In the Matter of the Arbitration
between
Amalgamated Meat Cutters, Butcher
Workmen and Affiliated Crafts of
North America, District Union Local #1
AFL-CIO

and

Acme Markets, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 20, 1967 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Under the terms of the Agreement of July 20, 1967 the Employer did not improperly demote Fay Gower from the position of Assistant Acme Market Manager on February 3, 1969.

DATED: November 24, 1969
STATE OF New York )
COUNTY OF New York )  
On this 24th day of November, 1969, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 69A/7981
In the Matter of the Arbitration between
Amalgamated Meat Cutters, Butcher Workmen and Affiliated Crafts of North America, District Union Local #1 AFL-CIO
and
Acme Markets, Inc.

In accordance with Article XXXIX of the Collective Bargaining Agreement dated July 20, 1967 between Acme Markets, Inc., hereinafter referred to as the "Employer," and Amalgamated Meat Cutters, Butcher Workmen and Affiliated Crafts of North America, District Union Local #1, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Under the terms of the Agreement of July 20, 1967 did the Employer improperly demote Fay Gower from the position of Assistant Acme Market Manager on February 3, 1969? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in New York City on October 1, 1969 at which time Mr. Gower, hereinafter referred to as the "grievant," and representatives of the Employer and Union, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath and the contractual provision for a tri-partite Board of Arbitration; agreeing instead to submit the issue for determination to the Undersigned as sole Arbitrator. The parties filed post hearing briefs.
The Union complains that the grievant was improperly removed from the post of Assistant Market Manager on February 3, 1969 after holding that job since September 3, 1968, in favor of two consecutive appointees who were junior in seniority to the grievant.

It is the Union's contention that the grievant's ability and qualifications for the Assistant Market Manager job were and are at least equal to those of the two subsequent appointees; that any deficiencies in the operations within his jurisdiction during his tenure were not his fault; and that therefore there was no legitimate basis for his demotion under Article XXII Section L a. and b. of the contract.

In addition to the Management Rights Clause (Article III A), the Employer also relies on Article XXII Section L. a. and b. in support of its action. Its case, in part, is based on its determination that the grievant did not perform his duties as an Assistant Market Manager satisfactorily despite notice to him of his deficiencies and counselling by the District Supervisor; and that the grievant thereby demonstrated a lack of ability to meet the job responsibilities of an Assistant Market Manager, and hence was properly demoted.

Article XXII Section L a. and b. read:

L. a. Respecting the promotion and demotion, re-hiring and transfer from one type of work to another, or location to another, the qualifications and ability of the employee shall be considered in conjunction with seniority standing. The promotion shall be based on fitness and ability with seniority a factor only when fitness and ability are equal.
b. The selection, promotion, demotion and transfer of employees in the Assistant Acme Market Manager, First Meat Cutter, Department of Head and Head Cashier classifications shall be subject to joint discussion between Employer and Union but the final decision shall be the prerogative of the Employer.

Although the provisions of Sub-Section b. above bear on the Employer's argument as to how the Arbitrator should interpret the entire foregoing contractual provision, it is undisputed that the "joint discussion" requirement of Sub-Section b. was complied with in connection with the grievant's demotion. Therefore, as I see it, it is principally with the application and interpretation of Sub-Section a. above that this dispute is concerned.

The Employer also asserts that the grievant's promotion to the job in question (at Acme Market No. 8316) on September 3, 1969 was only temporary in nature, and that the grievant was so advised and took the job on that basis. It claims that the grievant directly, and the Union representative indirectly, were notified that the grievant was to fill the job only until Mr. Dave Bolles completed the liquidation of a different store later that year, at which time he (Bolles) would be appointed to the job. And with Bolles' appointment the grievant was to be re-assigned to his original classification as a Produce Department Head. The grievant and the Union deny knowledge of this condition to or limitation on the September 3 appointment.

I consider the Company's claim that the grievant's appointment was only temporary to be immaterial. For it is conceded that Bolles who replaced the grievant following the
latter's demotion and Mr. French who thereafter succeeded Bolles in the position, were both junior in seniority to the grievant. So, whether the grievant's original appointment was to be temporary or not, he would still have a contractual right to complain, under Article XXII Section I a. of the contract (as indeed he and the Union do in this proceeding) because of his greater seniority over both subsequent appointees and his assertion of at least equal ability.

Accordingly because it would not be dispositive of the issue in dispute, I find I need not decide whether the grievant was notified at the time of his appointment that it was temporary in nature.

As I see it, though the facts are unique to the nature of the business involved, this is a classical "seniority and ability" case. In such matters the widely held view among arbitrators is not to overturn the Employer's judgment of the relative abilities and qualifications among the employees involved, unless that judgment is found to be arbitrary, capricious or discriminatory. In other words, there is a general presumption in favor of the Employer's judgment, rebuttable not simply by a different evaluation made by the Arbitrator, but only where the Employer's judgment is so unsupported by the facts and circumstances as to be inexplicable, grossly unfair or unconscionable. My own approach has been generally consistent with this view, except that where that presumption is not found to be supported by pertinent contract language, I tend to liberalize the rule by also applying a required standard of reasonableness to the Employer's action. In the
instant case, however, the more restricted presumption is found in the contract language of Article XXII Section L, Sub-Sections a. and b. Sub-Section a. clearly provides for a priority in favor of the senior employee, only when his fitness and ability are equal to employees with less seniority. Or in other words, even if the senior employee is capable of performing the job, a junior employee with greater ability would be able to preempt him. And obviously, if the senior employee is unqualified, he is foreclosed from competing for the job.

Also Sub-Section a. must be read together with Sub-Section b. The former sets forth the manner by which fitness, ability and seniority shall be weighed in cases of promotions, demotions, rehiring and transfers. But the latter expressly preserves the final decision as a prerogative of the Employer. This means, to my mind, that not only is it a prerogative of the Employer to make the final decision on comparisons of fitness and ability amongst employees with different seniorities, but that that decision is also final unless so erroneous as to be arbitrary, capricious or discriminatory. Or put another way, in view of the provisions of Sub-Sections a. and b., an arbitrator lacks the authority to overturn the Employer's decision merely because, in weighing the evidence on both sides, including that in support of the Employer's decision, he disagrees with or reaches a different subjective judgment from that of the Employer.

In the instant case there is considerable evidence in
the record to support the Employer's conclusion that the grievant did not and could not perform his duties as Assistant Market Manager at store No. 8316 satisfactorily. And consequently I cannot find that that conclusion and the decision based thereon to demote the grievant, was so contrary to the facts and circumstances as to be arbitrary, capricious or discriminatory. This is not to say that there is no evidence in support of the Union's contention that the grievant was not at fault, but rather that weighing the evidence on both sides, there is enough in support of the Employer's judgment so as to protect it under the widely followed rule in such matters, as reinforced by Section XXII, Sub-Sections a. and b. of the contract.

Specifically, the Employer charges that the grievant was deficient "in the principal areas of his duties of ordering and supervising the stock operation." It offered testimony by the grievant's District Supervisor to the effect that for extended periods of time, various departments within the store were without certain stock; that the inventory in the store-room areas was not adequate; that the shelf alignment and displays within the store were incomplete; that the grievant was spoken to about these conditions several times, and assigned a specialist to help him straighten out the ordering and shelf alignment situation; and yet unsatisfactory conditions persisted.

These conditions are not disputed by the grievant nor by the Union on his behalf. Rather, certain explanations,
designed to absolve the grievant of fault, are advanced. It is asserted that the grievant should not be held responsible for deficiencies in ordering stock, because he merely carried out the orders of his store manager, whom it is conceded suffered from a "drinking problem" and who was subsequently retired early. That the condition of the storeroom inventory was beyond the grievant's control because his inventory was disarranged by the influx of stock from another store which had been closed, making it unclear for several weeks what was on hand and what needed to be ordered. And that the stock on the shelves and the shelf alignment was performed by night shift employees during hours when the grievant could not supervise them directly.

Thus the question narrows down simply to whether the explanations advanced by the Union and the grievant are enough to so nullify the evidence upon which the Employer made its decision as to render that decision arbitrary, capricious or discriminatory. I think not. No doubt the grievant worked under some troublesome conditions. Yet I am not persuaded that they were of such a substantial or chronic nature as to explain away the deficiencies of the operations under his jurisdiction for the extended period of almost six months that he held the job. I think it most unlikely that he would have assumed full responsibility for any erratic orders of his manager, especially in view of his undisputed knowledge that the District Supervisor was not satisfied with his work. Yet not until the processing of his grievance did he defend
himself from the criticism of his District Supervisor on that latter ground. Moreover in the face of the District Supervisor's explicit instructions to straighten out the Light Bulb and Stationery Departments, the grievant was unable or unwilling to do so. It strikes me that confronted with the displeasure of his Supervisor in that particular situation, he would have found a way to cure the defect, even if the stocking of the shelves of those Departments was performed by night shift employees. And if his Manager countermanded the instructions of the District Supervisor, I think it reasonable to assume that the grievant would or should have made that known, in his own defense. No doubt the integration of the stock from another store created some confusion. Yet it happened only once and cannot be an excuse for continuing stockroom inadequacies. Indeed, the problems which the grievant faced could have been overcome by the exercise of those administrative and organizational abilities which one would expect of an Assistant Market Manager. Or if not, at least in the face of the criticism, displeasure and counselling from his District Supervisor, the grievant should have revealed what he thought to be insurmountable obstacles to the satisfactory performance of his duties. Either way the Employer's judgment that he lacked the ability to do the job, is based on factual grounds and probative evidence, and cannot therefore be faulted as arbitrary, capricious or discriminatory.

In short, though I believe there were certain circum-
stances which may have made the grievant's tasks more difficult, the record in support of the Employer's determination is not so frivolous or unsupported by the evidence as to rebut the presumption in its favor.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
International Association of Machinists
and Aerospace Workers District #47,
Phoenix Lodge #315

and

Airco Welding Products Division
Air Reduction Company, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated April 1, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The amount of vacation pay which the Company paid John Sindle upon his layoff in May, 1968 was correct. The Union's grievance is denied.

Eric J. Schmertz
Arbitrator

DATED: January 1969
STATE OF New York
COUNTY OF New York

On this day of January, 1969, 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 #69A/260
In the Matter of the Arbitration between
International Association of Machinists
and Aerospace Workers District #47
Phoenix Lodge #315

and

Airco Welding Products Division
Air Reduction Company, Inc.

In accordance with Article X of the Collective Bargaining Agreement dated April 1, 1968 between Airco Welding Products Division, Air Reduction Company, Inc., hereinafter referred to as the "Company," and International Association of Machinists and Aerospace Workers District #47, Phoenix Lodge #315, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

To what termination vacation pay was John Sindle entitled when laid off on May 23, 1968?

A hearing was held at the Company plant in Union, New Jersey on October 18, 1968, at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The parties filed post hearing statements and the hearings were declared closed as of December 3, 1968.

This dispute involves the application and interpretation of the following pertinent paragraphs of Article VII, Section 20 sub-section 6) of the contract which read:
If the termination occurs after one full year of service but before the completion of two years of continuous service on a fiscal basis, and provided a vacation was taken or paid for in lieu of vacation, the employee is entitled to one-twelfth of one week's vacation pay for each full completed calendar month of continuous service from the employee's first anniversary date to the date of termination.

If no vacation was taken in that second fiscal year or paid for in lieu of vacation, the employee is entitled to one week's vacation pay plus one-twelfth for each full completed calendar month of continuous service from employment anniversary date to date of termination.

Mr. Sindle, hereinafter referred to as the "grievant," was hired on August 22, 1966. A year later, in August, 1967 he received one week's vacation. On May 23, 1968 he was laid off. Upon his layoff he received termination vacation pay in the amount of 8/12 of one week's vacation.

The Company asserts that its payment of 8/12 of one week's vacation was proper under the applicable foregoing contract provisions. The Union contends, also under the foregoing contract language, that the grievant was entitled to one week's pay plus the 8/12 of one week's pay.

Based on the evidence before me I am persuaded that the first contract paragraph quoted above is applicable and not the second. And I am also satisfied that the Company met the contract requirement in paying the grievant 8/12 of one week's pay upon his layoff.

