contrary to Department policy as set forth in the stipulated
issue, and hence improper. In short the propriety of Department Order 225 is a "mixed bag," partially in accordance with the contract and Department policy and partially inconsistent therewith within the meaning of the stipulated issue.

Specifically as I see it, the reasons and results of Department Order 225 can be summarized in pertinent part as follows:

1. The disputed transfers in each instance made room for a newly appointed probationary fireman. Though in previous similar situations probationary firemen were introduced into active service by assignment to existing vacancies, thereby making transfers of veteran firemen unnecessary, I find nothing in the contract or Department policy that prohibits the Department from effectuating transfers to create openings for probationary firemen. So long as the transfers creating the vacancies do not constitute violations or inequitable application of existing Department policy not to transfer for punitive, arbitrary or capricious reasons, and are not in violation of the contract, the Department may make use of the transfer method to create vacancies for probationary firemen as a proper exercise of its managerial function. Neither the Union nor the Arbitrator has the authority to substitute their judgments for that of the Department in determining to which Companies the
probationary firemen will be assigned and in what numbers. Those determinations are clearly managerial prerogatives, and again unless they generate punitive, arbitrary or capricious transfers, are not reviewable in arbitration.

2. The transfers and Department Order 225 were an implementation by the new Fire Commissioner of a policy he long advocated as Chief of Department, namely a regular program to transfer men from existing locations to other work locations for the legitimate needs and good of the Department. And that lower level officers, such as Company Commanders would for the first time play more significant roles in developing and carrying out that program. Though that transfer program was much broader in scope, more on a pre-planned and scheduled basis, and would involve many more involuntary transfers than previously undertaken by the Department, I conclude it was and is a proper exercise of the Department's managerial authority, provided the transfers involved did not violate Fire Department policy as recited in the stipulated issue.

3. Companion to No. 2 above, some of the transfers under Order 225 were designed to give relief to
veteran firefighters who had been working in heavy running areas and were deemed overworked, by transferring them to less demanding locations. Involuntary transfers for this reason are a proper exercise of the Department's managerial prerogatives. Similarly, some of the transfers were for the bona fide purpose of giving firemen new and different fire fighting experiences, such as for example moving them from multiple dwelling areas to office building locations and/or to areas dominated by private frame dwellings. Inasmuch as different or varied fire fighting techniques are required in these different types of locations, transfers for this purpose were and are proper.

4. Some of the transfers under Order 225 were not involuntary but rather voluntary. Firemen were transferred pursuant to transfer requests on file to locations they requested. It is undisputed that those transfers under Order 225 were proper and they are not challenged by the Union.

5. However some of the transfers were contrary to criteria laid down by the Commissioner or the Department. For example in some cases the most
junior, most inexperienced firemen were transferred rather than those who by age, length of service and heavy work schedules deserved or needed relocation to less demanding areas. Where junior firemen were transferred not for new work experiences and/or not to more demanding locations, but rather only to make room for probationary firemen contrary to criteria laid down by the Commissioner or the Department, those transfers were arbitrary, violative of Department policy and hence improper under the stipulated issue.

6. The unilateral, precipitous transfer of some union delegates among the approximately one hundred and forty eight men transferred under Department Order 225 constituted a breach by the Department of the Union's representation rights under the collective bargaining agreement. Union delegates are recognized representational agents of the Union not only under the Union's constitution and by-laws but under the collective bargaining agreement. For the Department to unilaterally and precipitously transfer a delegate without reasonable prior notice to the Union, effectively terminates the Union's right of representation at the delegate level. It is not
for the Department to judge the authority or prestige of the delegates as Union representatives. It is sufficient that the delegates play a recognized role in administering the contract on behalf of the Union and its members. Hence it is not for the Department to make a unilateral distinction between delegates and members of the Union's executive board, by transferring the former with little or no notice while exempting the latter group from inclusion in the transfer order. As both are official Union representatives their relative authorities and need in carrying out the contract on behalf of the Union are matters for the Union to decide or are at least for mutual decision of the parties. This is not to say that delegates are immune from transfer. That would freeze a relatively large group of individuals and thereby hamper any legitimate transfer program of the Department. A rule of reason must be applied between the Union's right to maintain its contractual representation at the delegate level and the Department's right to effectuate legitimate transfers. Therefore, though the Department may transfer delegates, before it does so it must give reasonable notice to the Union to afford the Union reasonable time to replace that delegate without loss of continuity of representation or to attempt
to dissuade the Department from transferring that particular delegate. Order 225 as it applied to the delegates, did not give the Union this reasonable notice, and its effect was to improperly deny the Union the delegate representation to which it was contractually entitled in those situations. And I deem that improper whether the inconclusion of delegates in Order 225 was inadvertent, unknowing or willful.

7. Some of the transfers under Order 225 were for reasons of "attitude." Some firemen who were deemed to have the "wrong attitude" or "a poor attitude" about the area in which they worked; about the citizens of that area; about the officers over them; about the discipline, routine or duties assigned them; or who were suspected of some misconduct or of setting "poor" examples for other men in their companies; or who showed less than satisfactory dedication to their work, were involuntarily transferred for those reasons. The question before me is not whether the Department should have the right and power to transfer for these reasons but whether transfers for those reasons are violative of Department policy within the meaning of the stipulated issue. Frankly I can see
circumstances where the Department should be able to use its transfer power to attempt to cure or rehabilitate a fireman with any of those "attitude" problems. But no matter how viewed, transfers for those reasons, in my judgement constitute punishment for an unsatisfactory or troublesome attitude, and hence are punitive in nature within the meaning of the stipulated issue. In the face of the Department's assertion that its existing policy is not to transfer for punitive reasons, and that none of the transfers under Order 225 were punitive, I must find that those transfers based on attitudinal inadequacies, suspected misconduct, and/or an inadequate level of dedication to duty were inconsistent with the stated policy and therefore improper. This of course is without prejudice to the right of the Department to discipline under the prescribed disciplinary procedures.

8. Finally, based on the record, I consider it a logical and reasonable inference that Order 225 was, in part at least, the Department's retaliatory response to the November sixth strike.
Though the record does not contain "smoking pistol" evidence in clear support of the Union's charge of retaliation there are too many unusual and circumstantial factors, which taken together cannot be brushed off as innocent, coincidental or meaningless. Order 225 followed the strike by less than three weeks. It was announced at the end of one week effective at the beginning of the next, without any notice to the affected employees or the Union. The order was conceived, planned, and structured in unprecedented secrecy. Though Department officials met, formulated the plan, set forth standards and criteria for transfers, and ordered Company Commanders to produce lists of possible transferees, no memoranda, written instructions, meeting minutes or journal book entries of any of these transactions were made prior to the formal issuance of the order. The order was the broadest in scope and covered more firemen than any prior involuntary transfer order, and for the first time a number of Union delegates were included. In some instances Company Commanders were ordered to produce names for transfers within a matter of hours or less,
and in some cases were directly ordered to
do so or unceremoniously overruled when they
protested. Again this is not say that the
Department should not have the right to respond,
indeed to retaliate against an unlawful strike,
by using its transfer power to break up cliques;
to restore discipline; to restructure companies
in such a way as to reduce the chances of
future unlawful acts and to serve notice on the
employees that future misconduct may result in
transfers. Rather it is to say that such reasons
and purposes are obviously punitive in nature,
and in light of the stipulated issue and the
stipulated Department policy not to transfer
for punitive reasons, an order retaliatory in
nature is contrary to that existing Department
policy and improper. In short I infer that one
reason or one use of Order 225 was to make clear
to firemen that future unlawful acts or breaches
of Departmental discipline will be sternly dealt
with including the use by Company Commanders
of their newly acquired power to recommend
transfers. Again, while I can see circumstances
otherwise justifying the use of the transfer
"weapon" in this manner, the Department's existing policy as stipulated by the Department presently forecloses that use and it is to that existing policy and the stipulated issue that I am bound.

It should be clear that I make no determination of whether the Department committed an "improper practice" within the meaning of the Taylor Act or the New York City Collective Bargaining Law. Nor do I determine whether because the Union's strike was not a "protected activity" the Department's retaliatory intent is exempt from any improper practice characterization. These are matters within the exclusive jurisdiction of another forum, and are not before me or within my authority in this arbitration.

What remains is the question of what is to be done. Or in other words, if some directive or remedy is to be fashioned by this Arbitrator, how can the improper reasons and results of Order 225 be unscrambled from those that were legitimate.

The issue as to the delegates is severable however. Only a few are involved, and based on the record none wish to remain at the locations to
which they were transferred. Additionally there is the institutional right of the Union to delegate representation as previously enunciated in detail. Therefore within twenty days from receipt of this Award the Union delegates transferred under Order 225 shall be transferred back to the Companies and locations from which they were transferred under that Order. As for the remaining transferees under Order 225 it would be manifestly wrong to reverse all of them inasmuch as many were based on proper and bona fide grounds. Also I deem it neither practicable nor remedial to attempt to pick out those particular transfers that were based in whole or in part on the improper grounds delineated above. Not only is the record not complete on that but the problem might well be exacerbated by again dislocating an employee who has adjusted to his new assignment and does not wish to return to his original work location despite the impropriety of his transfer. An appropriate "unscrambling" and an appropriate decision to my mind is to direct a representative partial reversal of Order 225 equivalent as far as possible to those improper reasons on which Order 225 was based; and to uphold the Order
partially to an extent equivalent to those proper reasons on which the Order was founded. During the course of the hearings in this matter and in an effort to work out a settlement of the dispute (an attempt that failed) I asked the Union to make a survey of all the transferees of Order 225 (as well as those covered by another order not at issue herein) to determine which and how many wish to return to their original companies. At my request the Union made such a survey and submitted it to me and to the City.

I do not have the precise figures before me at this distance, but my recollection is that under Order 225 approximately thirty-five transferees including the delegates, out of the one hundred and forty-eight transferred want to return to the companies from which they were transferred. If that figure is correct I consider it to be reasonably equivalent to that part of Order 225 which I have found was based on improper grounds. Therefore in addition to the foregoing Award regarding the delegates I shall direct that between the date this Award is received and my
return to the United States (on September 2) the Union and the City meet and attempt, within the intent and holding of this decision to arrange the return of those and that number of firemen to their original companies within a forty-five day period subsequent to the receipt of this Award. If those figures are incorrect and/or if the parties cannot work out the re-transfers as aforementioned, I will make a final ruling on that remaining question within a matter of days after my return.