There is no dispute about the fact that the grievant's termination occurred after one full year of service but before the completion of two years service on a fiscal basis. I find also that "a vacation was taken," within the meaning of that phrase in the first paragraph of the foregoing con-
tract provisions. He received one week's vacation in August, 1967 which fell within the period of time between his first year's service and before the completion of his second year of service. And it is clear that the phrase "provided a vacation was taken or paid for in lieu of vacation" refers to the period after one year of service but before the completion of the second year. So the grievant received the vacation referred to in the first paragraph of the aforementioned contract provisions. Per force therefore, the last portion of that contract provision comes into play. It provides for termination vacation pay in an amount equal to 1/12 of one week's pay for each completed month of service from his first anniversary date to the date of his layoff. In this case the period from his first full year (or anniversary) to his layoff was 8 months, and accordingly his termination pay entitlement was 8/12 of one week's vacation.

The second paragraph of the contract provision referred to above I find inapplicable to the facts of this case. It provides for one week's vacation pay plus 1/12 for each full completed calendar month, only, as the introductory language states, "if no vacation was taken in that fiscal year ...." In the instant case the grievant received a vacation in the second fiscal year, and therefore that circumstance ousts his case from the provisions of this second paragraph.

In other words, the foregoing second paragraph is an alternative provision to the first paragraph. Both must be read together. Under the first paragraph, where an employee has received a vacation after the first year but before the
completion of the second, he is entitled to vacation termination pay only in the amount of 1/12 of a week's pay for each full month of service completed between his first anniversary date and the date of his termination. And under paragraph 2, if he has not received a vacation after the completion of his first year but before the end of his second, he would be entitled upon layoff to the one week's vacation which he did not receive (for his first year of service) plus 1/12 of one week's pay for each full month completed thereafter.

So the Union's grievance would be meritorious if the grievant had not received a vacation during the second year based on his entitlement of one full year of service. But he did, and therefore the facts in his case fall within the provision of the foregoing first paragraph and not the second.

Moreover this conclusion is well supported by past practice. This present contract language was the same in the three previous agreements between the parties, spanning the period from 1960 to 1968. During that time there were 29 layoffs or terminations of employees with more than one year service but less than two. In all but two instances the employees received termination pay in accordance with the Company's interpretation of the contract. The Company's explanation that the two variations were merely clerical errors, is plausible.

I recognize that on the face of it, the effect of this interpretation of the contract is to grant an employee with one year and 8 months of service no more pay, if laid off during his second year, than would be granted an employee who was laid off after only a total of 8 months employment. But
it must be recognized that this payment is not treated solely as termination pay under the contract, but rather as termination vacation pay. It is intended to compensate an employee for vacation time earned but not received. In the case of an 8 month employee, he would have earned only 8/12 of one week's vacation. In the case of the grievant, he had earned one week's vacation based on his first full year of service, which he received, leaving only 8/12 of one week's pay still due him as vacation for his service during the second year. Only after he has completed his second year of service, as provided by Article VII, Section 20, Sub 1) is he entitled to a full second week of vacation. So I find nothing inequitable about the amount of termination vacation pay received by the grievant, as compared to a hypothetical employee with only 8 months of service. Moreover I am satisfied that this interpretation, based on the contract language and past practice, is simply a reflection of the contract bargain entered into by the parties. A different result is a matter for collective bargaining and not arbitration.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
United Steelworkers of America,
Local 2242, AFL-CIO

and
Alleghany Ludlum Steel Corporation
Wallingford Steel Company Plant

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated August 6, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

1. The three day suspension of Henry Pruitt is reduced to a one day suspension. He shall be made whole for the other two days.

2. The discharges of G. Becker and T. Bouza were for just cause and are upheld.

DATED: December 19, 1969
STATE OF New York )
COUNTY OF New York )

On this 19th day of December, 1969, 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
United Steelworkers of America,
Local 2242, AFL-CIO
and
Alleghany Ludlum Steel Corporation
Wallingford Steel Company Plant

In accordance with Article V of the Collective Bargaining Agreement dated August 6, 1968 between Alleghany Ludlum Steel Corporation, Wallingford Steel Company Plant, hereinafter referred to as the "Company," and United Steelworkers of America, Local 2242, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

1. Did the Company have just cause for the suspension of Henry Pruitt on November 21, 22 and 23, 1968? If not, what shall be the remedy?

2. Were the discharges of G. Becker and T. Bouza for just cause? If not, what shall be the remedy?

A hearing was held in Wallingford, Connecticut on October 13, 1969 at which time representatives of the Union and Company, hereinafter referred to collectively as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The Union filed a post hearing brief on Issue #2. The parties agreed to extend the due date for the rendition of the Award until on or before December 22, 1969.

**Issue #1**

As I see it this is a classic "sleeping on the job versus
'I was sick'" Case.

The Company contends that on November 20, 1968 Mr. Pruitt, hereinafter referred to as the "grievant," left his work place without permission of or notice to his foreman; failed to respond to several pages of his name over the public address system; and was thereafter found by his foreman stretched on a bench on the second floor level of the plant locker room; and did not awaken or sit up until the foreman shook him by the shoulder.

The grievant, and the Union on his behalf, assert that he became ill during the early part of the shift; and he reported this to his foreman; that he went to the second floor of the locker room to obtain two aspirins from his locker; that announcements over the public address system cannot be clearly discerned at that location; and that he was neither asleep nor lying down when found in the locker room by the foreman, but rather sitting up.

Based on the evidence before me I believe that the grievant was both sick and asleep. I conclude the latter because I find no reason to disbelieve the testimony of foreman DiGuardi, who stated not only that he saw the grievant in a prone position with his eyes closed, but had to shake him by the shoulder in order to awaken him. There is nothing in the record to indicate antagonism or ill will between DiGuardi and the grievant and hence I find no reason why the former should bear false witness.

By the same token the weight of the evidence supports
the grievant's contention that he was sick during his shift that day. Determinative I conclude, is the testimony of vomiting. The grievant testified that he was sick to his stomach and vomited; and this was corroborated by the testimony of a fellow employee, James McCabe, who stated not only that the grievant told him he had vomited, but personally observed the vomit on the ground outside the plant door. Significant I think is the fact that DiGuardi acknowledged that the grievant stated when awakened, that he did not feel well and had taken aspirin. And uncontradicted is the testimony of another employee, John Sartori, who was the then local Union President, that DiGuardi stated in the course of the grievance procedure that the grievant "didn't look up to par." Also, Sartori testified that he too saw the vomit residue.

So, though I find that the grievant was indeed asleep in the locker room during his regular working hours, I also find that he was ill.

Because this is a disciplinary matter, with the burden on the Company to clearly prove the elements of its case, I am prepared to accord the grievant some benefit of the doubt by concluding that there was a causal relationship between his illness and his state of sleep. Accordingly, because the three day suspension was based on the Company's determination not only that the grievant was asleep, but also its disbelief of his claimed illness, I find that the full measure of the discipline imposed is not warranted.

However, the grievant cannot be found blameless. Even if
he told his foreman earlier in the shift of his illness, he is not excused from his failure to notify supervision at the time that he left his work area to go to the locker room. He was not so ill that he could not have done so. Nor should he have permitted himself to fall asleep without some notice to Supervision of his condition and whereabouts.

Considering all the foregoing I am satisfied that some disciplinary penalty, but less than the three day suspension, is appropriate. I think that the grievant's willingness to work the balance of his shift that night rather than accept a pass to go home when he stated that he had been ill, must be construed in his favor, in the light of my finding that he was actually ill. In that frame it demonstrates an attitude of responsibility toward his work. Therefore in accordance with my authority to fashion a remedy, my imposition of a lesser penalty shall be more in his favor than the Company's. I direct that the three day suspension be reduced to a suspension of one day, and that he be made whole for the other two days.

Issue #2

Messrs. Becker and Bouza, hereinafter referred to as the "grievants," were discharged for alleged theft. The question of whether there was just cause for the discharges involves both substantive and procedural aspects. Substantive, is the question of proof of the grievants' culpability of the offenses charged, to the standard required in discharge cases. Procedurally, the question is whether the grievants were accorded "due process" under Section 6.02 of Article VI of the contract.
On the substantive question I find for the Company. Un-
disputed is evidence that in the course of a police investiga-
tion the grievants gave and signed statements admitting the
facts upon which the theft charge is based, together with
signed statements acknowledging that they had been accorded
their constitutional rights in connection with the preparation
of those statements. Those statements were introduced into
evidence by the Company in this arbitration, and substantively,
stand unrebutted and unexplained by the grievants. Therefore
in my judgment, they are sufficiently determinative of the
grievants' culpability, as grounds for discharge in this arbi-
tration, where the standards of proof in such matters are
less demanding than in a criminal proceeding.

Article VI Section 6.02 reads:

Any employee who is summoned to meet with any
Management representative for the purpose of
being given a disciplinary suspension shall be
entitled to be accompanied by a Union represen-
tive if he so desires.

The Union claims a breach of the procedural requirements
of the foregoing section because a Union representative did
not accompany the grievants when they were interrogated by
the Company in the course of an investigation of the thefts.
Specifically, the Company's Industrial Relations Manager met
with the grievants and questioned them concerning the "con-
fessions" they gave the police. A Union representative was
not present nor were the grievants told of any possible right
of Union representation. The grievants were discharged a
day or so later.
The main thrust of the Union's case on the procedural question is that Section 6.02 was intended to apply, and if it is to have any real protective effect must apply, to those circumstances where employees are summoned not just to hear of the disciplinary suspension imposed, but for investigations and interrogations which may lead to disciplinary action. Or in other words, if Union representation is to be a meaningful protection to employees, that representation must be available when they are investigated as well as when disciplined.

I fully appreciate the "due process" concept advanced by the Union and I am sympathetic to it. But I must conclude that the full achievement of that concept in this contractual relationship is a matter for further negotiations between the parties and not arbitration.

Section 6.02 was negotiated by the parties themselves, and not by some outside legislative body. As such the parties had full control over how that clause was to be worded and to what circumstance it would apply. Consequently, where as here, the language is clear, the Arbitrator is bound to apply and enforce that language as written.

This is to be distinguished I believe, from certain legislative restraints on customary due process, where the affected party played no direct part in the legislation, and where its application to him might therefore be construed on a more liberal basis to assure protection of his rights. But that is not the case here. The "legislators" of Section 6.02 and the parties affected are the same. Hence the Arbitrator
should not read into the clause any provision which it does not contain. Clearly, if the parties intended Section 6.02 to cover investigative meetings between Management and an employee they could have included that coverage within the language of that Section. Obviously, inquiries, investigations and other types of preliminary procedures involving discussions between Management and an employee which could lead to discipline against the latter, were or should have been well within the contemplation of the parties at the time that Section 6.02 was negotiated and written. That that Section was expressly limited by its clear language to the circumstance where an employee is summoned to meet with a representative of Management "for the purposes of being given a disciplinary suspension" means just that and no more. This is especially true, where, as in the instant case, there is no evidence of a practice or even of any grievance settlement in support of the Union's interpretation.

The meeting which the Industrial Relations Manager held with the grievants was simply not for the purpose of giving a disciplinary suspension. It was, concededly, to investigate the charges against the grievants and their statements to the police. As such, though the grievants may well have been better represented and protected had a Union representative been present, and despite my personal view that Union representation ought to be accorded an employee on those occasions if he requests it, Section 6.02 of the contract does not now accord that right. Therefore, the Company's
investigation which led to the decision to discharge the grievants was not violative of the procedural requirements of Article VI Section 6.02 of the contract.

For all the foregoing reasons the discharges of G. Becker and T. Bouza were for just cause.

Eric J. Schmertz
Arbitrator
In accordance with the Arbitration provisions of the Collective Bargaining Agreement between Anheuser-Busch, Inc., hereinafter referred to as the "Company," and Brewery Workers Joint Local Executive Board of New Jersey, hereinafter referred to as the "Union," the Undersigned was designated as the sole Arbitrator to hear and decide the following stipulated issue:

Was Albert Ginsburg properly discharged?  
If not, what shall be the remedy?

A hearing was held at the offices of the New Jersey Brewers' Association in Newark, New Jersey on November 26, 1968 at which time Mr. Ginsburg, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The Company filed a post hearing brief and the hearings were declared closed as of December 14, 1968.

This case involves a classical problem of credibility and also some unusual elements of mystery. I find mysterious the pronounced reticence of the Company's key witness, General Foreman Hand to reveal that he prepared a written memo-
ramount of the events of the morning of March 2, 1968. Moreover, I am surprised that that written statement did not include the alleged effort of the then Union Shop Steward (who is now deceased) to "cop a plea" on behalf of the grievant.

If, as Mr. Hand orally testified, the Steward asked for the opportunity to do so, it would constitute "an admission against the grievant's interest" recognizable to laymen as well as lawyers and an important part of any recitation of the events.

However, despite these two mysterious aspects to Mr. Hand's testimony, I resolve the question of creditability in favor of the Company, and I accept the testimony of Messrs. Hand and Axne as to what took place at the panel of control switches. I do so simply because I find no reason why these two general foremen would falsify or fabricate a case against the grievant. There is no evidence or record of animosity, or other difficulty between the foremen and the grievant; nor any capriciousness on the part of the former; nor anything in the employment relationship upon which a charge of false testimony could be based.

Therefore I am persuaded that on March 2, 1968 the grievant turned the control switches from the "auto" position to the "hand" position. And per force I must reject his testimony that he turned the switch to the "off" position because he thought there was a jam on the conveyor line and then turned the switches back to "auto" upon some signal from someone working overhead.

By accepting the Company's version of what took place, and by rejecting the grievant's explanation, I must conclude
that the grievant committed a wrongful act. The Company charges that he "tampered" with the control switches, and that this constitutes an act of "industrial sabotage." The charges or conclusions of "tampering" or "industrial sabotage" presuppose a malevolence on the part of the grievant or a willful intent to injure the Company and disrupt production. If such was the grievant's intent, or if he was so motivated, or if the record supports such a conclusion, there can be no doubt that his discharge was proper.

But again mystery is present. Aside from his bare act of turning the switches to the "hand" position (which may disrupt the normal operation of the conveyor and roller systems, resulting in serious damage to production by extensive jams, bottlenecks and spillage of cans and bottles), there is no direct evidence suggesting any reason why the grievant did it. Neither his past employment record, nor his relationships with other employees or with supervision; nor any other information about him reveal a willful intent to do damage to the Employer. There is no evidence in the record that he harbored anger or resentment toward the Company; that his employment was of an adversary nature; or that he would profit or gain in any manner from sabotaging the production of the Company for which he worked for more than a decade, in an industry in which he had, and presumably would continue to earn his livelihood. (Of some significance, I believe, is the fact that since his discharge he has worked satisfactorily in another brewery without incident).

The Company has proved that he committed a wrongful act
by improperly turning the switches. But I am not satisfied that it has proved the malicious intent or malevolence which would support a conclusion of "tampering" or "industrial sabotage." Other explanations of his conduct are realistically possible. In other words, the evidence does not preclude these other possibilities.

It is undisputed that employees in the grievant's classification may, as part of their job duties, turn the switches from one position to another as conditions warrant. So it was not improper for him to operate the switches on the control panel. It is possible therefore that he committed a gross mistake in turning the switch to the "hand" position and is now seeking to cover up that error. I think it also possible that he may have suffered from some temporary imbalance, which led him to believe that he was acting correctly. Also possible, is that emotional or mental stress, without malice, may have impelled him to commit the wrongful act.

As indicated I do not think that the evidence or the record exclude these possibilities. Nor am I persuaded by clear and convincing evidence that the only reasonable explanation for the grievant's action was a willful intent to damage the Company by an act of "industrial sabotage."

So, though discharge would be wholly proper for a wrongful act based on malice, malevolence, or conscious intent to damage the Company a lesser penalty should be imposed if the act was prompted by the other less nefarious possibilities. In this case, I am constrained to resolve the mystery of the grievant's motice in his favor, simply because, as I
have indicated, the record does not dispel that mystery, and because in the case of a discharge I think the Company has the burden to do so. That the grievant was responsible for earlier "jams" or incidents of a similar type is purely speculative, unsupported by any probative evidence in the record. And fortunately the March 2nd incident did not result in damage, as there were few if any products on the conveyor system at the time. This is not to say that I conclude that the grievant did not commit an act of "industrial sabotage," but rather that the mysterious unexplained circumstances surrounding his conduct leave me unconvinced of that conclusion to the exclusion of other possibilities.

Therefore I choose to fashion a remedy which imposes some penalty on the grievant but less than the ultimate penalty of discharge, and I so AWARD:

If he wishes, the grievant shall be reinstated to his former position with the Company. But I direct that he suffer some loss of seniority and some loss of net pay. Accordingly, upon reinstatement his seniority shall be that which he enjoyed on the date of his discharge, or in other words, he shall not be credited with seniority during the period from his discharge to his reinstatement. His record shall be adjusted to show that the discharge is converted to a suspension to run from the date of discharge to the date of his reinstatement.

His reinstatement shall be without back pay, but as this would not impose a monetary loss upon him because he worked elsewhere in the industry during the period of his discharge, I direct that he be penalized by the loss of one month's pay. That amount of money shall be deducted from the grievant's pay over the next 12 months of his employment, or at the rate of 1/12 of his regular monthly pay each of the next 12 months of his employment.

Also the grievant is advised that if he chooses to return to the Company's employ he may be subject
to surveillance if the Company wishes to maintain surveillance over him. The Company has a right to protect itself not only after an act of sabotage has taken place, but also to prevent such acts. So if the grievant repeats his act of turning control switches to wrongful positions, there would be a strong if not irrebuttable presumption, in the view of this Arbitrator, that he did so willfully and with a malicious intent to sabotage the Company's production, and his forthwith discharge should be upheld.

Additionally, if the grievant displays a course of conduct, attitude, work record or personality quirks which might logically be construed as forewarnings or forerunners of a repeat of the wrongful act involved in this case, or one of a similar nature, the Company shall have the right to take reasonable steps to protect itself against the actual occurrence of these acts.

DATED: January 10, 1969
New York, New York
On January 10, 1969 I rendered an award on the issue of the discharge of Albert Ginsburg, hereinafter referred to as the grievant.

The parties to that arbitration have jointly reinstated my authority for a review of the record concerning that portion of my award assessing a penalty of one month's pay.

A review of the record discloses that the grievant was out of work for sixteen days during the period of his discharge. In find therefore, that his loss of pay for those sixteen days meet the purpose of the one month pay loss which I imposed. Accordingly that portion of my award assessing a monetary penalty of one month's loss of pay is hereby deleted. All other portions and provisions of the Award remain in full force and effect as before.

Eric J. Schmertz
Arbitrator

DATED: January 25, 1969
New York, New York
In the Matter of the Arbitration
between
Local 262 United Bakery, Confectionery, Cannery, Packing and Food Service Workers Union, AFL-CIO

and

Great A & P Bakery, Newark, New Jersey

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated July 26, 1968 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Otis Williams is reduced to a disciplinary suspension. He shall be reinstated without back pay, and the period of time between his discharge and his reinstatement shall be deemed a disciplinary suspension for a second breach of Article VII (c) of the contract.

DATED: August 1969
STATE OF New York )ss.: COUNTY OF New York )

On this day of August, 1969, 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 # 68-423
In the Matter of the Arbitration
between
Local 262 United Bakery, Confectionery, Cannery, Packing and Food Service Workers Union, AFL-CIO

and

Great A & P Bakery, Newark, New Jersey

In accordance with Article X of the Collective Bargaining Agreement dated July 26, 1968 between A & P Bakery, Newark, New Jersey, hereinafter referred to as the "Company," and Local 262 United Bakery, Confectionery, Cannery, Packing and Food Service Workers Union, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was Otis Williams discharged for just cause?
If not, what shall be the remedy?

A hearing was held at the offices of the New Jersey State Board of Mediation on July 25, 1969, at which time Mr. Williams, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The grievant was discharged for a second violation of Article VII Paragraph (c) of the contract which reads:

All available overtime work shall be equitably divided among the employees. All employees shall receive at least four (4) hours notice of overtime and may be excused there from upon presentation of a reasonable excuse and if replacement can be obtained,
On November 18, 1968 the grievant refused to work overtime and offered no excuse other than "personal reasons" for his refusal. There is no dispute that he received at least four hours notice of the overtime schedule. There is no assertion by the Union that "personal reasons" without further specific explanation by the grievant constituted a "reasonable excuse" within the meaning of the foregoing contract clause.

The record discloses that the grievant received a disciplinary suspension from September 20 to October 1, 1967 for his failure or refusal to complete an overtime assignment at that time.

Under the normal application of the well settled rule of "progressive discipline," the penalty of discharge may be imposed for a subsequent contract violation or misconduct if the employee had been disciplined to a lesser degree (either by formal warning or suspension) previously for the same offense. That rule applies to those offenses for which the penalty of summary dismissal is too severe or precipitous. Its intent, not only to discipline and ultimately terminate an employee who persists in proscribed conduct, is to afford an opportunity for the employee to rehabilitate himself and cease any further prohibited acts or conduct. Implicit, I believe, in the purpose of rehabilitation is that the employee understand what is expected of him and be put on notice not only that his first contract breach or misconduct is unexcused, but that any repetition may result in his termination. It is on this last point that I think this case differs from the classical application of the progressive discipline formula.
Based on the grievant's testimony at the hearing together with the circumstances surrounding the disposition of his grievance in 1967, I am not fully satisfied that he comprehended his obligation to work overtime under the conditions and with the limited exceptions set forth in Article VII (c) of the contract, or that he understood the disciplinary suspension between September 20 and October 1, 1967 was due to his breach of that contract requirement.

I accord him the benefit of his statement that he was not familiar with the provisions of Article VII (c). Also it appears that the grievant thought his earlier disciplinary suspension was not for a refusal to work overtime, but rather because he left his work assignment without authorization after he began, but before completing the overtime.

In short, there is some doubt in my mind as to whether the grievant was sufficiently on notice, either by knowledge of the contract or by comprehension of the reason for the earlier disciplinary suspension, of what the Company would not tolerate and what it was about his behavior which needed correction.

Accordingly, for that special reason I conclude that the penalty of discharge is too severe. What is appropriate is one final disciplinary suspension, imposed as a result of this Award, which clearly places the grievant on notice that the contract requires overtime to be worked under the terms and conditions set forth in Article VII (c), and that any further violations of that provision by him, would, in the opinion of this Arbitrator, constitute grounds for his discharge.
The grievant's discharge shall be reduced to a disciplinary suspension. He shall be reinstated without back pay and the period of time between his discharge and his reinstatement shall be deemed a disciplinary suspension for a second violation of Article VII (c) of the contract. The parties are directed to notify the grievant accordingly so that there is no further possible misunderstanding about his status and the reasons for his disciplinary action.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 259 United Automobile Workers

and

Automobile Dealers Industrial Relations Association of New York, Inc.
on behalf of Rogers Pontiac Co., Inc.

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated June 30, 1967 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The Company violated the contract when it closed its entire Service Shop on October 2, 1968. It had the right to lay off one half of the Service Shop work force that day in accordance with seniority. The remaining one half of the Service Shop work force, namely those with greater seniority were entitled to work that day and accordingly shall be paid one day's pay at their regular rate as a measure of damages.

The Arbitrator's fee for the first hearing, at which the Union requested and was granted an adjournment, shall be borne by the Union. The balance of the Arbitrator's fee shall be shared equally by the parties.

Eric J. Schmertz
Arbitrator

DATED: June, 1969

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

On this day of June, 1969, 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 0790 68
In the Matter of the Arbitration
between
Local 259 United Automobile Workers
and
Automobile Dealers Industrial
Relations Association of New York, Inc.
on behalf of Rogers Pontiac Co., Inc.

In accordance with Section XV of the Collective Bargaining Agreement dated June 30, 1967 between Automobile Dealers Industrial Relations Association of New York, Inc. on behalf of Rogers Pontiac Co., Inc., hereinafter referred to as the "Company," and Local 259 United Automobile Workers hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the contract by closing on October 2, 1968? If so, what shall be the remedy?

Hearings were held at the offices of the American Arbitration Association on May 12 and June 18, 1969 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

October 2, 1968 was Yom Kippur. The Company closed down its operations that day because it anticipated a sharp reduction in its business. Based on the amount of its business on Yom Kippur the prior year (when it remained open) and over the Rosh Hashanah holidays in 1968 (when it also remained open)
the Company determined that its business in the Service Shop would be half of normal if it remained open on October 2. The Company contends that its action was in accordance with Section XXIII of the contract which reads:

A. In the case of a layoff, except probationary employees, the Employer shall give 3 working days notice to the employees affected or 3 days pay in lieu thereof.

B. If an employee reports to work such employee is to receive at least 8 hours work or pay. The Employer, however, may, in line with seniority, notify any employee by 5:00 P.M. of the day prior to the time such employee must report for work to the effect that he need not report in which event the Employer need not pay such employee any amount or give such employee any work that day. The Employer shall not abuse this provision.

The Union charges a violation of that Section as well as Sections XIX, XVII and IV of the contract.