(Signed) Eric J. Schmertz
Eric J. Schmertz
Impartial Chairman

DATED: August 25, 1974
REPUBLIC of the PHILIPPINES
ISLAND OF MINDANAO
CITY OF DAVAO

On this twenty-fifth day of August, 1974 came before me Eric J. Schmertz to me known and known to me to the person who executed the foregoing document and who acknowledged to me that he executed the same in my presence.

(Signed) Epifanio Estradado
Notary Public
September 16, 1974

Mr. Kalman Seigel
Editor, Letters to the Editor
The New York Times
229 West 43rd Street
New York, New York 10036

To the Editor:

Your editorial Oil on the Fire of September 11, 1974 presented a one-sided analysis of my arbitration decision and wrongly appraised my authority as the arbitrator.

I directed a "representative partial reversal" of the transfer order because I found that some of the transfers were for punitive or arbitrary reasons in violation of the Fire Department's policy not to transfer firemen for those reasons. That was the narrow and precise issue which the City and the union presented to me for determination. To have made such a finding of fact and still upheld all of the transfers would have been inconsistent with the issue presented, in violation and in excess of my authority, and under arbitration law, would have jeopardized the validity of my decision.

Your editorial failed to state that I found many valid reasons for most of the transfers and that in several respects the bulk of the transfers were based on a proper exercise of the Fire Department's managerial prerogatives.

Your editorial did not note that I upheld the Fire Commissioner's right to make transfers not just for the "legitimate needs and good of the Department" but also on several other specific and important grounds, a right first enunciated and codified in my decision and a right which the union had steadfastly refused to acknowledge.
Your editorial did not state that I expressed the view that the Department ought to have a policy and right, in response to an illegal strike, to transfer firemen guilty of misconduct, to restore discipline, to break up cliques, and to otherwise serve notice that further misconduct would be dealt with severely. But in view of the Department's acknowledged contrary policy I could not uphold those transfers in this case which were violative of that policy, and by consequence violative of the collective bargaining agreement.

Your editorial did not disclose that I expressly reserved the Department's right to initiate disciplinary proceedings against any fireman accused of misconduct, even if his transfer was inconsistent with the Department's transfer policy.

Also, my decision clearly implied that in my view, because the union's strike was illegal and hence not a "protected activity" the Department's retaliatory response was not an improper practice under the New York State Taylor Act or the New York City Collective Bargaining Law.

Your editorial suggests that Supreme Court Justice Burton B. Roberts was bound to more rigid legal restraints in the criminal case arising out of the strike than was I as the arbitrator in the transfer case. Quite the contrary. An arbitrator's authority is limited to the terms of the collective bargaining agreement and in some instances, as here, even more limited by the issue stipulated by the parties. Justice Roberts had vastly greater power and authority. First with the indictments and then the guilty pleas of certain leaders of the firemen's union, he was armed with the power to impose jail sentences unless some other arrangement both dispositive of the offenses and in the public interest was achieved. With that power and leverage he was able to entertain and encourage a flexible "plea bargained" result which satisfied those objectives. A review of your news reports at that time will show that Justice Roberts discussed his plans with me, among others, and that I fully supported what he sought to do and ultimately worked out.

For almost a decade, as impartial chairman between the City of New York and the firefighters, as the mediator in several contract negotiations, as Chairman of the panel which arbitrated the contract dispute following the strike and which rendered a decision editorially commended by the New York Times as "sensible", and as a public member of the Office of Collective Bargaining, I have devoted my efforts towards the estab-
Establishment of stable, responsible and lawful labor relations between the City and the union in the public interest. You correctly state that "one admirable contribution of impartial arbitration as a means of settling labor-management disputes is that the arbitrator seeks to interpret contract obligations in a way that will permit orderly and constructive future relations between employer and unionized employees." A full reading of my decision will show that it is not inconsistent with both those objectives.

Very truly yours,

Eric J. Schmertz
Arbitrator

EJS: hl
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration

between

Local 185 IUE, AFL-CIO

and

CTS of Ashville, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 21, 1972 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The phrase "total earnings" in Article 11A Sections 1 through 8 includes vacation pay paid employees in the prior year. For the vacation years covered by the grievance the Company shall include vacation pay in its calculation of the total earnings of the affected employees for the fiscal year ending May 31. Appropriate upward adjustments in vacation pay entitlements under Article 11A Sections 1 through 8 shall be paid to the affected employees.

Eric J. Schmertz
Arbitrator

DATED: July 5, 1974

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

On this 5th day of July, 1974, 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. 3130 0118 73
In accordance with Article 16 of the Collective Bargaining Agreement dated January 21, 1972 between CTS of Ashville, Inc. hereinafter referred to as the "Company," and Local 185, IUE AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Does the phrase "total earnings" in Article 11A Sections 1 through 8 include the vacation pay paid the employees in the prior year? If so, to what remedy are the affected employees entitled?

A hearing was held in Ashville, North Carolina on January 20, 1974 at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived. The parties filed post hearing briefs and the hearing was declared closed as of July 2, 1974.

The Company's defense in support of its contention that vacation pay paid employees during the fiscal year is not part of "total earnings" under Article 11A is primarily based on nine years of "past practice." The Company argues that the phrase "total earnings" is ambiguous; that under that circumstance past practice is controlling; that the unvaried past practice has been to exclude the prior year's vacation pay
in calculating total earnings; that the Union knew or should have known of this practice and has thereby acquiesced and accepted the practice as the proper interpretation of the contract.

I reject the Company's argument simply because I do not find the phrase "total earnings" to be ambiguous. Based both on my experience and my research I am satisfied that it is well settled that "earnings" includes vacation pay. Absent conditional or restrictive language or a special contractual definition of the word "earnings," paid vacations are regularly interpreted as part of an employee's annual earnings. In the instant case the contract contains no restrictions, conditions or any limiting definition of the word "earnings" or the phrase "total earnings." I find it no different from other "fringe" payments such as holiday pay, bereavement pay, shift bonus, overtime pay and cost of living increases, which the Company concedes are included as part of "total earnings" under Article 11A.

Accordingly I interpret the phrase "total earnings" as clear — to include vacation pay which an employee received during the fiscal year ending May 31.

It is similarly well settled that past practice or acquiescence in a practice is applicable only where contract language is ambiguous or otherwise unclear. But where, as here, because the word "earnings" and the phrase "total earnings" are not ambiguous but rather widely accepted as including vacation pay, a past practice different from the contract provision is binding only until challenged and only until
either party serves notice that it intends to enforce the contrary contract language. Therefore the practice upon which the Company relies, and its argument concerning the Union's acquiescence in that practice, is applicable for the vacation years prior to the period covered by the instant grievance. But the instant grievance constitutes notice by the Union seeking a return to the contract language as written and to its proper interpretation.

In short, it is immaterial if the Union knew or should have known of the practice since 1966. That is not prejudicial to the Union's right to now insist that the contract, rather than the contrary past practice be followed, beginning with the vacation years covered by the instant grievance.

In addition to the foregoing conclusion regarding the well settled meaning of the phrase "total earnings," there are additional facts supportive of the Union's position in this case. The Company acknowledged that it proposed the precise wording of the disputed contract language. A fundamental rule of contract law is that disputed language should be interpreted against the party who wrote it. Also, there is evidence that when the Company proposed the phrase "total earnings," it told the Union that it included "all earnings." Had the Company intended to exclude vacation pay, it should have said so. That it did not, and that no such restriction was placed in the contract must be construed as adverse to the position upon which the Company now relies. Additionally, it is undisputed that under similar contract language between this Company and the
United Auto Workers at Elkhart, vacation pay for the prior years vacation paid during the fiscal year ending May 31, is and has been included as part of an employee's "total earnings" for calculation of the next year's vacation pay. Though not alone determinative, that method of administering substantively similar contract language by the Company at a different location and with a different union, is evidence that the contract phrase "total earnings" has not been interpreted unequivocally by the Company to exclude the prior year's vacation pay. Indeed the practice at Elkhart is fully consistent with the broadly accepted meaning of the word "earnings," and the phrase "total earning" as previously mentioned.

Finally, I do not accept the Company's assertion that to find for the Union would constitute "pyramiding vacation pay." If an employee works 52 weeks a year, two weeks of which, for example, is paid vacation, his vacation pay is nothing more than regular pay for the 2 weeks he is on vacation. So, where an employee takes his vacation and receives vacation pay for that time away from the job, he receives nothing more than wages, which are clearly earnings. And to include those wages as part of his total earnings during any fiscal year is obviously and logically proper. It would constitute "pyramiding" only if he worked during his vacation and both his vacation pay and wages for the same period of time were included as part of "total earnings" in calculating the next year's vacation entitlement. Under that example an employee would receive not only vacation pay but also two weeks wages because he worked during
his vacation period; or in other words 54 or more weeks pay for a 52 week period. To include both as part of his total earnings would constitute pyramiding. But that circumstance is not part of the instant grievance nor what the Union seeks. And the Union has stipulated that total earnings, so far as direct wages and vacation pay are concerned, may not exceed 52 weeks in any given year.

Accommdently the Union's grievance is granted. For the vacation years covered by the instant grievance the total earnings of the affected employees shall include vacation pay paid them during the fiscal year ending May 31. Appropriate adjustments in their entitlement under Article 11A of the contract shall be made.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration:

between

Local 584 I.B.T Milk Drivers and Dairy Employees Union
and
Dairymen's League on behalf of Dairylea Cooperative, Inc.

OPINION
and
AWARD

The stipulated issue is:

Was there good cause for the discharge of George Cuccia? If not, what shall the remedy be?

A hearing was held at the American Arbitration Association on May 15, 1974 at which time Mr. Cuccia, 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.

To reverse the grievant's discharge I would have to believe that his truck ran at two miles to the gallon of gasoline; that on the day in question, when the grievant drove no more than 30 miles, fifteen gallons of gasoline were consumed; that the grievant purchased ten gallons of gasoline in two five gallon containers (in two successive transactions at the same gas station) at a time during the gasoline shortage when the law prohibited sales in cans of such quantities; that the sale took place even though the station attendants could not identify the grievant the very next day when he, together with representatives of the Employer visited the gas station for the very purpose of authenticating his story;
that Company representatives who observed the grievant's truck testified falsely that they saw him remove cans of gasoline from the interior of the truck where milk is stored (whereas the grievant asserted he carried the gasoline cans in the driver's cab) and that the phone call to the Company regarding the grievant's conduct was false.