I find no violation of Section IV. The entire Service Shop was closed and the Company's decision to suspend operations that day, clearly was not discriminatorily based upon the factors set forth in that Section.

I do not find a violation of Section XIX. That Section relates to the loss of an economic benefit which the employees enjoyed prior to the signing of the Agreement; but does not bear on the Company's express right under Sections XXIII and XVII of the contract to reduce its work force in the event of a diminution of work.

Accordingly this dispute involves the application and interpretation of Sections XXIII and XVII.

Obviously the layoff provisions of the contract (Section XXIII) must be read in conjunction with the seniority clause
(Section XVII.) The former Section specifically provides for notice of layoff "in line with seniority." The latter Section also provides, in clear terms, an order of layoff in accordance with seniority following the layoff of probationary employees. So the two Sections are interrelated.

I am satisfied that the Company notified the employees in the Service Shop of the decision to close the entire Shop on October 2, 1968 within time limits required by Section XXIII. However, I find that the Company went beyond the intended scope of Sections XXIII and XVIII in laying off all the Service Shop employees that day.

The express condition that employees may be laid off "in line with seniority" means, if it is to have any meaning at all, that the layoffs are to be commensurate with the quantity of diminution in the available work. Therefore, where there is no available work in the Service Shop, all the Service Shop employees may be laid off. On the other hand if there is significant available work, but less than the normal amount, the Company may lay off only those employees not needed as a result of the diminution. But to lay off the entire force in that circumstance would be to deprive some of the employees, especially those with greater seniority, of the opportunity to work on the remaining available service work.

In the instant case the record discloses that a significant amount of service work was in fact available for October 2, 1968. The Company conceded that its business that day would have amounted to about one half of normal. So work was available for at least one half of the Service Department work...
force. It cannot be asserted, and indeed the Company does not make the assertion, that such a quantity of available work is de minimus in nature.

The contract does not provide for a guaranteed work week irrespective of the quantity of the work available. It does provide for layoffs in accordance with seniority in the event of a reduction in business. But the Company's right to effectuate layoffs must be reasonably equivalent to the quantity of that reduction. Hence when one half of the normal quantity is available the Company need only retain one half of its employees for that day. But it may not lay off everyone.

Accordingly the Company erred when it closed down its entire Service Shop on October 2, 1968. It had the right to lay off one half of the Service Shop work force that day, provided seniority was followed. The remaining one half of the Service Shop work force, namely those with greater seniority were entitled to work that day and accordingly shall be paid one day's pay at their regular rate as a measure of damages.

[Signature]

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between
Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
and
Borden Metal Products Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 1, 1968 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Frederick Meyers is reduced to a second disciplinary suspension. He shall be reinstated but without back pay. He is directed to immediately commence, and thereafter continue to maintain, a satisfactory record of attendance and punctuality as a condition of his continued employment. If not, the Company has grounds for his summary dismissal.

DATED: October 1969
STATE OF New York )
COUNTY OF New York )

On this day of October, 1969, 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. 1330-0624-69
In the Matter of the Arbitration between

Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and

Borden Metal Products Company

In accordance with Article XVI Section (E) of the contract dated January 1, 1968 between Borden Metal Products Company, hereinafter referred to as the "Company," and Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

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

A hearing was held at the offices of the American Arbitration Association on September 26, 1969 at which time Mr. Meyers, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing data and statements, and the hearings were declared closed as of October 27, 1969.

The grievant was discharged for a record of excessive absenteeism and lateness extending over 3-1/2 years, for which he was previously both warned and suspended.
The evidence clearly establishes the excessive and unsatisfactory nature of the grievant's attendance record for the period of time involved. Nor is the prior warning or prior suspension disputed by the Union. Also, I find no significant improvement in that record during the one year period between the grievant's suspension and discharge.

Under the well recognized principle of "progressive discipline," which the Company has properly applied to this case, together with the equally well settled rule that permits an employee's discharge for chronic absenteeism irrespective of cause, I can fully appreciate why the Company took the action it did. But there is one factor in the record however, which leads me to believe that the grievant may not only have been unable to prevent some of his absences and tardiness (which standing alone would not be a mitigating factor), but that he may now be able, forthwith, to maintain a totally satisfactory record of attendance and punctuality.

There is evidence in the record that some of his absences and tardiness stemmed from a medical problem concerning his foot and leg. If this condition was chronic, together with the balance of his attendance record, it would not be enough to immunize him from discharge, no matter how he sustained the foot condition and even though it may have been beyond his fault or control. For no matter what the reason, an employer is entitled to regular and sustained attendance from an employee; and if he does not get it, regardless of the reason, he is not obligated to retain that employee. But assuming the bona fides of the foot and leg condition (I choose to
accord the grievant the benefit of the doubt in that regard, as the medical evidence both ways represents a standoff), the grievant testified that just prior to his discharge, that condition had been cured; and that he is now ready and able to attend to his job on a regular and satisfactory basis. Though there is of course some doubt, I think it possible that he can now radically change his record, so as to immediately commence, and thereafter maintain, an attendance record fully satisfactory to the Company. Therefore I have decided to afford him the opportunity to do so. I shall direct his reinstatement. But because there is not yet evidence of an improved record of attendance, he shall not receive back pay, and the period of time between his discharge and reinstatement shall be deemed a second disciplinary suspension. The grievant is warned that his record of attendance must become satisfactory forthwith, and that he must maintain a record of attendance and punctuality thereafter on a satisfactory basis as a condition of his continued employment. If not, and no matter what the reason, the Company would have grounds to discharge him summarily.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Brentwood Teachers Association
and
Brentwood Public Schools
Union Free School District #12

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated March 27, 1968 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

A requirement that teachers work without additional compensation beyond 10 minutes after the final bell to place students on homeward bound buses that arrive late is violative of the contract. This Award applies not only to the period from September 1968 to the date of the grievance, but prospectively when and where the circumstance occurs. No retroactive pay is awarded. However, from the date of this Award forward, where, because homeward bound school buses arrive late at the schools, teachers are required to remain beyond 10 minutes after the final bell to place students on those buses, such teachers shall receive additional compensation at straight time pay for the extra time so worked.

DATED: March 1969
STATE OF New York )
COUNTY OF New York ) ss.: On this day of March, 1969 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 0020 69
In accordance with Article III Level 4 of the Contract Agreement dated March 27, 1968 between Brentwood Public Schools, Union Free School District #12, hereinafter referred to as the "District," and Brentwood Teachers Association, hereinafter referred to as the "Association," the Undersigned was designated as the Arbitrator to hear and decide a dispute relating to the Association's claim that the Contract has been violated when teachers are required to remain beyond 10 minutes after the final bell in order to place students on late arriving school buses.

A hearing was held at the District's office in Brentwood, New York, on March 4, 1969 at which time representatives of the Association and the District appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath and the contract provision calling for the rendition of the Arbitrator's Award within 14 days after the close of the hearing.

From the beginning of the school year in September, 1968, the District has experienced difficulties with its school buses. Buses which take students from the District's school to their homes at the end of the school day, arrive late at three spec-
ific schools; namely South Elementary, Southwest Elementary and Hemlock Park Elementary. Initially all of the teachers at those schools were required to remain with their students until the last of the students was placed on a bus. As a result teachers at these three schools remained beyond 10 minutes after the final bell, for varying amounts of time. Later by arrangement among the teachers and with the agreement of the District, only those teachers assigned to "bus duty" remained when buses arrived late.

There is agreement that the problem has improved substantially since September. But it is not yet entirely solved. It is also undisputed that the 10 minute period after the final bell is the normal time in which teachers place students on homeward bound buses if the buses arrive at the schools on time. And that if the prescribed bus schedule is met, the 10 minute period is adequate. There is no disagreement between the parties on the instances of bus lateness, nor do they disagree on the amount of time teachers remain beyond 10 minutes after the final bell. It is stipulated that the District's records in this regard shall obtain.

The Association's position is supported by the language of the contract. Article IV Section A provides in pertinent part that:

Teaching hours shall be 15 minutes before attendance is taken until 10 minutes after the final bell

and that

The required work day shall be no longer than 6 3/4/ hours...
It is undisputed that the total period of time between 15 minutes before attendance and 10 minutes after the final bell is 6 3/4 hours. Therefore any work by a teacher beyond 10 minutes after the final bell is in excess of 6 3/4 hours, and hence more than the "required work day."

The District contends that Section C.1. of Article IV constitutes a pertinent exception to foregoing contract provisions. I am unable to agree. Section C.1. does provide for circumstances under which teachers are expected to remain beyond the normal work day. But I do not conclude that "bus duty" is among those circumstances. Said Section reads:

Teachers are expected to remain after the end of the normal work day when necessary and without additional compensation to fulfill their professional obligations connected with the teaching of children, such as participation in parent-teacher conferences, tutorial help of students, case conferences, in-service professional growth activities or meetings, etc.

The District contends that "bus duty" is included within the "etc." Neither by the general rules of contract interpretation nor by the past experience of the parties, can such a conclusion be reached. I agree with the District's argument that "bus duty" is among the obligations of a professional teacher, but within the context of Section C.1, I am not persuaded that it is a professional obligation connected with the teaching of children. Indeed Section C.1. sets forth certain examples of obligations connected with the teaching of children, namely conferences, tutoring, professional growth activities and meetings. Under the traditional rule of contract interpretation, the use of "etc."
following such enumerated examples means additional activities of a like nature. I am not satisfied that the parties intended that "bus duty" be considered an activity similar to the enumerated examples, and I do not believe that it can be deemed similar by any normal definition. Moreover the use of "etc." is designed to cover those circumstances which the parties could not reasonably contemplate at the time that the contract was written. Difficulties with bus transportation was manifestly within the knowledge and contemplation of the parties at the time this contract clause was negotiated. In the prior year the District experienced bus difficulties as well. Homeward buses arrived late at the schools in that year too. And that condition was discussed by the parties during their negotiations of the current contract. Therefore if "bus duty" beyond 10 minutes after the final bell was intended to be included within Article IV Section C.1. the parties could, and should have listed that circumstance as one of the exceptions to the required work day of 6 3/4 hours. That they did not, means to me, that that duty was not meant or intended to be among the professional obligations connected with the teaching of children, and hence not encompassed within the "etc."

Nor can I accept the District's argument that the complaint should be dismissed because it is de minimus. With the exception of the month of December, 1968 during which buses were late for a total of only 9 minutes throughout the entire month, the accumulated time in each of the other months, September 1968 through February 1969 amounted to
several hours, and involved significant numbers of teachers. In those months homeward bound buses arrived late at the three schools on a substantial number of days each month. I do not consider this to be *de minimus*. Moreover, the District itself did not act as if it viewed the condition as *de minimus*. It took definitive steps, both in making its own administration more efficient and in its dealings with the bus contractor, to correct the problem as quickly as possible. So it, as the Association, recognized the problem of late arriving buses to be sufficiently troublesome to demand decisive remedial action.

For the foregoing reasons I find that work beyond 10 minutes after the final bell to load students on homeward bound buses, is not within the teachers' regular work day, nor within the explicit exceptions to that work day. Accordingly, the requirement that he do so without additional compensation is violative of the contract.

Remaining are the questions of to what period of time the Association's complaint applies, and what remedy, if any, should be fashioned. I find that because buses continued to arrive late after the date of the Association's complaint, that complaint is in the nature of a "continuing grievance." It applies of course to the period of time from September to the date it was filed, but was intended obviously, to cure a condition prospectively as well, if that condition persisted. And therefore, because that condition has persisted albeit on a considerably improved basis, the Association's complaint, and my Award shall apply not only to the period before the
grievance was filed, but prospectively as well.

I have decided not to fashion a retroactive remedy for two reasons. First I believe that the Association, though it requests retroactive overtime pay, is more interested in an end to bus duty beyond 10 minutes after the final bell and to an Award that such work is not within the teachers' regular work day; and second, because I am convinced that the District has made a determined and good faith effort to correct the problem, the fault for which lies primarily with the bus contractor. Therefore, the Association's request for retroactive pay is denied. And because it expressed no interest in compensatory time off, that possible remedy shall not obtain either. However, if from the date of this Award, the teachers remain 10 minutes beyond the final bell in order to load students on buses which have arrived late, those teachers shall be compensated for that additional time at their regular rates of pay. Such additional pay is clearly contemplated by the language of Article IV Section C.1. That section sets forth the circumstances under which teachers are expected to work beyond the normal work day "without additional compensation." Therefore other duties beyond the normal work day not encompassed within that Section or elsewhere in the contract, must be paid for if performed. And in the absence of an explicit formula for premium pay, I find no basis to fix the rate beyond straight time.