These are conclusions which I would have to reach in order to accept the grievant's defense. I cannot do so because, cumulatively surrounding the same event, they are so implausible a series of circumstances as to be unbelievable.

Accordingly, for disciplinary purposes the Company has met its burden of establishing its case by the quantum and standard of proof required in such matters. And for the offense, the penalty of discharge is proper.

The Undersigned having been duly designated as the Arbitrator, and having been duly sworn, and having duly heard the proofs and allegations of the above named parties, makes the following Award:

There was good cause for the discharge of George Cuccia.

Eric J. Schmertz
Arbitrator

DATED: May 31, 1974
STATE OF: New York ), ss.:
COUNTY OF: New York,

On this 31st day of May, 1974, before me personally came and appeared Eric J. Schmertz to me known and known to be to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

1330 0435 74
Though the stipulated issue is:

Whether the Henry M. Hald High School Association breached Article XXII of the Collective Bargaining Agreement in that it has failed to adhere to the procedures as outlined in Section 1-R - Department Chairmen, regarding the selection of Department Chairmen at Bishop Reilly High School

the underlying and threshold issue is whether the Faculty and Staff Handbook Diocesan High Schools is part of the Collective Agreement, subjecting claimed violations of the Handbook to the grievance and arbitration procedures of the Collective Bargaining Agreement (Article XXXI).

Hearings were held on January 17 (on another issue subsequently held in abeyance) and on March 18 and March 28, 1974, at which time representatives of the above named Union and Association appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. Post hearing briefs were filed.

The underlying and threshold issue is answered in the affirmative. Article XXII incorporates the Handbook by express reference into the Collective Bargaining Agreement. Said Article in pertinent part reads:
The parties to this Agreement have established a Handbook Committee for purposes of developing Association-Wide policies, professional procedures and other working conditions as referred to in the Preface to the Handbook.

The Handbook Committee shall be composed of representatives of the Union, the religious teachers in the member schools, Principals of the member Schools and the Association.

This Committee is a standing committee and is authorized to compose a handbook, the sections of which shall be effective for all teachers covered by this Agreement when submitted to and approved by the Association.

I deem the language
"the sections of which shall be effective for all teachers covered by this Agreement when submitted and approved by the Association"

to incorporate the substantive provisions of the Handbook, as they affect the lay teachers covered by the Collective Bargaining Agreement, as conditions of employment within and under the Collective Bargaining Agreement.

Had the parties not intended the Handbook as part of the contract they should and could have conditioned its reference with appropriate restrictive language in that regard, or at least with a limitation which foreclosed from the grievance and arbitration provisions of the contract, claimed violations of the Handbook. Such restrictive or conditional language could easily have been included either in the Collective Bargaining Agreement generally, particularly in Article XXII, or as part of the Arbitration clause, or in the Handbook itself. No such limiting language is to be found. Clearly, by other types of limitations negotiated in the contract, the parties well knew how to maintain the Handbook independent of the contract or
immune from the grievance and arbitration provisions of the contract had they intended to do so.

But they did not. By application of well settled contract law, any prior agreement to the contrary is superceded by and merged in the subsequent and clear language of the Collective Agreement and the latter places no limitation on the contractual application of the Handbook as it applies to faculty covered by the Collective Bargaining Agreement. (There is no dispute that the Handbook clause in question, namely Section 1-R, was submitted to and approved by the Association pursuant to the third paragraph of Article XXII of the contract.)

Having found that the terms and provisions of the Handbook are incorporated into and constitute terms and conditions of the Collective Bargaining Agreement by operation of Article XXII, it follows that a claimed violation of a Handbook provision is an "allegation of a violation of (the) Agreement" within the meaning of Article XXXI. Hence the instant grievance, namely an alleged violation of Section 1-R of the Handbook is a grievance within the meaning of Article XXXI of the contract and subject to arbitration thereunder. Accordingly the Association's contention that the issue is not arbitrable because the Handbook is not subject to arbitral review is rejected.

In this regard I do not find that Section 4 of the Handbook constitutes a "grievance procedure" which supercedes or ousts the grievance and arbitration provisions of the contract from consideration of a claimed violation of the Handbook. Section 4 only sets up a "review group" to 'clarify and inter-
pret Handbook items." But I do not find it to be an adjudicatory procedure for the resolution of disputes and therefore, so far as the lay faculty is concerned, does not constitute either an adequate or intended substitute for the grievance and arbitration provisions of the Collective Bargaining Agreement.

I fail to see, as the Association argues, how the foregoing could be interpreted to apply the Collective Bargaining Agreement to the religious faculty. Undisputedly the Handbook is applicable to the religious as well as to lay faculty. The incorporation by reference of the Handbook into the Collective Bargaining Agreement means simply that the provisions of the Handbook as they affect lay faculty become conditions of employment under the Collective Bargaining Agreement only for those employees, (i.e. the lay faculty) covered by the Collective Bargaining Agreement. Hence my findings herein in no way extend collective bargaining rights or the right to arbitrate Handbook disputes to any faculty member or employee not covered by the Collective Bargaining Agreement.

The evidence adduced in connection with the stipulated issue indicates that the Association did not specifically follow the procedure required by Section 1-R of the Handbook in the appointment of the Science and Social Studies Department Chairmen at Bishop Reilly High School. However, I deem it unnecessary to determine whether the Union grieved that violation within the specified time limitations of Article XXXI of the contract, simply because I find it impracticable and unnecessary to fashion a remedy. To reverse the appointment of the two Depart-
mental Chairmen is not only not feasible but could be disruptive to the educational plans and programs. And to require the Association to canvas the faculty members of each affected Department anew would, in my judgment, be nothing more than a pro forma exercise culminating in the same result. Therefore, other than finding that the Association violated the contract by its failure to consult with all members of the affected Departments when, as the evidence shows, certain faculty members who were not consulted were available for consultation, no remedy is awarded.

The Undersigned, having been designated as the Arbitrator between the above named parties and having been duly sworn and having duly heard the proofs and allegations of said parties, makes the following Award:

The Faculty and Staff Handbook Diocesan High Schools as it affects the lay faculty covered by the Collective Bargaining Agreement, is incorporated in and is part of the Collective Bargaining Agreement by operation of Article XXII of said Agreement. As such, claimed violations of the Handbook are grievances within the meaning of Article XXXI of the contract and subject to the grievance and arbitration provisions thereof.

The Association breached Article XXII of the Collective Bargaining Agreement in that it failed to adhere to procedures outlined in Section 1-R - Department Chairmen, regarding the selection of the Science and Social Studies Department Chairmen at Bishop Reilly High School. Whether the Union grieved within the time limits required under Article XXXI of the Collective Bargaining Agreement is immaterial because no remedy is awarded.

Eric J. Schmertz
Arbitrator
Dated: July 1974
State of New York )
County of New York)

On this day of July, 1974, 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 0996 73
In the Matter of the Arbitration
Between
Local 45 Culinary and Bartenders Union
and
Host Services Of New York, Inc.

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

The Company's discharge of Xavier Colombier under Section 9 (c) of the Memorandum of Agreement dated September 21, 1973 was proper and is upheld.

Eric J. Schmertz
Arbitrator

Dated: July 31, 1974

STATE OF NEW YORK ) SS.
COUNTY OF NEW YORK)

On this 31st day of July, 1974, 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.
The stipulated issue is:

What shall be the disposition of the Union's grievance dated May 29, 1974?

A hearing was held at the Company plant in Secaucus, New Jersey on October 9, 1974 at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties were afforded an opportunity to file post-hearing briefs.

The Union's grievance dated May 29, 1974 reads:

All work and duties of the Operator of Mainway Warehouse that is being done by outsiders shall be discontinued and reinstated to the Operator of Mainway Warehouse.

The Union is complaining that certain "switching" duties previously performed by the Operator have been assigned to non-bargaining unit employees in violation of the collective...
bargaining agreement. More specifically, it is the Union's contention that non-bargaining unit truck drivers or "shuttlers" bring trailer/trucks to the company's location, positioning them in the yard and open the trailer doors in readiness for loading, and that this is work previously performed by the bargaining unit Operator and constitutes "switching" within the meaning of his job duties.

The record does not support the Union's contention. I find that the Company made a method change regarding the manner and sequence of the arrival of trailer/trucks at the warehouse; that this change in method involves equipment and personnel (i.e. trucks and drivers) neither previously nor presently covered by the collective bargaining agreement; that as a consequence there has been a substantial reduction in the amount of switching work now required; that by practice the work of "switching" is different than as alleged by the Union; and that what switching work remains is performed exclusively by the Operator as needed, and not transferred or assigned to non-bargaining unit personnel.

Prior to the change, trailer/trucks and drivers not covered by the collective bargaining agreement arrived at the Company's location at various hours during the day. The drivers drove the trailer/trucks into the Company's yard and positioned the trailers at locations for loading or elsewhere if all the loading locations were occupied. If a trailer was placed at a loading bay the driver also opened the doors to ready the trailer for loading. As now, that initial
positioning was performed not by the Operator but, by the non-bargaining unit driver. Also previously, towards the close of the work day a number of trucks arrived and were positioned in the Company's yard overnight to be loaded the following day. More trucks than could be position for loading arrived at that time and congestion within the yard resulted. Nonetheless, entry into the yard and the parking of each trailer either at a loading bay or elsewhere was performed by non-bargaining unit truck drivers. Only the following day, as trailers had to be switched from wherever they were parked to the loading bays did the bargaining unit Operator perform that work. In other words, moving a trailer **within** the yard from a location at which it was initially placed by a non-bargaining unit driver to a loading point constitutes "switching" within the meaning of the contract.

Under the method change trailer/trucks no longer arrive at the close of the business day and trailers do not remain in the yard overnight. Instead, utilizing a "staging area" elsewhere, trailer/trucks are shuttled to the warehouse at regular and orderly intervals, so, as each arrives it can be positioned as before by the driver (or in this case the shuttler), but more frequently at a loading bay. A backlog of parked trailers elsewhere in the yard awaiting room at a loading bay has been sharply reduced during the day and virtually eliminated overnight. Consequently, a sharp reduction in the amount of switching work has resulted. But after a trailer has been parked in the yard by a shuttler,
but not at a loading bay, its movement thereafter to a loading position is still performed by the bargaining unit Operator.

In short, trailer/trucks enter the yard and are initially positioned now as previously by a non-bargaining unit employee. Since that work was not previously done by the Operator it is not switching work and accordingly has not been transferred to non-bargaining unit personnel. Switching work, as before, (meaning the moving of trailers from the position in which they were initially placed in the yard by the truck driver, to a loading bay) is still exclusively performed by the Operator, although the need for it has been sharply reduced by the method change.

I find no restriction on the Company's right to make the instant method change. The change was for a bona fide reason; operations have been made more efficient and productive. Additionally, because the change involved equipment and personnel not covered by the collective bargaining agreement that agreement does not bar the Company from installing the new method. Moreover, the Operator is not guaranteed a continuing and unchangeable quantity of switching work. Rather the contract guarantees only that when switching work is to be performed, if any, it is to be done by the bargaining unit Operator as part of his job classification. That the quantity of that work has diminished is not a contract violation so long as what switching work remains is assigned to the Operator. I find that the Company has met this requirement.
Accordingly, the Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The Union's grievance dated May 29, 1974 is denied.

DATED: December 6, 1974
STATE OF: New York ) ss.
COUNTY OF: New York )

On this sixth day of December, 1974, 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.
On June 23, 1970 I rendered an Industry-Wide Award and Order setting forth the contractual and procedural obligations of all Employers under Article IV of the Collective Bargaining Agreement. That Award and Order are incorporated by reference herein and made part hereof.

Thereafter, on September 8, 1970 I rendered an Award implementing the Industry-Wide Award and Order of June 23, 1970. I found certain Employers in violation of Article IV and my Industry-Wide Award and Order and I directed them to pay damages to the Union. The September 8, 1970 Award is incorporated by reference herein and made a part of it.

In substance, both the aforementioned Awards directed all Employers to comply with all provisions of Article IV of the contract. The Awards expressly provided that Employers may only dispatch those drivers who, following their probationary period, have joined the Union, paid the Union initiation fee, and are paid-up Union members in good standing within the meaning of the law and Article IV of the contract.

The Awards made clear that Employers who dispatched drivers who did not meet those requirements were liable to the
Union for ordinary damages and, in case of continued violations, punitive damages.

The rulings, principles and admonitions set forth in the aforementioned Awards are re-affirmed and reiterated herein, and are effective, binding and enforceable now, retroactively for the entire period since those Awards were rendered, and for the future (until and unless changed by the mutual agreement of the Union and the Board of Trade.) The parties shall make reference thereto.

In a memorandum dated May 7, 1974 to the Members of the Board of Trade, its counsel, Maurice H. Goetz, Esq., correctly stated the provisions, rulings, requirements and import of my Awards of June 23 and September 8, 1970. Mr. Goetz' memorandum is incorporated by reference herein and made a part hereof. Reference thereto shall be made.

On May 13, 1974 I convened a meeting between representatives of the above named parties to discuss the Union's assertion that large scale violations of Article IV of the contract had been taking place over an extended period of time despite my foregoing Awards. At that meeting the Union presented a large number of grievances charging many employers with violations. The Union contended that virtually all employers were in violation of Article IV and my prior Awards, and that the Union had not received the requisite initiation fees and/or dues from as many as 16,000 employees over an extended period of time. On behalf of the Employers Mr. Goetz vigorously denied the magnitude of the alleged violations.
Irrespective of the actual extent of the Union's complaints, the records produced and the contentions made by the Union at that meeting persuade me that violations have been committed by a sufficient number of Employers in a significant number of situations over a long enough period of time to warrant another Industry-Wide Award and Order as follows:

All Employers shall comply with all provisions of Article IV of the Collective Bargaining Agreement. Following the probationary period an Employer may not dispatch a driver who is not a member of the Union; who has not paid the Union initiation fee; and who by failure to pay or tender Union dues is not a paid up member of the Union in good standing within the meaning of Article IV and the law. The Employer shall take steps to ascertain an employee's status pursuant to the contract and to the procedures outlined in my prior Awards.

Additionally (in response to another portion of the Union's complaint) the attention of all Employers is called to Section 5 of Article IV. Each Employer shall comply therewith by furnishing to the Union once a month a list of new employees covered by the contract, hired by such Employer during the preceding month.

Employers who violate Article IV, this Award or my prior Awards of June 23 and September 8, 1970 shall
be subject to ordinary and punitive damages under conditions previously stated. The Union's pending grievances alleging violations of Article IV and my prior Awards, shall not now be adjudicated. However, an Employer who hereafter violates Article IV, this Award, or my Awards of June 23, and September 8, 1970, and/or fails to comply with Mr. Goetz' memorandum of May 7, 1974 shall be liable not only for damages as aforementioned, but in addition I will permit the Union in those cases to open up for adjudication for damages any prior grievances now pending against that Employer alleging violations of Article IV and my Awards.

Eric J. Schmertz
Impartial Chairman

DATED: May 20, 1974
STATE OF New York )ss.: COUNTY OF New York)

On this 20th day of May, 1974, before me personally came and appeared Eric J. Schmertz to me known and known to me as the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
To: Members of METROPOLITAN

From: Maurice H. Goetz, Counsel

The Union has filed many hundreds of grievances against some of our member fleets alleging violation of Article 4 (Union Shop Provision) of the Collective Bargaining Agreement. Initial investigation has indicated that many hundreds (if not thousands) of employees have been permitted to work in our industry, over the last several years, without being required to join the Union after 30 days, as required in our contract. If this is borne out by evidence at a hearing, it would result in each of you being liable for the amount of dues and/or initiation fees to which the Union would have been entitled. In addition, the Impartial Arbitrator in our industry, Eric Schmertz, has indicated in a prior award that our employers may be liable to punitive damages for continuing violations of this type.

Since the aforementioned award is lengthy, covering some six pages which cite the details against specific garage members of our Association, we are reprinting below only those extracts from said award that are pertinent to the entire industry:

"I find the above named companies, in the instances indicated below, breached Article IV of the Collective Bargaining Agreement and my Industry-wide Award and Order of June 23, 1970. Where appropriate I have awarded money damages to be paid by the Company to the Union. In this proceeding the damages shall be deemed 'ordinary or compensatory', measured by the amount of an employee's delinquency in payment of dues or initiation fee to the Union. However, the measure of damages awarded in this proceeding should not be construed as the limit of potential damages for other or subsequent cases involving breaches of Article IV and my Industry-wide Award and Order. I reserve the right to Award more extensive damages, including punitive damages especially in cases of repeated violations of Article IV and my Industry-wide Award and Order subsequent to the date of that Award and Order."

I cannot emphasize strongly enough how this type of violation inflames our relationship with the Union. They, too, are having financial difficulties and since enforcement of the Union Dues Payment Requirement does not cost our fleets any money, they view this type of violation as an intentional act of hostility.

I urge all of you to check up on all of your employees, IMMEDIATELY, and make certain that anyone employed by you more than 30 days has joined the Union. In each case in which you find a delinquency, please put an immediate stop to it and require that employee to join and pay his dues as soon as possible.

With the advent of a central computer system at the Union offices, delinquency will be located and the employers will be penalized. Please let's avoid such a condition coming to pass.

MHG/yr
(#40 - '74)
In the Matter of the Arbitration
between

Local 3036 New York City Taxi Drivers
Union, AFL-CIO

and

Metropolitan Taxicab Board of Trade, Inc.,
on behalf of Dalk, Iona, Ardee, Blue Haven,
G & M, Mine and Dynamic Garages

The Undersigned, as Impartial Chairman under the Collect-
ive Bargaining Agreement between the above named parties, and
having duly heard the proofs and allegations of the parties
at hearings on September 2 and 4, 1970, renders the following

AWARD:

I find that the above named companies, in the in-
stances indicated below, breached Article IV of
the Collective Bargaining Agreement and my Industry-
wide Award and Order of June 23, 1970. Where appro-
priate I have awarded money damages to be paid by
the Company to the Union. In this proceeding the
damages shall be deemed "ordinary or compensatory,"
measured by the amount of an employee's delinquency
in payment of dues or initiation fee to the Union.
However, the measure of damages awarded in this pro-
ceeding should not be construed as the limit of
potential damages for other or subsequent cases in-
volving breaches of Article IV and my Industry-wide
Award and Order. I reserve the right to Award more
extensive damages, including punitive damages es-
pecially in cases of repeated violations of Article
IV and my Industry-wide Award and Order subsequent
to the date of that Award and Order.

I find that Dalk Garage violated Article IV of the
contract and my Industry-wide Award and Order of
June 23, 1970 when, on August 4, 1970 it dispatched
employees I. Mandell, G. Colan, E. Rosa, R. Pattwell,
M. Stone and J. Bard, when each was delinquent in
the payment of Union dues for the month of July, 1970.
The Company shall pay to the Union the amount of
$3.50 for each of said employees, or a total of $21
as damages.
I find that Dalk Garage breached Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when, on August 4, it dispatched employees M. Bornstein and R. Brayman. Based on the Company's records and the Company's contention that each was a "new hire," all three, when dispatched on August 4, had not yet joined the Union though they had been in the Company's employ more than 30 calendar days as of that date. Accordingly, the Company shall pay to the Union $10 for each employee, or a total of $20 as damages.

The Union has not established that employee R. Mennella was dispatched on August 4, 1970, and therefore its grievance that he was dispatched while delinquent in payment of Union dues is denied.

The evidence indicates that employee J. Myers was hired by Dalk on August 3, one day before he was dispatched. However, his payment to the Union on August 5 of an initiation fee and back dues, is evidence of his prior employment in the Industry. It is clear that on neither August 3rd or 4th did the Company make any inquiry of Myers in order to ascertain whether he was new to the Industry or only new to this garage. Article IV and my Industry-wide Award and Order requires that the employer check a driver's Union membership card or book or examine the driver's paid Union receipt before dispatching him. Had such been done or requested by the Company in connection with Myers, his prior status within the Industry might have been disclosed. If he failed to make such disclosure the Company would then have been justified in considering him as a new employee. But because the Company failed to make such inquiry, I direct that the Company pay the Union damages in the amount of $10.

I find that Iona Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970 when, on August 4, 1970, it dispatched employees J. Torres and V. Carter at a time that each was delinquent in the payment of Union dues for the month of July, 1970. The Company shall pay to the Union the amount of $3.50 for each said employee or a total of $7 as damages.