My prospective Award shall be implemented by the parties in accordance with a "rule of reason." I am sure the Association will agree that isolated instances, involving negligible
amounts of time beyond 10 minutes after the final bell, may not be totally avoidable. And a claim for pay in such circumstance may be unreasonable. On the other hand, the District must recognize that the teachers have never claimed they have the right to abandon the children before placing them on home-ward bound buses. On the contrary, the teachers and the Association recognize an overriding responsibility to care for the children and see that they are safely installed on the buses no matter how long they must wait for the bus beyond 10 minutes after the final bell.

Therefore, absent agreement of the Association on a plan of compensatory time off, the sole remedy available to the teachers is additional compensation for that time. And I Award that remedy, prospectively from the date of my Award, in those situations, under a "rule of reason," where the amount of extra time, either singly or cumulatively, and the number of instances, is beyond the negligible.

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

District 15 International Association of Machinists, AFL-CIO

and

Brockway Motor Trucks, Inc.

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

The phrase "December 31 of each vacation credit year" set forth in Section 2 of Article XV of the contract means December 31 of the year in which the vacation is taken. Specifically, in the instant grievance, it means December 31, 1968. Employees who took or were eligible for vacations during the summer of 1968 were entitled to vacation time measured by their service up to December 31, 1968 even if that part of their service from the date of their vacation to December 31, 1968 was anticipatory, provided they met the other undisputed qualifications for a vacation.

The Company shall grant the affected employees the appropriate additional vacations.

Eric J. Schmertz
Arbitrator

DATED: 196
STATE OF New York )ss.: 
COUNTY OF New York 

On this day of 196, 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 # 69A/812
In the Matter of the Arbitration between
District 15 International Association of
Machinists, AFL-CIO

and

Brockway Motor Trucks, Inc.

Opinion

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated November 1, 1967 between Brockway Motor Trucks, Inc., hereinafter referred to as the "Company," and District 15 International Association of Machinists, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

What is the appropriate interpretation of Article XV of the contract dated November 1, 1967 with reference to vacation eligibility?

A hearing was held at the offices of the American Arbitration Association in New York City on December 16, 1968 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded the parties to offer evidence and argument and to examine and cross examine witnesses. The parties waived the Arbitrator's oath and the contract provision for a tri-partite Board of Arbitration, agreeing instead to submit the issue for determination to the Undersigned as the sole Arbitrator.

What is actually in dispute is the meaning of the underscored phrase of the following portion of Section 2 of Article XV:
An employee will receive vacations as set forth in this Section according to the vacation service credits he has acquired prior to December 31 of each vacation credit year, and calculated in accordance with the provisions of Section 3 and 4 of this Article, if the employee has also met the requirements of Section 5 of this Article.

The Union contends that the date of December 31 referred to above, is the year in which the vacation is taken. In the instant grievance, which involves a claim for additional vacation time of the year 1968, the date of December 31 means that date in the current year, 1968. In other words, under the Union's interpretation employees who take their vacations during the summer months of 1968 would be entitled to an amount of vacation based not only on service up to that time, but also anticipated service to December 31, 1968.

The Company interprets the reference to December 31 as meaning that date in the year before the current vacation is taken. Or in other words, employees taking vacations during the summer months of 1968, receive amounts of vacation based only on their service up to December 31, 1967.

The parties agree that if the Company's interpretation is upheld, the affected employees have received the correct amount of vacation time. But if the Union's interpretation is granted, the affected employees are entitled to and shall receive additional vacation time.

Under the Union's interpretation an employee may receive a vacation entitlement based, in part at least, on a period of employment which he has not yet served. His vacation during the summer months of 1968 would be calculated, in part, on service he is yet to perform from the end of
that vacation to December 31, 1968.

If this seems incongruous, so too is the effect of the Company's interpretation. The Company's view could mean that an employee hired soon after December 31, 1967 would have to serve a year and a half before he had acquired the requisite one year service credit for a vacation. It would mean that not until the vacation period in the year 1969, or a year and a half after he began work, would he have compiled at least one year service prior to December 31, 1968. So that under the Company's interpretation, some employees may have to serve well beyond the minimum before they are entitled to any vacation.

A full reading of Article XV persuades me that the disputed language means the year in which the vacation is taken, even if, as a result, the amount of the vacation entitlement is in part "anticipatory." The language "prior to December 31 of each vacation credit year" cannot refer to an earlier year, thereby disregarding all service during the year in which the vacation is taken, simply because Section 3 which sets forth the manner in which vacation service is to be computed, provides for computation from the first day that the employee began until the last day of his employment. So all continuous service is to be credited toward vacations, which must per force include, in the instant case, service performed during the year 1968. And therefore the date of December 31 must mean December 31, 1968. For if it meant the year 1967 all service actually performed in 1968, even that from January to the summer months when the vacations are taken, would be
totally disregarded for purposes of computation. And that would be inconsistent with the intent of Section 3.

Moreover, if the disputed language was intended to mean December 31, 1967 or December 31 of the year prior to that in which the vacation is taken, it could easily have said so. Indeed, where the parties did mean the prior or previous year they had no difficulty in setting that forth - specifically in Section 5 of the same Article. There, in fixing the hours of attendance required in order to be entitled to vacations, the contract speaks of at least 960 hours of work during the previous vacation credit year. But though they could have, the parties did not use such language in the disputed Section of Section 2. Instead, that Section talks only of December 31 of each vacation credit year. If, as the Company argues, it was intended to mean the previous year, the language of Section 2 could and should have been the same as the pertinent language of Section 5, namely by wording the present disputed language of Section 2 to read "December 31 of each previous vacation credit year." But the word "previous" is not now found in Section 2 whereas it is found in Section 5. The only logical conclusion is that those two phrases in each Section mean different points in time. The latter, so far as the instant grievance is concerned, means the year 1967, and the former, the disputed clause herein, must mean December 31 of the current year in which the vacation is taken. Or, so far as this grievance is concerned, December 31, 1968.
Accordingly the Union's interpretation is upheld and the affected employees are entitled to additional vacation.

Eric J. Schmertz
Arbitrator
In accordance with Article XII of the Collective Bargaining Agreement dated October 25, 1967 between Brown & Sharpe Manufacturing Co., hereinafter referred to as the "Company," and International Association of Machinists & Aerospace Workers, District #64, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the grievances of Thomas H. Hennessy and Andrew B. Lambert, and two contract interpretation issues (referred to as Items 2 and 5 in the American Arbitration Association letter of November 27, 1968.)

Hearings were held at the Company plant in North Kingston, Rhode Island on November 22, 1968 and January 13, 1969. The parties expressly waived the Arbitrator's oath.

During the course of the first hearing on November 22, 1968, the grievance of Thomas H. Hennessy was settled by and between the parties and withdrawn from arbitration.

Prior to the commencement of the second hearing on January 13, 1969, Items 2 and 5 were settled by and between the parties and withdrawn from arbitration.

With regard to the grievance of Andrew B. Lambert, I find and hold that Mr. Lambert, hereinafter referred to as
the "grievant," has abandoned his grievance. The grievant failed to appear at the first hearing. At the request of the Union his grievance was continued until the second hearing. Though he was given due notice, the grievant again failed to appear at the second hearing. I find the Union has done all it can in an effort to present the grievant's case in arbitration, but that absence of the grievant at the two scheduled hearings made presentation impossible. Also I hold that, under that circumstance, the Company need not be subjected further to that grievance.

Accordingly, the Union's request for a further continuance of the grievant's case is denied, and the Company's motion that his grievance be dismissed, is granted.

However, consistent with the settlement of the Hennessy grievance, I recommend that Mr. Lambert be afforded an opportunity to transform his discharge into a resignation. I recommend that if he submits his written resignation within thirty days from the date of the Award, the Company accept it in place of, and effective as of the date of his discharge.

In addition to the foregoing ruling dismissing the grievance, I presented this recommendation orally to the parties during the course of the second hearing and the Company expressed its willingness to accept it.

Eric J. Schmertz
Arbitrator
On this 16th day of January, 1969, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1130 0262 68
In the Matter of the Arbitration
between

Office of Labor Relations, City of New York,
on behalf of the Fire Department of the
City of New York

and

Uniformed Firefighter's Association
Local Union #94, AFL-CIO

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

Issue No. 1.
The Employer's elimination of Ambulance #3 was not proper. It shall be restored to service on the same regular basis as obtained from August 1963 to December 1968.

Issue No. 2
Without prejudice to the Union's right to complain when and if a specific order under Section 3.8.3 of the All Units Circular #147 is issued, the bare content of that Section and the statement of the Chief of Department as to how it may be applied, do not enlarge the firemen's job description in violation of the Collective Bargaining Agreement.

DATED: December 1969
STATE OF New York )ss.: COUNTY OF New York )

On this day of December, 1969, 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. A-63-69
Case No. A-64-69
In the Matter of the Arbitration
between
Office of Labor Relations, City of New York,
on behalf of the Fire Department of the
City of New York

and
Uniformed Firefighter's Association
Local Union #94, AFL-CIO

The Undersigned was designated as the Arbitrator to
hear and decide the following stipulated issues:

1. Was the Employer's elimination of Ambulance #3
   proper? If not, what shall be the remedy?

2. Does the content and interpretation of all Units
   Circular #147 enlarge the Firemen's job descrip-
   tion in violation of the Collective Bargaining
   Agreement? If so, what shall be the remedy?

A hearing was held at the office of Labor Relations on
November 17, 1969 at which time representatives of the above
named parties appeared and were afforded full opportunity to
offer evidence and argument and to examine and cross examine
witnesses. The Arbitrator's oath was expressly waived.

Issue No. 1

Ambulance #3 was placed in service in August, 1963,
primarily to provide first aid and ambulance transportation
for injured firemen from the scene of fires to hospitals in
Queens County. It performed this work, together with certain
collateral services until December, 1968 when eliminated by
the Fire Department. Thereafter coverage of Queens County
was included as part of the work of Ambulance #2 which pre-
viously worked in Kings and Richmond Counties. Ambulance
#2 now covers all three boroughs.
The Employer asserts that Ambulance #3 was eliminated because it is no longer needed and there is little work for the firemen who man it full time. It points to a marked statistical fall off in the number of firemen treated during the year 1968 and argues that the work previously performed by Ambulance #3 has been assumed without difficulty by the Department's Ambulance #2 and other ambulances attached to hospitals in Queens County.

The Union disputes both the accuracy and significance of the Employer's statistics and protests the abolition of what it claims to be a protected benefit enjoyed by the firemen for over five years.

Based on the record before me I conclude that Ambulance #3 was placed in service as a result of a bilateral agreement between the Employer and the Union, for which the firemen gave a specific consideration and which, because of the particular circumstances involved, may not now be unilaterally terminated by the Employer.

The uncontradicted evidence discloses that as a result of discussions between the Employer and the Union, (initiated by the former) the ambulance was purchased by the Union's Welfare Fund (made up only of firemen contributions); and that over its years of service from 1963 to the near end of 1968 no discussions, during subsequent contract negotiations or at any other time, took place between the parties regarding its use.

There is no doubt that Ambulance #3 represents a benefit to the firemen. No matter how many or few firemen it attended,
its availability to handle actual or potential injuries was a tangible service to the employees. It may well be that Ambulance #2 has and will continue to be able to cover the work previously done by Ambulance #3, together with its previously assigned work in Kings and Richmond Counties. But from the standpoint of quick and efficient handling of potential injuries, especially where the incident rate of fires has and continues to increase, a single ambulance responding to fires in three boroughs cannot be deemed an equal replacement for an ambulance geographically limited to Queens. Accordingly, though statistically Ambulance #2 has so far been able to meet the needs of Queens County, I cannot conclude that it is as good a protective device as would be the case if Ambulance #3 was still in service.

It is neither my intention nor within my authority to rule that the Employer may not under any circumstances unilaterally discontinue a mutually agreed upon benefit. Rather, I find that in this case where the ambulance was bought by the firemen at the Employer's request, there is a presumption in favor of its continuation unless the conditions under which it was established have so markedly changed as to make its continuation unnecessary or unreasonable. And in view of the absence of any question of its continued use, during subsequent contract negotiations or over the five years of its service, the Union had good reason to believe the ambulance would continue to operate on that basis.