I find that Ardee Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970 when, on August 4, 1970 it dispatched employees S. Perez and J. Mayer at a time that each was delinquent in the payment of Union dues for the month of July 1970. The Company shall pay to the Union $3.50 (Perez) and $2.50 (C. Mayer, a part timer) or a total of $6 as damages.
I find that Blue Haven Garage failed to comply with the provisions of Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on August 4, 1970, it dispatched employee M. Sanabria without asking for his Union membership card or book or paid up receipt. As stated in my Industry-wide Award and Order, employees new to the Industry have a 30 day probationary period before being required to join the Union. But unless the employer knows that the employee is new to the Industry, or asks a driver new to his garage for a Union book, card or paid up receipt before dispatching him, that employer cannot determine whether that employee is entitled to the 30 day probationary period. Therefore in the instant case when the Company made no effort to ask for any of those documents, and did not know his prior status, it failed to follow the requirements of Article IV of the contract and my Industry-wide Award and Order. Again, had it made such inquiry and had the employee stated that he was new to the Industry, I would not find that the Company breached the contract or my prior Award if later evidence disclosed that the employee had worked previously in the Industry, was delinquent in Union dues and had therefore misled the Company. Employees who wilfully mis-informed a new employer in this regard would be subject to discipline. I will not Award money damages in this grievance because there is no evidence to show that Sanabria was previously employed in the Industry. (As distinguished from the grievance concerning J. Myers (Dalk)). Also, my rulings and observations in this situation are dispositive only of this particular case and shall not be construed by the parties as a precedent for any subsequent matters. I call attention to the fact that Section 7 of Article XVIII of the contract calls for an Industry-wide seniority list. Once such a list is available and maintained on an up-to-date basis, the prior service of any employee within the Industry should be a matter of record and known to both the Union and to employers covered by the contract.

I find that G & M Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on August 4, 1970, it dispatched employee V. Ortiz when he was delinquent in payment of Union dues for the months of April, May, June and July, 1970; employee R. Saavedra when he was delinquent in the payment of Union dues for the month of July 1970; and employee J. Wamhueller who failed to join the Union and pay the initiation fee though more than 30 calendar days after he entered the Company's employee had passed. The Company shall pay to the Union damages in the amount of $14 (for the
Ortiz violation); $3.50 (for the Saavedra violation) and $10 (for the Wanmueller violation), or a total of $27.50 as damages.

I find that Mine Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on August 4, 1970 it dispatched employees Kronenfeld and V. Sammarco, when each was delinquent in payment of Union dues for the month of July, 1970. The Company shall pay to the Union the amount of $3.50 for each said employee or a total of $7 as damages.

I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on the dates set forth in the grievances it dispatched employees L. Rosenthal, A. Viera, V. Del Valle, J. Torres, R. Jenkins and E. Mulero when none of those employees could produce evidence of their paid up status as members of the Union. The placing of money by the employee with the employer, in the form of cash, money order or check, to cover Union dues and/or initiation fee, to be remitted by the employer to the Union, does not constitute compliance with Article IV of the contract or my Industry-wide Award and Order. Therefore, when these employees paid the amounts of their delinquency to the Company for remittance to the Union, just prior to their being dispatched on the days in question, it did not cure their delinquencies for that day. Evidence of their paid up status with the Union in the form of the documents referred to in my Industry-wide Award and Order of June 23, 1970, must be presented before the driver is dispatched. I will not award damages in this case because the record indicates that the Union Shop Chairman, without authority from higher Union officials, may have led the employer to believe that the procedure followed with regard to these particular employees, on the particular days involved, was acceptable.

I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on July 3, 1970 it dispatched employee F. Jordon who, as of that date, had not joined the Union though more than 30 calendar days had elapsed from his date of employment with this garage. The Company shall pay the Union the sum of $10 as damages.

I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970 when on July 10, it dispatched employee S. Ward, a part-timer, when he was delinquent in payment of Union dues for the months of February through June 1970. The Company shall pay the Union the sum of $12.50 as damages.
I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on July 8, 1970, it permitted employee A. Rodriguez, an inside man, to continue at work though more than 30 days had passed since his date of employment and he had not joined the Union. The Company shall pay the Union the sum of $10 as damages.

I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on July 7, 1970 it dispatched employee S. LaQuerra when he was delinquent in Union dues for the months February through June, 1970. I will not award money damages in this case because there appears to have been some arrangement between the Union Shop Committeeman and the Company to give this employee, who had lost his license and been out of work since January of 1969, an opportunity to resume employment and earn some money before paying past dues.

I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on July 1 and July 7, after being told by the Union representative of his delinquency, it dispatched employee A. Starkey. Because the Company was placed on notice about this employee's delinquency and prior employment within the Industry before he was dispatched on those two days, I award damages for the total amount of that delinquency, namely for the months of October, 1969 through June, 1970. Therefore the Company shall pay to the Union the total sum of $31.50 as damages.

I find that Dynamic Garage violated Article IV of the contract and my Industry-wide Award and Order of June 23, 1970, when on July 6, 1970 it dispatched employee D. Bullock when he was delinquent in Union dues for the period January through June 1970. I will not award money damages because the record indicates that this employee was sent out pursuant to some understanding between the Company and the Union garage representative that an employee who had been ill for extended periods of time may be given an opportunity to work and earn money before being required to pay his delinquency. It should be stated however, that the proper procedure in such a situation is for the employee to apply to Union headquarters for a special work permit which is designed to achieve the same result.

The foregoing Awards of money damages are remedies for the breaches of contract and my Industry-wide
Award and Order committed by the employers. Payment thereof by the employers to the Union does not relieve the employees involved of the duty to pay dues and initiation fees owed.

Eric J. Schmertz
Impartial Chairman

DATED: September 8, 1970
STATE OF New York ) ss.: 
COUNTY OF New York) 

On this 8th day of September, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

In the Matter of the Arbitration between

New York City Taxi Drivers Union
Local 3036, AFL-CIO
On behalf of Tom Robbins

and

Metropolitan Taxicab Board of Trade, Inc.
On behalf of Dover Garage, Inc.

AWARD

During the course of the hearing on June 11, 1974 the above named grievant (Tom Robbins) and the above-named Union and Employer reached the following agreed upon stipulation, which I make my AWARD:

The above parties stipulate as follows regarding the instant arbitration concerning whether reasonable cause exists for the discharge of Tom Robbins.

It is agreed that the utilization of self help in the form of a work stoppage to redress a grievance is not justified and that all such grievances should be submitted to arbitration in accordance with the Collective Bargaining Agreement. It is further agreed that no other remedy is permitted and that the arbitration forum is fully capable of redressing any and all grievances.

It is acknowledged that the work stoppage that occurred at Dover Garage on May 14, 1974 is an impermissible method of handling a grievance. If Tom Robbins instigated or encouraged such work stoppage, Dover Garage would be justified in imposing a disciplinary penalty up to and including discharge, subject to review under the grievance and arbitration provisions of the contract. Whether or not Mr. Robbins did so is not adjudicated at this time. The rights of the parties on that question are expressly reserved.

In the future if Mr. Robbins commits any violation of any work rule at Dover Garage, the question of penalty may be considered in light of his entire work record, again subject to review under the grievance and arbitration provisions of the contract.

The instant arbitration is withdrawn.
The parties may post or otherwise properly disseminate this AWARD.

Eric J. Schmertz
Impartial Chairman

DATED: June 7, 1974
STATE OF New York ) ss.
COUNTY OF New York)

On this 7 day of June, 1974, 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
New York City Taxi Drivers Union Local 3036, AFL-CIO
and
Metropolitan Taxicab Board of Trade, Inc. on behalf of Jayson Operating Corp.

The undersigned, as Impartial Chairman under the Collective Bargaining Agreement between the above-named parties makes the following findings and Award:

Jayson Operating Corp. has violated Article IV of the Collective Bargaining Agreement and my Industry-Wide Awards of June 23, 1970, September 3, 1970 and May 20, 1974, during the period from February 20, 1974 through November 27, 1974 by dispatching drivers who were not members in good-standing of the Union (i.e. delinquent in the payment of dues and/or initiation fee). As liquidated damages for the contract breach, the Employer shall pay to the Union the sum of $3,200. Payment shall be made within no more than twelve months from the date of this Award and in equal monthly installments of not less than $250 per month, except that this Employer agrees that he will pay no less than $266.66 per month.

The Employer shall have the right to review the records upon which the Union's claims herein are based. If within two weeks from the date of this Award the Employer
disputes the accuracy of those records, the Employer will notify and discuss the matter with the Union, and if within one week thereafter the Employer and the Union are not in agreement, the matter shall be referred back to the Impartial Chairman for resolution.

With regard to the period of time prior to February 20, 1974, the rights of the Union are reserved to make claim for damages resulting from alleged breaches of said Article IV and Industry-Wide Awards if the Employer continues to dispatch drivers who are not Union members in good-standing. The Union’s right in this regard also extends to alleged breaches which are subsequent to November 27, 1974.

As set forth in my Prior Industry-Wide Award the payment by the Employer of the foregoing sum shall not relieve the individual employees involved of the dues and initiation fees owed to the Union and the Union shall retain the right to collect said dues and initiation fees from said employees.

The Union will proceed in the presentation of similar claims against all other Employers whom the Union contends are in violation of Article IV of the Collective Bargaining Agreement and my prior Industry-Wide Awards for the period February 20, 1974 through November 27, 1974. In the interests of expedition, the Union will prepare and submit to counsel for Metropolitan Taxicab Board of Trade its total claims against each of said Employers for said period, together with the sum it would accept as liquidated damages in settlement of said claims based upon the formula applied in the instant case and with which the parties are familiar.
If the foregoing is not complied with by this Employer, the Union shall have the right to petition the Impartial Chairman for an immediate hearing and for extraordinary relief. Disputes over the interpretation and application of the foregoing are to be submitted to the Impartial Chairman for immediate resolution. The foregoing is applicable only to the Union's claims against this and other Employers for the period of time from February 20, 1974 to November 27, 1974 and does not constitute a modification of or an amendment to my prior Industry-Wide Awards. Said Awards remain applicable for relevant periods prior to February 20, 1974 and subsequent to November 27, 1974.