The Employer's contentions are not inconsistent with this theory. It claims that the conditions which originally justified Ambulance #3 are no longer present. But its case on this score is vulnerable for two reasons.
First, there is no evidence that the agreement to establish Ambulance #3 contained, as a condition of its continued use, any proviso regarding the number of fires to which it would respond or the number of employees to be treated. Indeed, the very nature of the work of this type of vehicle subjects any estimates of its actual or potential use, to wide variations.

As I see it, the ambulance was established not for the purpose of attending a certain specified number of fires or to service any specified number of firemen, but rather to be available in Queens County to respond to fires and to service injured firemen when and if such service was needed, irrespective of the quantity. In short, I do not find that the elimination of the ambulance was to be triggered by any fortunate decrease in injuries, especially when the realistic potential of an upswing in injuries from the increased number of fires, remains so manifest. Second, the Employer's statistics are incomplete and hence not conclusive. In 1967 Ambulance #3 handled about as much work as did Ambulance #1 and #2 and placed second amongst the three, in the number of firemen treated. The 1968 statistics offered in evidence by the Employer show a substantial fall-off in the work of Ambulance #3. But I cannot conclude that this represents any significant or accurate trend. Uncontradicted is the Union's testimony that the 1968 statistics for Ambulance #3 represent only seven of the eleven relevant months of that year, because it was used elsewhere, outside of Queens for four months. If in service throughout 1968 (until December when discontinued)
Ambulance #3 might well have compiled a statistical record equal or close to those of Ambulances #1 and #2.

Also the questionable reliability of any such statistics as a measurement of future work was recognized by Chief Hartnett, the Employer's personnel officer. In his memorandum of November 13, 1969 setting forth the work statistics of Ambulances #1, #2 and #2, for 1967 through 1969, he stated "the trends are not significant." To my mind this means that because of the rising number of fires and the unpredictability of injuries which may result, any prospective calculation of this use of the ambulances (including Ambulance #3 if it had been continued) would be speculative at best. So I am unable to conclude that the conditions under which Ambulance #3 was placed in service in 1963 have so markedly changed as to justify its elimination, unilaterally by the Employer.

For all the foregoing reasons the Employer's elimination of Ambulance #3 was not proper. It shall be restored to service on the same regular basis as obtained from August 1963 to December 1968.

**Issue No. 2**

All units Circular #147 effective July 15, 1968 and as amended April 1, 1969 contained the following provision:

3.8.3 CO CMDR may utilize Co. personnel as necessary to perform clerical duties in units in connection with FP duty.

The Union contends that this provision as written, together with a statement by the Chief of Department as to how it may be implemented, is contrary to and hence violative of
Article V Schedule A, Section 2 c of the Collective Bargaining Agreement which reads:

**Fire Prevention Operations**

Under normal supervision of company officers a fireman, individually or collectively with other firemen, performs inspectional, investigational, educational and regulative duties in the area of fire prevention operations. These activities involve separate procedures and the making of decisions requiring individual judgment but in accordance with prescribed methods and procedures and/or direction of immediate superiors. This shall include but is not limited to -

a .......
b .......
c ........
d .......
e .......

This shall exclude but is not limited to -

a .......
b .......
c Clerical, other than those specifically related to required duties.

The Union claims that under 3.8.3 of all Units Circular #147 the Employer intends to assign to firemen a wide range of clerical duties in connection with fire prevention work which will exceed the bounds of "those specifically related to required duties."

The Union complaint is premature. It cites no specific circumstance in which a clerical duty order was given any fireman under Section 3.8.3 of the All Units Circular. So it is impossible for me to determine whether that provision of the circular was implemented in any way inconsistent with or in violation of the contractual job description and limitations therein.
As I see it the Union is worried that Section 3.8.3 of the circular, as gratuitously interpreted by the Chief of the Department, may produce a work assignment violative of the job description. But so far as the record before me is concerned, this has not yet occurred. And until it does, I find no adversary dispute between the parties. Section 3.8.3 of the Circular as worded may be the basis for orders consistent with or in violation of the contractual job description. Which, depends upon how it is applied and implemented. But until applied or implemented improperly, the Union has no complaint.

Accordingly without prejudice to the Union's rights to complain when and if a specific order under Section 3.8.3 of the All Units Circular #147 is issued, the bare content of that Section and the statement of the Chief of Department as to how it may be applied, do not enlarge the firemen's job description in violation of the Collective Bargaining Agreement.

Eric Jr. Schmertz
Arbitrator
In the Matter of the Arbitration between  
Local 282 I.B.T.  
and  
Clearview Concrete Pipe Corp.  

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 1, 1966 to June 30, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Alex Kobusky is reduced to a disciplinary suspension. He shall be reinstated without back pay. The period of time between his discharge and his reinstatement shall be deemed a disciplinary suspension and so noted on his employment record.

Eric J. Schmertz  
Arbitrator

DATED: May 1969  
STATE OF New York  
COUNTY OF NEW YORK  

On this day of May, 1969, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
Local 282 I.B.T.

and

Clearview Concrete Pipe Corp.

The stipulated issue is:

Was there just cause for the discharge of Alex Kobusky? If not what shall be the remedy?

Hearings were held at the offices of the American Arbitration Association on March 26 and April 9, 1969, at which time Mr. Kobusky, hereinafter referred to as the "grievant," and representatives of the above-named Union and Company, hereinafter referred to as the "parties," appeared. Full opportunity was afforded the grievant and the parties to offer evidence and argument and to examine and cross examine witnesses.

The grievant was discharged for "damaging vehicles."

Initially, I do not find any meaningful procedural defect in the Company's action. The contract calls for notice to the Union before an employee is fired. Obviously, this is designed to provide the Union with the facts as viewed by the Company, and to afford the Union an opportunity to adequately represent the employee involved. Though in the instant case notice to the Union prior to the discharge was not given, I do not find that the purposes of such notice were at all frustrated. The Company informed the Union representative of the grievant's discharge shortly after the
discharge was effectuated. The Company fully explained the reason for its action; and the grievant and the Union on his behalf were given adequate opportunity to protest. Accordingly I find that procedurally the Company complied substantially with that section of the contract, so that its omission of notice to the Union before the formal discharge, is not a fatal defect.

Substantively the Company claims that on November 29, 1968, while parking his fully loaded International truck in an "aisle" (which the Company states was a prohibited parking area), the grievant backed into a Brockway truck pushing it backwards several feet, badly damaging its fender and bumper. So far as this record is concerned there were no eye witnesses to the accident. It was reported to the Company by the driver of the Brockway who discovered it later in the same day, when he returned to his truck to retrieve some apparel.

The Company contends that the penalty of discharge was appropriate because this accident was the grievant's third. Earlier in July of the same year he tore a fender while driving a Company truck and in September caused a trailer to become stuck in a sand pit at a construction site which he entered contrary to standard operating instructions, and which resulted in damage to the trailer's drive shaft. There is no serious dispute over the occurrence of these two earlier incidents.

Based on the weight of the evidence I am persuaded that the grievant was responsible for the third accident as well. But I conclude that because the Company did not make it clear
to the grievant after the first or second accident that discipline including discharge would be imposed if a further accident occurred, the penalty of discharge in this case was precipitant and therefore is modified to a disciplinary suspension.

Several factors point to the grievant's responsibility for the damage to the Brockway. His International truck was parked in front of the Brockway, and there is no dispute that he parked it there. It is also obvious that the damage to the Brockway was caused by the International. Only the latter, fully loaded as it was with beams, with its size and weight, could push the Brockway truck the several feet backwards causing tire skid marks on the roadway. And it was positioned to do so. Also the record discloses that paint from the newly painted Brockway was seen on one of the tire flaps of the International indicating impact between the two vehicles. Considering these facts, it is apparent that the International pushed into the Brockway rather than visa versa.

The grievant does not deny the accident. He stated that it "could have happened." But that he "does not remember it happening." He does not deny that the Brockway was parked in the aisle when he backed in, but rather that he did not see any other vehicle in the aisleway. It seems to me that he should be much more unequivocal. An accident of this type, with this magnitude of impact (causing the Brockway to be pushed several feet backwards) is not something one does not remember. Certainly if it happened, the grievant would have a vivid recollection of it. And on the other hand if it did not
Within the frame of that rule neither purpose was attempted by the Company or afforded the grievant in this case. Following the accidents in July and September he was not decisively warned either orally or in writing that such accidents would not be tolerated. He was not told that discipline would be imposed if he continued to have accidents. He was not told either orally or in writing that he would be fired if he caused accidents in the future. All that he was told was "to be more careful." The Company witnesses conceded that this was the extent of its displeasure made known to him. This is not to say that discharge is not a proper penalty for accidents to vehicles. Clearly an employer may discharge an employee who causes damage to Company equipment. But absent a rule or contract provision calling for summary dismissal, discharge for damage of the types involved in this case requires a proper foundation by notice and warning. The torn fender in July was not in and of itself grounds for discharge, but a formal warning either orally or in writing was clearly appropriate. If the Company so warned the grievant at that time, he would have been put on notice that future vehicle damage would not be tolerated. He would have known not only "to be more careful" but that his failure to do so would result in more severe discipline.

Again in September, the Company had an opportunity to admonish the grievant in a way that would have made it clear he was in danger of losing his job. If discharge was not then appropriate (and it may well have been sustainable then if a warning had followed the July accident) the Company could have
imposed a disciplinary suspension. At least it should have warned him unmistakably that further damage would result in his dismissal. Had the Company followed that procedure I would have had no trouble upholding the discharge in this case. But absent that foundation I judge the discharge penalty to be inconsistent with the principle of progressive discipline which, as I have indicated, I find to be particularly applicable to the facts in this case.

Accordingly the grievant's record warrants a disciplinary penalty in the form of a suspension. His discharge is changed to that penalty. He shall be reinstated but without back pay. The period of time from his discharge to his reinstatement shall be deemed a disciplinary suspension and so noted on his employment record. He is warned, and this Award is notice, that future negligent acts causing damage to vehicles or other offenses would, in my opinion, be grounds for his immediate dismissal.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Local 376, United Automobile Workers of America
and
Colt's Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated August 5, 1967 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The discharge of Norman Hardacker was precluded by a prior settlement and therefore not for just cause. He shall be reinstated with back pay less any money he earned in gainful employment since the date of his termination.

Dated: July 1969
STATE OF New York ss.
COUNTY OF New York

On this day of July, 1969, 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. 12 30 0032 69
In the Matter of the Arbitration
between
Local 376, United Automobile Workers
of America

and

Colt's Inc.

In accordance with Article XV of the Collective Bargaining Agreement dated August 5, 1967 between Colt's Inc. hereinafter referred to as the "Company," and Local 376 United Automobile Workers of America, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company have just cause for the discharge of Norman Hardacker? If not what shall be the remedy?

A hearing was held at the Company offices in Hartford, Connecticut on May 2, 1969, at which time Mr. Hardacker, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs and the hearings were declared closed as of June 19, 1969.

The grievant was discharged for assaulting a fellow employee, one John Lewis, Jr., in violation of Company Rule #9b. The grievant threw the contents of a soda bottle at Lewis and then kicked him. The grievant does not deny the act but claims Lewis provoked him and that he acted in self defense.
Lewis denies that he acted in any way to lead the grievant to believe he had to defend himself.

I need not resolve the sharply contradictory and conflicting testimony regarding the allegations of provocation because I find a proper resolution of this case on procedural grounds.

There is no dispute over the propriety of the Company rule. It has been in existence for an extended number of years. Its reasonableness is manifest, not only on the generally well settled principles of industrial relations, but specifically because of the nature of the Company's product - firearms and live ammunition. Also it was promulgated in a manner that meets all the well established conditions for enforcement. It was prepared in written form, disseminated amongst the employees, made available to each new hire including the grievant, and was and has been posted conspicuously. And there is no dispute that it was accepted by the Union.

So there is no question that the Company has the authority to discharge an employee who commits an assault. But though the Company has this clear right, it may, either expressly or by conduct waive it, or settle a dispute over which it could be invoked on a basis less than the imposition of the discharge penalty. And if there be a waiver or settlement, the Company is thereby bound, and may not thereafter discharge the offender, even if at the outset it may have had grounds to do so. This latter circumstance is what I conclude is involved in the instant case.

Rule #9b as extracted from the written Company Rules, together with the introductory language setting forth the
authority of the "Supervisory Force" reads:

Members of the Supervisory Force, having authority over the employees of the Company, will take disciplinary action in accordance with the facts and conditions surrounding each individual case. This disciplinary action, may, at the discretion of the supervisor, be any of the following:

1. Immediate discharge
2. Suspension
3. Demotion
4. Written warning
5. Verbal warning

......
The following are offenses which are reasons for action:

......
9. Conduct contrary to common decency or morality, such as:
   ......
   b. Assault with intent to injure.

The rule is clear and so is the authority of the supervisor. He has the authority and discretion to determine which penalty shall be imposed. No doubt he exercises this discretionary authority depending upon the seriousness of the offense. But under the clear language of the rule, it is the supervisor who is empowered to act. And so far as the most severe penalty is concerned, it is not simply that of "discharge" but rather the power of "immediate discharge."

The record before me discloses that the supervisory force failed to invoke the rule as written, and beyond that consummated a settlement that constituted a waiver of any later resort to the discharge penalty.

I am persuaded that responsible and authorized supervisors, together with the Union steward, the grievant and the assaulted employee, reached a final and satisfactory understanding. Or
at least the supervisory force acted in such a manner as to reasonably lead the Union and the grievant to believe that a settlement had been achieved.

Shortly after the assault Supervisor Wells called a meeting in his office at which another supervisor, Mr. Bryan; the Union steward, Mr. Harding; the grievant, the assaulted employee and some others were present. As a result of that meeting the grievant expressed apologies to Lewis; they shook hands; and both were permitted to return to work for the balance of the shift. The steward asked Supervisors Wells and Bryan whether they "were satisfied" and whether "that settled it." The testimony discloses that Messrs. Wells and Bryan either gave their assent or said nothing. But there is no evidence that they responded negatively to the steward's question or reserved their option to impose or recommend a disciplinary penalty later. The supervisors did not testify in refutation on this point.

The grievant was not discharged until the day after the incident, and then by the Company's Vice President for Personnel. The Company explains that the supervisors did not fire the grievant at the time of the assault because they lacked the authority to do so - as only the industrial relations and personnel department possesses that power. This may be so as a matter of internal policy and procedure between and amongst the supervisory and executive personnel of the Company. But the rule explicitly provides to the contrary. It states that the power to discharge, indeed immediately, is vested with the supervisor. Therefore despite any variation there-
from within the ranks of management, the Union, its steward and the grievant were entitled to believe that supervisors were authorized to effectuate discipline, including discharge, and logically therefore, were similarly authorized to resolve any dispute on a lesser basis. For there can be no real quarrel with the conclusion that if, as the rules provide, a supervisor has the power to fire offending employees, he is equally cloaked with the apparent authority to waive that power or to reach a settlement without exercising that power, both of which bind the Company.

I am satisfied that the results of the meeting in Supervisor Wells' office amounted to an authoritative decision by the supervisors to waive the imposition of the discharge penalty. That it was limited as they contend, merely to the maintenance of tranquility between the two employees so that both could work the balance of the shift without any further danger, is not persuasive. For if they intended all along to recommend discipline or discharge, there was no reason whatsoever for the grievant to be continued on the job for the balance of the shift, nor was there any need to bring about or participate in a rapprochement between the two employees. And if the supervisors doubted their authority to fire the grievant forthwith, but wished rather to conduct a further investigation together with a recommendation to higher Company representatives, they could and should have ordered the grievant to punch out and suspended him forthwith pending their investigation. Either course of action in my view, would have preserved the Company's right to impose discharge later. That right might well have
been preserved also had the supervisors done nothing but report the events to higher management the next day for action. As I see it, despite the rule for immediate discharge, a delay until the next day pending an investigation and consideration of higher management would be neither prejudicial to the grievant nor inconsistent with the purpose and intent of the rule. Instead, the supervisors conducted what amounted to a grievance meeting. They heard both employees present their version of the assault, with the presence of the shop steward. And the result of what they initiated -- the grievant's apology, the handshake between the two employees, and either the supervisors' assent or the failure to disclaim in response to the steward's assumption that a resolution had been achieved, can be construed only as an authoritative settlement.

Accordingly, though the Company may have had grounds to discharge the grievant if it had acted pursuant to its own rule, the action of the supervisors constituted a waiver of that right. And that waiver in the form of a settlement serves as a bar to the Company's subsequent attempt, the following day to impose the discharge penalty.

For the foregoing reasons the discharge of Norman Hardacker was improper. He shall be reinstated with back pay less any money he earned in gainful employment since the date of his termination.

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

Community and Social Agency Employees
Union, Local 1707, American Federation
of State, County and Municipal Employees,
AFL-CIO

and

Council of Jewish Federations and
Welfare Funds, Inc.

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

The discharge of Jacob Goldfein is reduced to a
disciplinary suspension. He shall be reinstated
forthwith but without back pay. The period of
time between his discharge and his reinstatement
shall be deemed a disciplinary suspension and
shall be so noted in his employment record. He
shall not receive the salary increment scheduled
for January 1, 1970 under Article XVIII of the
contract until, following his reinstatement he
completes an amount of active service equal to
the period of his suspension. In subsequent years,
for additional salary increments or adjustments,
under the contract, his anniversary date shall be
as of January 1.

DATED: December 19 1969
STATE OF New York
COUNTY OF New York

On this day of December, 1969, before me personally
came and appeared Eric J. Schmertz to me known and known to
me to be the individual described in and who executed the
foregoing instrument and he acknowledged to me that he execu-
ted the same.
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration
between
Local 107, International Ladies
Garment Workers Union, AFL-CIO
and
D'Armigene, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated March 15, 1967, as extended May 1969 to July 14, 1972 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Sandra Byer is not doing production work in violation of Article IX Section 2 of the contract.

DATED: December 1969
STATE OF New York )
COUNTY OF New York )

On this day of December, 1969, 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. A69-1373
In accordance with the Arbitration provisions of the Collective Bargaining Agreement dated March 15, 1967, as extended May 1969 to July 14, 1972, between D'Armigene, Inc., hereinafter referred to as the "Company," and Local 107, International Ladies Garment Workers Union, AFL-CIO, hereinafter referred to as the Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Is Sandra Byer doing production work in violation of Article IX Section 2 of the contract? If so, what shall be the remedy?

A hearing was held at the offices of the New York State Board of Mediation on November 25, 1969, at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The Union contends that Mrs. Byer is doing bargaining unit production work and that she and the work that she is performing belong within the Union's jurisdiction.

The Company asserts that the work performed by Mrs. Byer
is not production work within the meaning of Article IX Section 2 of the contract; that at the time of the NLRB certification election in 1963 and over the years thereafter, including the negotiation of the current contract extension, this work was excluded from the bargaining unit. The Company argues therefore that the Union is seeking in this proceeding what it failed to achieve when certified, and during subsequent negotiations.

The evidence supports the Company's position. The disputed work involves cutting samples; recutting mistakes, special custom orders (as to size and fit), and similar work in connection with small quantity orders. Article II reads:

**UNION RECOGNITION**

The bargaining unit covered by this Agreement consists of all non-supervisory cutting workers (cutters and examiners) employed by the Employer. It is agreed that the Union represents a majority of such workers and that it shall be the sole and exclusive bargaining representative for all workers in the bargaining unit during the entire period of this Agreement. Neither the Employer nor any of its agents shall directly or indirectly discourage membership in the Union.

and Article IX Section 2 provides:

**DISTRIBUTION OF WORK**

2. No member of the Employer or supervisory employee or designer or any person outside the bargaining unit shall perform any work in any job covered by this Agreement, except in cases of emergency.

But neither in 1963 when the Union was recognized, nor at any time thereafter has the disputed work been performed by "cutting department workers." Nor has it ever been located in the cutting department. In 1963 the disputed work was
done by one Helen Skuderna. She was challenged by the Union when she attempted to vote in the certification election. That challenge was upheld by the Labor Board. I am satisfied that the Union's challenge relating as it did to Miss Skuderna's supervisory status, also established the work which she was performing as outside the jurisdiction of the "non-supervisory cutting department." At that time the disputed work was performed at an entirely different plant than the one in which the cutting department was located.

Thereafter, before Mrs. Byer assumed the work, it was performed by one Mary Rubbo, also a non-bargaining unit employee. And following the consolidation of the Company's New York City and Long Island plants, it was still not located in the cutting department, but rather in a "sample room" in a different wing of the building. The Union neither objected to nor grieved Mrs. Rubbo's status, nor claimed the work she did.

Mrs. Byer, following a period of work on production items in the cutting department during the first 30 days of her employment (which the Company concedes involved work within the Union's jurisdiction) thereafter assumed the disputed work in the sample room.

Based on the evidence before me I am satisfied that the latter work is not the same as what she did during her earlier employment in the cutting department. Instead, her subsequent assignment encompassed the very same work which had previously been performed by Skuderna and Rubbo. And again it was located in the "sample room," separate and apart from the cutting department.
In 1969 when the contract was extended following the strike of that year, the Union demanded that Mrs. Byer and another employee, one Cordillo, be added to the bargaining unit. The Company agreed to place Cordillo and his work within the unit but not Mrs. Byer.

Based on the foregoing, I conclude that there is a significant difference between the large quantity production work handled by the bargaining unit employees in the cutting department and the special, custom, or sample orders which have been the responsibility of non-bargaining unit employees since inception of the Union since 1963. I conclude also that the work performed by Mrs. Byer and claimed by the Union in this proceeding, is of the latter type. And that at the time of the Union's certification, during contract administration thereafter, and in the course of the contract extension negotiations, this work was neither included in nor intended as work belonging to the non-supervisory cutting department workers. Accordingly, its performance by a non-bargaining unit employee is not violative of Articles II or IX of the contract. Per force, inclusion of the disputed work within the bargaining unit is a matter for negotiation and not arbitration.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Deer Park Teachers Association
and
Deer Park Board of Education

In accordance with Article XV of the contract dated June 21, 1968 between the Deer Park Board of Education, hereinafter referred to as the "Board," and Deer Park Teachers Association, hereinafter referred to as the "Association," the Undersigned was designated as the Arbitrator to hear and decide, under the conditions set forth in the 3rd Stage-Advisory Arbitration of Article XV, the following stipulated issue:

Was there a violation of Article VI Section 1 of the contract when the Board assigned a teacher hired for a science position (which was posted as a notice of a vacancy) to the job of a Junior High School physical education teacher (which was not posted as a vacancy) in the JFK Junior High School.

A hearing was held at the offices of the American Arbitration Association on August 4, 1969 at which time representatives of the Board and the Association, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to present their respective cases.

During the course of the hearing the Arbitrator stated to the parties that the issue in dispute appeared to be potentially moot. He suggested therefore that the parties might wish to make an effort to resolve the dispute between them. Thereafter,
in accordance with the Arbitrator's suggestion, the parties met together in private without the Arbitrator's participation or presence.

As a result of that meeting the parties advised the Arbitrator that they have agreed to terminate this proceeding without prejudice to their respective positions in the event that a future similar controversy should arise.

DATED: August 13 1969  
STATE OF New York  
COUNTY OF New York  

On this 13th day of August, 1969, 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 0543 69
In the Matter of the Arbitration between
Local 702, Motion Picture Laboratory Technicians I.A.T.S.E., AFL-CIO

and

De Luxe General Laboratories, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated October 1, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The grievance in case #69A-2 does not fall within Section 17(c) of the Collective Bargaining Agreement. Accordingly the Union's claim regarding the present operation of the machines during lunch is denied.

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

Dated: April 1969
State of New York County of New York

On this day of April, 1969, 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 #69A-2
In the Matter of the Arbitration
between
Local 702, Motion Picture Laboratory
Technicians, I.A.T.S.E., AFL-CIO
and
De Luxe General Laboratories, Inc.

The stipulated issue is:

Does Grievance 69A-2 fall within Section 17(c)
of the Collective Bargaining Agreement?

It is stipulated that if the Arbitrator decides
that question in the negative, the Union's claim
regarding the present operation of the machines
during lunch is denied. If answered in the
affirmative, the parties shall negotiate condi-
tions for the operation of the machines during
lunch as provided by Section 17(c).

A hearing was held at the Company offices on February 28,
1969 at which time representatives of the parties appeared
and were afforded full opportunity to offer evidence and argu-
ment and to examine and cross examine witnesses. The parties
filed post hearing briefs.

The machines in question are three Duplex color positive
developing machines. The question for determination is
whether certain changes in equipment on those machines which
have occurred since the Award of Arbitrator Joseph E. McMahon
in case #67A-25, dated August 23, 1967, together with the
changes which were before him in that proceeding, make the
Duplex machines new, unusual and reconstructed equipment or
accelerated within the meaning of Section 17(c) of the con-
tract.