Eric J. Schmertz
Impartial Chairman

Dated: December 20, 1974

STATE OF NEW YORK )
COUNTY OF NEW YORK )

On this 20 day of December, 1974, before me personally came and appeared Eric J. Schmertz to me known and known to me as the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public

MAURICE L. WILHELM
NOTARY PUBLIC STATE OF NEW YORK
No. 90-88-2972
Qualified in Nassau County
Term Expires March 30, 1976
In The Matter of the Arbitration between
New York City Taxi Drivers Union
Local 3036, AFL-CIO

and
Metropolitan Taxicab Board of Trade, Inc.,
On Behalf of Circle Garage and Chad 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 said parties at hearings duly held on October 14, 1974, makes the following AWARD:

The grievance of Irving Adler against Circle Garage, that he was improperly terminated and/or improperly denied reemployment, is denied. I find that the grievant quit his employment when he left his job on or about July 25, 1974, (and did not return until early September) after his request for a leave of absence for that period was denied by the Employer. Under Article XXIX Section 1 of the contract, the Employer has discretion in granting or denying a request for a leave of absence. But that discretion is not absolute or unchallengeable. Where an employee has a bona fide and pressing need for a leave of absence, where the period of the leave requested is of reasonable duration considering the need, where approval has been granted by the Union, an Employer's denial may be an abuse or an improper exercise of his discretion. In short, implicit in Article XXIX Section 1 is that an Employer may not unreasonably withhold his approval of a bona fide request for a leave of absence. And this is applicable whether the leave of absence requested is during the summer months or at any other time. However in the instant case the grievant has not persuaded me that his request for a leave was for a bona fide or compelling need nor has he established...
that the reason he gave to the Employer met that test. The record is unclear and the evidence conflicting and offsetting as to whether he asked for a leave "to visit his Grandmother" or "to visit a sick Aunt and niece in California." If the former (which the Employer contends was his reason and for which there is evidentiary support) I cannot fault the Employer for denying the request during the busy summer season especially when the leave was requested for as long as five weeks. The grievant has not offered sufficient evidence to establish that his request was not "to visit his Grandmother" but rather "to visit a sick Aunt and niece." So the grievant's case falls short of the requirement that the bona fides or compelling nature of the need for the leave be established. Also for either purpose I consider a request for five weeks, covering the full month of August and the first week in September when the taxi-cab industry is at its busiest and when drivers are most needed, to be excessive and unwarranted. I conclude that that amount of time off even to go to California for the purpose alleged by the grievant is longer than necessary and beyond what the Employer need approve. Hence I do not deem the Employer's denial of the leave of absence to have been unreasonable or an abuse of discretion. Inasmuch as the grievant left not only without the Employer's approval, but in contravention of the denial of the leave, the Employer had no obligation to reemploy him upon his return in September.

The discharge of William Graham by Chad Operating Corp., was for just cause. Over his year and a half employment with this Employer the grievant has been involved in ten accidents. I reject his assertion that he was blameless each time. I have stated in previous decisions that I accept the principle of "accident proneness" as a valid basis for an employee's termination following the application of "progressive discipline." I deem that the grievant falls into an accident-prone category, and it is noted that prior to his discharge and his final accident he had previously
been twice suspended because of his accident record. It is manifest that the taxicab industry has a special duty of care and a responsibility for safety, to those who ride in taxicabs and to the general public at large. Considering that duty and responsibility, I conclude that the grievant, whose accident record for whatever reasons is excessive, would represent too much of a risk if reinstated as a driver. Therefore I will not require the Employer or any other employer in the industry to employ him in that capacity. The grievant is a well educated, intelligent and personable individual, who, it is hoped, will be able to find a pursue employ successfully in some other field or endeavor.

Eric J. Schmertz
Impartial Chairman

Dated: October 16, 1974
State of New York ss.: County of New York

On this sixteenth day of October 1974, 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. 41-9811480
Qualified in Queens County
Commission Expires March 30, 1976
IMPARTIAL CHAIRMAN NEW YORK CITY TAXICAB INDUSTRY

In the Matter of the Arbitration between

Larry Erlichman

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of Marby Operating Corp.

Opinion
and
Award

The instant dispute was first initiated by Mr. Erlichman, hereafter referred to as the "claimant" in Civil Court of the City of New York, Small Claims Part. The Court suggested, and the claimant and the above named Employer agreed, that the matter be determined by arbitration under the Arbitration Provisions of the Collective Bargaining Agreement between the Metropolitan Taxicab Board of Trade, Inc. and New York City Taxi Drivers Union, Local 3036, AFL-CIO.

The New York City Taxi Drivers Union Local 3036, hereinafter referred to as the "Union," set forth its position regarding this arbitration to the Undersigned orally prior to the commencement of the Arbitration hearing, and in a written statement dated May 7, 1974. The Union's written statement reads:

STATEMENT ON BEHALF OF NEW YORK CITY TAXI DRIVERS UNION, LOCAL 3036, AFL-CIO, IN THE MATTER OF LAWRENCE EHRLICHMAN AND MARBY OPERATING CORP.

The position of the union in this matter is that it approves the holding of the arbitration herein for the following reasons:

The individual who has made the within complaint did not advise the union of any grievance that he wished to be processed on his behalf and did not request that any such grievance be processed. He thereby waived and/or forfeited any and all right to union representation at any stage of proceedings based on his complaint. It is the understanding of the union that the
complainant did, however, commence an action against the employer in the Civil Court of the City of New York, Small Claims Part, wherein the Court advised the complainant that his only remedy consistent with the collective bargaining agreement was to proceed with arbitration. The Court set an adjourned return date and urged that any arbitration be held before that date. The union did not learn of any of these developments until a time directly prior to the last such day for arbitration. It is only upon the foregoing limited set of circumstances that the union has consented to the holding of the within arbitration between complainant and the employer, and consequently the union does not participate further except to grant its continuing approval and consent to the holding of the remainder of this arbitration.

Dated: New York, New York
May 7, 1974

Respectfully submitted,

(Signed) Donald F. Menagh
Attorney for New York City Taxi Drivers Union, Local 3036, AFL-CIO

In accordance with the foregoing, a hearing was held on May 7, 1974 at the offices of the American Arbitration Association in New York City. The claimant and representatives of the Employer appeared. All concerned were afforded full opportunity to present their cases. The Arbitrator's oath was expressly waived. The claimant was a taxicab driver. During the week in question he worked two days and grossed $91.70 in bookings. On one of the days, February 25, 1974, he was held up at gun point and robbed of approximately $50.00.

The claimant contends that of the balance of the bookings which he turned in to the Employer following the robbery, the Employer retained more than what would have been its total share
At the hearing, the Undersigned, together with the claimant and representatives of the Employer, reviewed the applicable contract provisions and the respective mathematical calculations upon which the Employer and the claimant rely. Based on these reviews it became clear that the Employer had not retained more than the share of the bookings to which it was entitled, and that the claimant's assertion that the Employer kept a portion of his commission was inaccurate and unfounded. The claimant acknowledged his error.

Specifically the claimant was a 43% driver. That means that of his total bookings each week the Employer gets 57% and he 43%. Of his total bookings of $91.70 during the week in question the Employer was entitled to retain over $50.00. But the claimant did not turn in that amount following the robbery. He turned in less. Consequently the Employer did not receive its 57%. And obviously there was neither enough left for the claimant to receive any commission nor was any of his commission entitlement included in the money which the Employer received and retained. (The Employer has agreed to waive the difference between what it received and the total 57%.)

However, based on the practice of this Employer an employee who is robbed under these circumstances has received a $5.00 credit when he files a police report with the Employer. Though the claimant did not file such a report by the date of this hearing, the Employer agreed to pay him $5.00 if he did so without delay following the hearing.
Accordingly the Undersigned as Impartial Arbitrator renders the following Award:

1. The claim of Larry Erlichman that the Employer retained commissions to which Erlichman was entitled, is unfounded and denied.

2. Provided Mr. Erlichman has filed a completed police report with the Employer, the Employer shall pay him the sum of $5.00.

Eric J. Schmertz
Impartial Chairman

DATED: May 1974
STATE of New York
COUNTY OF New York

On this day of May, 1974, 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.
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

In The Matter of The Arbitration

between

New York City Taxi Driver's Union
Local 3036, AFL-CIO

and

Metropolitan Taxicab Board of Trade, Inc.: on behalf of Terminal Garage

The Undersigned, as Impartial Chairman under the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties makes the following INDUSTRY-WIDE AWARD:

The Employer's arrangement to lease some of his cabs to employees who are bargaining unit drivers is an interference with and in violation of the Union's rights of representation and collective bargaining under the contract.

The Employer asserts that drivers who accept the lease arrangement will remain employees within the bargaining unit. As such, a lease negotiated by the Employer directly with an individual driver is clearly improper, inasmuch as the Union is the sole bargaining agent for employees in the bargaining unit, and individual employees may not, without the Union's agreement or without the sanction of the Collective Bargaining Agreement, negotiate terms and conditions of employment on their own.

The Employer concedes that the terms and conditions of the lease are significantly different than the terms and conditions of the collective bargaining agreement. Hence the lease represents a material change in the terms and conditions of employment of the affected employees, and that may not be done by the Employer unilaterally, or even in agreement with individual employees during the life of the collective bargaining agreement without negotiating those material changes in conditions of employment with the Union.
Additionally, I conclude that the lease arrangement is not an "elimination of service" or an elimination or change in "processes" or a "curtail(ment) (of) its operation" within the meaning of Article III (Management) of the contract. In short this particular leasing arrangement is not authorized by the Management Article of the collective bargaining agreement. It is not an elimination of a service or a curtailment of an operation, because the service continues but in a different form. It is not a change in the method of service or process because those terms, in my view, refer to the means of servicing the riding public. And the lease arrangement makes no change in that service. Rather it simply changes, radically, the employment conditions of the employees.

Nor is the instant lease arrangement a "lease" within the meaning of Article XXIII of the contract. Under that Article an employer may lease his fleet or a portion thereof to another employer or to a person, group or organization who assume employer status. Under the instant disputed leasing arrangement the lessee does not become an employer, but remains an employee.

There being no authority in the contract supportive of the Employers leasing arrangement, the Union's recognition, representation and collective bargaining rights under Article I must be deemed pre-eminent. And without the Union's approval or agreement the Employer may not change the conditions of employment of bargaining unit drivers from the conditions set forth in the contract to a different set of conditions under a lease.

In view of the foregoing it is unnecessary for me to decide whether the Employer's lease arrangement is violative of Rule 89 of the Rules Governing Drivers of Public Taxicabs and Public Coaches of The New York City Taxi and Limousine Commission.
Accordingly during the life or effective period of the current collective bargaining agreement the Employer may not lease his cabs to employee drivers. Those leases already entered into are deemed null and void and shall be terminated forthwith. The affected drivers shall remain as bargaining unit drivers under the terms and conditions of the collective bargaining agreement.

In view of the acknowledgement that other employers in the Industry have entered into similar lease arrangements with some of their drivers or contemplate doing so, this Award, barring any such arrangements, shall be deemed Industry-wide.
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

In the Matter of the Arbitration
between
New York City Taxi Drivers
Local Union 3036, AFL-CIO

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of Marby, Metro and Checker
Garages.

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

The discharge of Al Sysler by Marby Garage was
for just cause, and is upheld.
I do not accept the grievant's testimony on how the
accident happened. His explanation is implausible
and unbelievable. I conclude he was responsible for
the accident which was his fifth in a relatively short
period of employment. I am satisfied that he has been
previously placed on notice that his record of acci-
dents was both excessive and unsatisfactory. This last
accident demonstrates his inability or unwillingness
to heed that notice. His accident record, thus, appears
to be chronic. Under that circumstance the Employer
need not run the risk of his continued employment.
There was reasonable cause for the discharge of Emilio Garcia of Metro Garage. His discharge is upheld. I conclude he was insubordinate and grossly disrespectful to a managerial employee as alleged by the Company. However the Company shall pay him three days pay because of its delay in providing him with a termination slip, without which he was unable to obtain employment elsewhere in the Industry.

Checker Garage violated the contract when it employed and dispatched new drivers subsequent to June 1, 1974 when the grievant, William Strickman sought but was denied employment as a full time driver. Based on many years of undisputed service as a driver in the Industry prior to his employment as a managerial dispatcher for Checker Garage, the grievant acquired Industry-seniority. Disregarding his period of service as a dispatcher for Checker and irrespective of whether or not he acquired Employer seniority when he drove on his days off while working as a dispatcher, or when he drove for two consecutive weeks between periods of employment as a dispatcher for Checker, his previously acquired Industry-seniority entitled him to employment as a driver on and after June 1, 1974, before the Company hired and dispatched new drivers. Article XXI Section 10
of the contract applies to both Industry and Employer seniority and accords the grievant this priority. To refuse him a bargaining unit job, but to hire new drivers instead is inconsistent with the provision of Section 10 that "senior drivers not lose anything because of new drivers." Therefore the Company erred when it refused him employment as a driver on June 1, 1974 and when on and after that date it hired drivers with no seniority. There is nothing in the contract which excludes from Section 10 a person who previously worked as a managerial employee at the garage where he seeks bargaining unit employment based on bargaining unit acquired Industry seniority. Nor does it provide for loss of Industry seniority upon assuming a managerial job.

I understand the Company's reluctance to hire, as a bargaining unit driver a person who previously worked in the same garage in a managerial position. In his latter capacity he supervised and may have disciplined bargaining unit members. But the contract does not accord the Employer that selective right, nor is there evidence in this record that the grievant, when he worked in a managerial capacity, carried on those managerial duties in such a way as to raise potential difficulties between himself and other bargaining unit employees upon his return to the bargaining unit. In accordance
with Article XXI Section 10, the Company shall not refuse to employ and dispatch the grievant as a driver. Because I am not persuaded that he could not have worked elsewhere, his claim for back pay is denied.

Eric J. Schmertz
Impartial Chairman

DATED: July 1974
STATE OF New York )
COUNTY OF New York)

On this day of July, 1974, before me 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.
The instant dispute was first initiated by Mr. Erlichman, hereafter referred to as the "claimant" in Civil Court of the City of New York, Small Claims Part. The Court suggested, and the claimant and the above named Employer agreed, that the matter be determined by arbitration under the Arbitration Provisions of the Collective Bargaining Agreement between the Metropolitan Taxicab Board of Trade, Inc. and New York City Taxi Drivers Union, Local 3036, AFL-CIO.

The New York City Taxi Drivers Union Local 3036, hereinafter referred to as the "Union," set forth its position regarding this arbitration to the Undersigned orally prior to the commencement of the Arbitration hearing, and in a written statement dated May 7, 1974. The Union's written statement reads:

STATEMENT ON BEHALF OF NEW YORK CITY TAXI DRIVERS UNION, LOCAL 3036, AFL-CIO, IN THE MATTER OF LAWRENCE EHRICHMAN AND MARBY OPERATING CORP.

The position of the union in this matter is that it approves the holding of the arbitration herein for the following reasons:

The individual who has made the within complaint did not advise the union of any grievance that he wished to be processed on his behalf and did not request that any such grievance be processed. He thereby waived and/or forfeited any and all right to union representation at any stage of proceedings based on his complaint. It is the understanding of the union that the
complainant did, however, commence an action against the employer in the Civil Court of the City of New York, Small Claims Part, wherein the Court advised the complainant that his only remedy consistent with the collective bargaining agreement was to proceed with arbitration. The Court set an adjourned return date and urged that any arbitration be held before that date. The union did not learn of any of these developments until a time directly prior to the last such day for arbitration. It is only upon the foregoing limited set of circumstances that the union has consented to the holding of the within arbitration between complainant and the employer, and consequently the union does not participate further except to grant its continuing approval and consent to the holding of the remainder of this arbitration.

Dated: New York, New York
May 7, 1974

Respectfully submitted,

(Signed) Donald F. Menagh
Attorney for New York City Taxi Drivers Union, Local 3036, AFL-CIO

In accordance with the foregoing, a hearing was held on May 7, 1974 at the offices of the American Arbitration Association in New York City. The claimant and representatives of the Employer appeared. All concerned were afforded full opportunity to present their cases. The Arbitrator's oath was expressly waived. The claimant was a taxicab driver. During the week in question he worked two days and grossed $91.70 in bookings. On one of the days, February 25, 1974, he was held up at fun point and robbed of approximately $50.00.

The claimant contends that of the balance of the bookings which he turned in to the Employer following the robbery, the Employer retained more than what would have been its total share had there not been a robbery.
At the hearing, the Undersigned, together with the claimant and representatives of the Employer, reviewed the applicable contract provisions and the respective mathematical calculations upon which the Employer and the claimant rely. Based on these reviews it became clear that the Employer had not retained more than the share of the bookings to which it was entitled, and that the claimant's assertion that the Employer kept a portion of his commission was inaccurate and unfounded. The claimant acknowledged his error.

Specifically the claimant was a 43% driver. That means that of his total bookings each week the Employer gets 57% and he 43%. Of his total bookings of $91.70 during the week in question the Employer was entitled to retain over $50.00. But the claimant did not turn in that amount following the robbery. He turned in less. Consequently the Employer did not receive its 57%. And obviously there was neither enough left for the claimant to receive any commission nor was any of his commission entitlement included in the money which the Employer received and retained. (The Employer has agreed to waive the difference between what it received and the total 57%.)

However, based on the practice of this Employer an employee who is robbed under these circumstances has received a $5.00 credit when he files a police report with the Employer. Though the claimant did not file such a report by the date of this hearing, the Employer agreed to pay him $5.00 if he did so without delay following the hearing.
Accordingly the Undersigned as Impartial Arbitrator renders the following Award:

1. The claim of Larry Erlichman that the Employer retained commissions to which Erlichman was entitled, is unfounded and denied.

2. Provided Mr. Erlichman has filed a completed police report with the Employer, the Employer shall pay him the sum of $5.00.

[Signature]
Eric J. Schmertz
Impartial Chairman

DATED: May 1974
STATE of New York
COUNTY OF New York

On this day of May, 1974, 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.
May 14, 1974

Maurice H. Goetz, Esq.
Rosenman Colin Kay Petschek Freund & Emil
575 Madison Avenue
New York, New York 10022

Dear Mr. Goetz:

Re: Larry Erlichman - and - Metropolitan
Taxicab Board of Trade, Inc. on behalf
of Marby Operating Corp.

I enclose a duly executed copy of my Award and Opinion
in the above matter.

Very truly yours

Eric J. Schmertz
Impartial Chairman

EJS:ha
encl.
May 14, 1974

Donald F. Menagh, Esq.
Menagh, Trainor & Finger
130 East 40th Street
New York, New York 10016

Re: Larry Erlichman - and - Metropolitan
Taxicab Board of Trade, Inc. on behalf
of Marby Operating Corp.

Dear Mr. Menagh:

I have this day forwarded a copy of my Award and
Opinion in the above matter to Counsel for the Employer.
The informational copy is enclosed herewith for your
files.

I neglected to get Mr. Erlichman's address. If
you or the Union would let me know what it is I will
transmit a copy to him without delay.

Very truly yours

Eric J. Schmertz
Impartial Chairman

EJS:ha
STATEMENT ON BEHALF OF NEW YORK CITY TAXI
DRIVERS UNION, LOCAL 3036, AFL-CIO, IN THE
MATTER OF LAWRENCE EHRlichMAN AND MARBY
OPERATING CORP.

The position of the union in this matter is that it
approves the holding of the arbitration herein for the following
reasons:

The individual who has made the within complaint did
not advise the union of any grievance that he wished to be pro-
cessed on his behalf and did not request that any such grievance
be processed. He thereby waived and/or forfeited any and all
right to union representation at any stage of proceedings based
on his complaint. It is the understanding of the union that the
complainant did, however, commence an action against the employer
in the Civil Court of the City of New York, Small Claims Part,
wherein the Court advised the complainant that his only remedy
consistent with the collective bargaining agreement was to pro-
ceed with arbitration. The Court set an adjourned return date
and urged that any arbitration be held before that date. The
union did not learn of any of these developments until a time
directly prior to the last such day for arbitration. It is only
upon the foregoing limited set of circumstances that the union
has consented to the holding of the within arbitration between
complainant and the employer, and consequently the union does
not participate further except to grant its continuing approval
and consent to the holding of the remainder of this arbitration.

Dated: New York, New York
May 7, 1974

Respectfully submitted,

Donald J. Murray
Attorney for New York City Taxi
Drivers Union, Local 3036, AFL-
CIO.
The stipulated issue is:

Did the Hospital fail to provide obstetrical and medical service benefits to the wives of the following House Staff Officers in violation of Article VI of the contract?

Dr. Mark Altschuler  Dr. Charles Nissman
Dr. Michael Davis  Dr. James Mond
Dr. Joseph Williams  Dr. Julius Shulman
Dr. Robert Lane  Dr. Allen Kisner

If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on July 29, 1974 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 pertinent part of Article VI reads:

Each League Hospital shall maintain and shall not diminish Blue Cross, Blue Shield, Major Medical and/or free hospitalization and medical service benefits which were provided to House Staff Officers on October 1, 1972.

It is undisputed, in the instant case, that the wives of the grievants are covered under the foregoing contract provision.

It is also undisputed that up to some time in 1973, and therefore as of October 1, 1972 obstetrical care and related medical services were provided to the wives of the House Staff Officers by attending physicians at the hospital. The Union
contends that this type of obstetrical service constitutes "free medical service benefits" not to be diminished, within the meaning of the foregoing contract provision. It seeks reimbursement to the grievants for the costs they incurred or will incur for comparable private obstetrical services.

The Hospital asserts that Article VI was not intended to cover or continue obstetrical care and related medical services by attending physicians. Acknowledging that such service was rendered to House Staff Officers until sometime in 1973, the Hospital contends however, that it was simply a professional courtesy voluntarily extended by individual attending physicians to fellow House Staff physicians; that it was not a service rendered by the Hospital; that the Hospital did not and cannot now control or direct an attending physician to perform that service; and that when attending physicians discontinued the professional courtesy and began charging for their services in and after 1973, the Hospital was not obligated to provide an alternative comparable benefit. In short it is the position of the Hospital, which does not provide Blue Shield coverage, that so far as obstetrical and related medical services are concerned it is required to provide services through its clinic only.

I uphold the Union's case because the contract on its face supports the Union and because the Hospital has not proved the defenses on which it relies. The Hospital merely asserts that it does not control the work of attending physicians. But no evidence was offered to show that the Hospital does not have this measure of control or was unable to direct or persuade attending physicians to continue this free service. Nor did an attending physician testify that his previous service was only a professional courtesy and that he would not continue to render it if
requested or instructed to do so by the Hospital. The question of the degree of control that the Hospital has over the attending physicians is unclear in this record and controverted. In view of that fact and that attending physicians did provide free obstetrical services to the House Staff until 1973, the burden is on the Hospital to establish that the change since 1973 was and is beyond its control. The Hospital has not done so to my satisfaction.

Additionally and significant in my judgement is that the foregoing disputed contract language was first introduced into the collective bargaining agreement in 1970. At that time the Hospital knew or should have known that attending physicians were providing free obstetrical services to the House Staff. It is both logical and reasonable therefore that the foregoing contract language, negotiated at the very time that those services were available, would be construed to cover existing services, and to continue them undiminished for so long as that language remained in the contract. During the negotiations culminating in the 1970 contract, the Hospital had the obvious opportunity to contractually delineate between medical services which it was obligated to provide and continue for the House Staff, and those services which they then and now contend were professional courtesies unrelated to the Hospital's obligations. Yet the Hospital did not do so. Instead it negotiated the foregoing broad and unconditional language. Also, that particular language was drafted, introduced into the negotiations and into the contract at the initiation of representatives of the Hospital, and was a Hospital offer that exceeded the mediator's
proposal for a settlement of that issue. For those reasons I see no reason why the traditional rule that contract language should be interpreted against the party who drafted and offered it, should not be applicable in this case.

Accordingly I find that obstetrical and related medical services accorded House Staff Officers by attending physicians working at the Hospital on October 1, 1970, and until sometime in 1973, were "medical service benefits" within the meaning of the first sentence of Article VI of the contract. And in the absence of an evidentiary showing that the Hospital is unable to continue such medical service through attending physicians, Article VI requires that it either take steps to attempt to have attending physicians render such service or in the alternative provide a comparable benefit.

In the instant case the grievants have incurred private obstetrical expenses as a consequence of births which have already occurred or present pregnancies. The expenses of each grievant as stipulated in the record (which run between $300 and $550) do not seem to me to be out of line with what obstetricians charge. Therefore I consider it an appropriate and fair remedy that the Hospital reimburse each of the grievants in the amounts so stipulated. However the Union and its members are cautioned that this decision is not a license for House Staff Officers to seek obstetrical services at luxurious or unreasonable fees. In the event that the
Hospital is unable to arrange for obstetrical services through its attending physicians or in some other comparable manner, its obligation under Article VI for payment of private obstetrical fees is limited to the reasonable and customary level for such services.

The Undersigned as the duly designated Arbitrator under the arbitration agreement between the above named parties and having been duly sworn and having duly heard the proofs and allegations makes the following AWARD:

The grievances of Drs. Altschuler, Davis, Williams, Lane, Nissman, Mond, Shulman and Kisner are granted. The Hospital violated Article VI of the contract by failing to undertake to continue free obstetrical and related medical services by attending physicians working at the Hospital for the wives of House Staff Officers, and by failing to provide an alternative comparable benefit. The Hospital shall reimburse each grievant in the amount stipulated in the record for private obstetrical services. The Hospital’s obligation is limited to the payment of reasonable and customary fees for obstetrical services.

DATED: September , 1974
STATE OF New York )
COUNTY OF New York )

On this day of September, 1974, 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 III, Section II of the Agreement and Declaration of Trust dated July 1, 1970 the Undersigned was designated as the Arbitrator to hear and decide issues over which the Union and Employer Trustees of the above named fund are deadlocked.

A hearing was held at the offices of the American Arbitration Association on December 4, 1974, at which time representatives of the Employer and Union Trustees appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Two issues are in dispute. First, the Employer Trustees complain that the Union Trustees will not provide them with a prepared list of members who are drawing benefits from the Suplemental Unemployment Benefits Fund. The Employer Trustees explain that they need this list to verify the bona fides of the claims. And second, that the fee of counsel for services on behalf of the Employer Trustees in this proceeding be paid by the Fund.

The Union Trustees do not seriously dispute the right of the Employer Trustees to the list per se, nor do they dispute the fiduciary duty of the Employer Trustees to verify
the legitimacy of the claims. Rather the Union Trustees object to the use to which that list has been put by Employer members of the Terrazzo and Mosaic Contractors Association. The Union Trustees contend that for the short time it was made available to the Employer Trustees, the list was sent by those Trustees to Employer members of the Association to verify that benefits were not being paid to employees actively employed; but that the Employers used the list for another purpose, namely to hire, on a selective basis, persons of their choice whose names appeared on the list. And that such hiring practices are discriminatory and violative of a long standing past practice of "going through the Union" to obtain employees. It is because of this alleged use of the list, which the Union finds objectionable, that the Union Trustees have now refused to make the list available to the Employer Trustees.

The Union Trustees confuse the instant proceeding with a dispute under the collective bargaining agreement between the Union and the Contractors Association. The Union Trustees complaint about how the list has been used by the Employers is simply not within the jurisdiction of this arbitration hearing. This arbitrator's authority stems from the Agreement and Declaration of Trust and is limited to deciding disputes between the Trustees involving the application and interpretation of the Trust Agreement. It does not extend to cover the
practices or conduct of Employer members of the Association, particularly hiring practices. That question, involving as it does a subject possibly covered by the collective bargaining agreement, but certainly not covered by the Trust Agreement, places in issue the application and interpretation of the collective bargaining agreement and is beyond the authority of this arbitration proceeding. If the Union Trustees or the Union believe that Employers are misusing the list of members drawing benefits from the Fund, by using the list to engage in discriminatory hiring or hiring methods contrary to required practice, that constitutes a grievance under the collective bargaining agreement, and the Union's right to file such a grievance under the appropriate provisions of the collective bargaining agreement is reserved. Similarly the rights of the parties on the merits and the arbitrability of such a dispute are reserved.

In claiming that the fee of counsel for representing them in this proceeding should be paid by the Fund, the Employer Trustees rely on Article II Section 4 and Article III Section 11 of the Agreement and Declaration of Trust. Neither support that claim. I am not persuaded that the reference to "employment of....legal....assistance" in Section 4 of Article II was intended to apply to an adversary dispute between the two sets of Trustees. That Section relates, as I see it, to the establishment of the Trust and to its normal administration
(i.e. collecting contributions and administering the business affairs for which the Trust was established.) The instant dispute does not fall within that purpose.

The phrase "the cost and expenses incidental to any such proceedings shall be borne by the Trust Fund" set forth in Section II or Article III is a provision common to most arbitration clauses in collective bargaining agreements, or in agreements like the instant one, which provide for the arbitration of disputes or deadlocks. It has been regularly interpreted to apply to the arbitrator's fee and expenses and the administrative fee if any of the arbitration tribunal. It has not been interpreted to cover either the costs or fees of counsel for either side to the dispute, or to the costs or expenses of witnesses produced by either side. The expenses of counsel and witnesses are borne by the party utilizing or calling them. Section II of Article III expressly deals with the arbitration of disputes among the Trustees. Had the parties intended that the foregoing phrase go beyond its customary meaning to include counsel fees arising from the adversary arbitration hearing, they could and should have so provided explicitly. That they did not leaves the phrase with its customary and well settled meaning - excluding counsel fees of the type claimed by the Employer Trustees in this case.
The Undersigned, duly designated as the Arbitrator under the arbitration agreement in the above matter, and having been duly sworn, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

1. The list regularly prepared by the Union Trustees, of members drawing benefits from the Supplemental Unemployment Benefits Fund shall be made available by the Union Trustees to the Employer Trustees.

2. The Employer Trustees may utilize the list to verify the legitimacy of the claims. If they circulate the list among Employers it shall be solely for that purpose.

3. As stipulated by the parties medical information about a person on the list shall be deemed confidential. It may be known to the Trustees in their fiduciary capacity, but shall not be available or made known to Employers or the Union without the consent of the person involved.

4. If the Union Trustees or the Union believe that the list is being used by any Employer member of the Association to hire personnel in an alleged discriminatory manner or allegedly in violation of the collective bargaining agreement or proper hiring practices, the Union may grieve under the collective bargaining agreement. The rights of the Union and the Employers with regard to the merits or arbitrability of such a grievance are expressly reserved.

5. The claim of the Employer Trustees that the fee of counsel representing them in this arbitration proceeding be paid by the Fund, is denied.

DATED: December 26, 1974

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

On this twenty sixth day of December, 1974 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. 1330-0772-74