There is no dispute that since the McMahon Award the
machines have not been accelerated beyond the speed of 175,
which that Award held to be normal under the terms of the contract. So there has been no new acceleration in the speed of the machines, which standing alone, would now warrant the application of Section 17(c) of the contract. The main thrust of the Union's argument is one of cumulative effect. It argues that the accelerated speed of the machines plus the other changes weighed by Mr. McMahon, together with subsequent changes in certain parts of the machines, transform those machines into new, unusual and/or reconstructed equipment.

I have considered the changes which were before Mr. McMahon when he denied the Union's request for an increase in the Duplex machine crew complement, namely:

1. The increase in machine speed from 150 to 175.
2. An increase in the temperature of the developing solution.
3. Extra requirements of the IBM cards.
4. Extra supplies entailed in the use of "black bags," and dimmer lights.
5. Extreme difficulty in making double splices; together with the changes subsequent thereto, namely:
   1. Alteration of the film feed mechanism from sprocket gears to a friction system
   2. Installation of a different type gear clutch.
   3. A change in the position of the gear clutch.
   4. Installation of a jet spray washer ("bird bath")
   5. Installation of a squeege film drying system;
and I have concluded that the overall and basic function and operation of the Duplex machines, which are of 1955
vintage remain fundamentally unchanged, and consequently do not constitute new, unusual or reconstructed equipment within the meaning of Section 17(c) of the contract.

Accordingly the Union's grievance in case #69A-2 is denied.

[Signature]

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

In the Matter of the Arbitration
between

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

and

De Luxe General, Inc.

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

The 40 hour cumulative guarantee on a five day basis at straight time under Section 18 is a right and privilege to which the grievants are entitled. Therefore, the grievants, Messrs. Robert Rubinstein, Edward Hauch and Martin Garrett should have been paid that guarantee for the days Monday through Friday of the week in which Washington's Birthday fell in the year 1969. And in addition, under Section 5 of the contract, they are entitled to holiday pay for Washington's Birthday. Therefore they should receive a total of 6 days pay for that week. The Company is directed to make the appropriate payment.

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

Eric J. Schmertz
Permanent Arbitrator

DATED: September 1969
STATE OF New York )
COUNTY OF New York )

On this day of September, 1969, 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 #69-A9
In the Matter of the Arbitration "
between "
Local 702, Motion Picture Laboratory "
Technicians, I.A.T.S.E. "
and "
De Luxe General, Inc. "

The issue as stipulated by the parties is:

Are the three grievants, Robert Rubinstein, Edward Hauch and Martin Garrett entitled to 8 hours pay for Washington's Birthday 1969?

Hearings were held at the American Arbitration Association and the Laboratory on June 18 and 20, 1969, at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath and the contract time limit for rendition of the Award were waived and the parties filed post hearing briefs.

The parties recognize that as worded, the issue does not precisely define the dispute. Actually the grievants, who are Negative Developers on the midnight shift, received 8 hours pay for Washington's Birthday 1969. But they received only a total of only 40 hours pay for the week in which that holiday fell, because, though the holiday fell on Saturday of that week, the Laboratory worked only four of the week days (Monday through Thursday). The issue in dispute involves the Union's claim on behalf of the grievants for a sixth day of pay for that week, on the theory that the grievants were entitled to a guarantee of 40 hours work and pay, Monday through Friday,
whether or not the Laboratory worked each of those days, plus holiday pay for the holiday which fell on Saturday. So, more accurately the issue is:

Are the grievants entitled to a sixth day of pay (of 8 hours) for the week in which Washington's Birthday 1969 fell?

Under Section 5 of the contract, Washington's Birthday is an enumerated holiday for which employees shall be paid without being required to work, provided they report for work any day during the week in which it fell. What is pertinent is Paragraph (b) thereof which reads:

Should any of the foregoing holidays fall on a Saturday, employees shall be paid an extra day's pay for the week in which said Saturday holiday falls.

The Union contends that the grievants are "weekly employees;" that as such they enjoy a guaranteed work week of 40 hours; and that therefore for the week in question their compensation should total that basic guarantee plus the extra day's pay for that week for Washington's Birthday which fell on Saturday - or in other words a total of six days pay.

The Company concedes that the grievants are "weekly employees" but not among those weekly employees guaranteed 40 hours work or pay; that the Company has the right to operate its Laboratory on less than a five day week basis; that the grievants are entitled to pay only for time worked; and therefore the total pay they received for the four days worked that week plus the holiday pay equalled their full entitlement.

As I see it the pertinent contract provisions are Section 12(a) and (e), and Section 18. The former read:
12. Weekly and Hourly Employees:

(a) nothing herein contained shall be deemed to have modified the rights and privileges presently enjoyed by weekly employees. Employer shall not change the status of any employee from weekly to hourly or from hourly to weekly without the Union's consent.

(e) Employees on negative developing operations shall not be paid for time absent, but the pay so deducted shall be divided equally among the remaining employees of the operating crew affected by said absence.

and the latter:


The present night crew engaged in Negative Developing, Positive Developing, Make-up News Timers and Make-up News Printers at De Luxe will operate on the basis of a six-hour minimum daily call and a 40 hour cumulative guarantee on a five-day basis at straight time.

Though the Company concedes that certain "weekly employees", specifically certain senior Timers, Titlemen and similarly highly skilled employees, enjoy a full week's pay guarantee whether the Laboratory works a full week or not, it argues that the only contractual guarantee to the grievants is the apportionment under Section 12(e) of the pay of an absent Negative Developer among the employees of the crew who report for work and who are affected by the absence. From this the Company concludes that the grievants are entitled to pay only when they work and that no pay attaches to days they are absent whether or not they are absent on their own initiative,
or as here, because the Company decided to close the Laboratory. And Section 18 is considered inapplicable by the Company because the "newsreel work" under which it is headed, is no longer part of the Company's business.

The Union's interpretations are different. It points out that neither under Section 12 nor anywhere else in the contract is there a distinction between "weekly employees" such as Timers and Titlemen and the Negative Developers. And that absent any contractual distinction, it is improper for the Company to accord a weekly guarantee to the former group and deny it to the latter, especially in view of the explicit language of Section 12(a). Moreover the Union does not accept the Company's interpretation of the word "absent" in Section 12(e). It does not agree that an employee foreclosed from working because the Laboratory has been closed, is "absent" within the meaning of Section 12(e). And consequently the Union concludes that one of the "rights and privileges" presently enjoyed by the grievants, as weekly employees, is a guarantee of pay **except** when they are absent within the meaning of Section 12(e) of the contract.

Alternatively the Union claims that the 40 hour weekly guarantee as set forth in Section 18 of the contract is a right and privilege which the grievants enjoy as weekly employees because they presently qualify under the conditions and terms of that section; or, having undisputedly once been covered by Section 18, they may not now be deprived of their rights thereunder without the Union's consent to a change in their status (per Section 12(a)) even if the conditions of
Section 18 are now not present in the Laboratory. Or in other words, without the Union's consent any rights the grievants enjoyed because of their work on "newsreel makeup" they shall continue to enjoy as "weekly employees" whether or not there has been a material change in the nature or quantity of the Company's newsreel work.

In my view, the grievant's claim for a sixth day of pay for the week in question, turns simply on whether they have a guaranteed regular 40 hour work week. If so they would be entitled to that guarantee for Monday through Friday of the week in question, even though the Laboratory was closed on Friday; plus a day's pay for Washington's Birthday which fell on Saturday. If not, they were properly paid for the work performed plus the holiday.

I agree with the Union's interpretation of the word "absent" in Section 12(e). Since that Section draws a distinction between those members of the operating crew who are at work, and any employee thereof who is "absent," it must refer to the circumstances where the Laboratory is in operation and the "absent" employee is not at work due to his own act, volition or incapacity. But clearly it does not apply to a circumstance where an employee is ready, willing and able to come to work, but cannot do so because the Laboratory has been closed. This is not to say that under proper circumstances the Company does not have the right to close down its operations; but rather that if it does so, it cannot claim that the employees who are unable to work thereby are "absent" within the meaning of Section 12(e). But Section 12(a) and (e)
are not enough in and of themselves to substantiate the Union's claim that the grievants, as "weekly employees," are entitled to a full week's pay guarantee. Rather, because Section 12(a) only guarantees them a continuance of the rights and privileges enjoyed by "weekly employees" and immunity from a change in status without the Union's consent, the question of whether a guaranteed work week is among those protected rights and privileges, remains unanswered by Section 12.

The only pertinent contract language on the matter of a guaranteed work week is Section 18. Therefore, in my judgment, the grievants' right to any such guarantee over and above the holiday pay depends on whether Section 18 applies to them.

There is no dispute that Section 18 once actively applied to the grievants. It was during the years that the Company handled a large and regular volume of daily or twice weekly newsreel makeup work. At that time, as is now the case, the grievants were members of the night crew, classified as Negative Developers and worked at this Laboratory. So as of May 23, 1966 when the present provisions of Section 12(a) and (e) were negotiated the grievants did enjoy the weekly pay guarantee of Section 18. As "weekly employees" they were not then distinguished under that category from other "weekly employees" such as Timers and Titlemen, etc. The Company made the distinction only when this type of newsreel work was either discontinued or fell off sharply, some time in January 1968. The Company then deemed that its obligations under Section 18 to the Negative Developers were no longer applicable. Its present
position that Section 18 does not apply is based on the same conclusion - that because there is no newsreel work of the type and quantity previously in existence, the grievants, who may have enjoyed rights thereunder during an earlier period and under different circumstances, lost those rights when those circumstances changed.

Factually the evidence supports the Company's assertion that any present newsreel work is markedly different in type and quantity from what the grievants handled prior to January 1968. It is now a very small part of their regular assignments; whereas previously it was a significant part of their work. It appears that the total quantity of any work which could be classified generally as "newsreel" involves no more than a total of a few minutes over any four week period. And while this may well be a "newsreel" assignment I am not prepared to conclude that it constitutes the type or quantity of the "newsreel makeup" work contemplated by Section 18. Ordinary logic might therefore produce a conclusion that the rights and benefits under Section 18 are vitiated by the absence of conditions contemplated by that Section. But I am constrained to find that Section 12(a) of the contract dictates a different result.

Until January 1968 there is no dispute that the grievants were covered by and enjoyed the benefits of Section 18, and were as much "weekly employees" as any others so classified. Under the contract in effect in January 1968, when the Company's newsreel makeup work came to an end, Section 12(a) of the contract was the same as it is now. It meant then that for the life of that contract there could be no modification
in the rights and privileges enjoyed by weekly employees and any change in their status required the Union's consent.

It is undisputed that at no time during the remaining months of that contract, following the end of the newsreel work, did the Union consent to any change in the status of any of the employees covered by Section 18. So for the balance of that contract, despite the significant change in the newsreel makeup work, the rights and privileges of the employees under Section 18 and their status were not modified. And I am unable to find that there was any change thereafter during the negotiations or following the execution of the present contract. Section 12(a) was repeated in the present contract, thereby preserving the rights and privileges that the grievants and all other weekly employees enjoyed previously. And their previous status, unchanged because of the absence of any Union consent, was similarly perpetuated. Also, significantly I believe, Section 18 was repeated in the new contract, even though the newsreel work under which it is headed, at least in the Company's view, was terminated almost 11 months earlier. I can only conclude that it found its way into the new agreement, not just to substantively cover the possibility of a resumption of the newsreel work, or as a mere oversight, but as a continued recognition of the fact that the certain enumerated employees thereunder enjoyed rights protected by Section 12(a), which had not been changed over the 11 month period between the predecessor contract and the present agreement, nor changed under the current contract because the Union had not consented to any change in the status of those employees.
In short, the change in the newsreel work was not enough to change their status, simply because Section 12 (a) requires the Union's consent to effectuate that change; and from the time that Section 18 did apply, there has been no such consent. And obviously, for an employee's status to be maintained, there can be no diminution or deprivation of any of the rights or privileges which attach to that status.

Therefore though the condition for which Section 18 was originally intended may no longer be present, the rights and status of the employees, including the grievants, which they acquired thereunder when it was actively applicable, are maintained not only by the continued inclusion of Section 18 in the present contract, but by the express protection of Section 12(a).

Accordingly the grievants are entitled to the 40 hour cumulative guarantee on a 5 day basis at straight time set forth in Section 18, and should have received 5 days pay for Monday through Friday of the week in which Washington's Birthday fell on a Saturday, and in addition they should have received holiday pay for Saturday as a sixth day. The Company is directed to make payment thereof.

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between
Local 702, Motion Picture Laboratory Technicians, I.A.T.S.E.
and
De Luxe General, Inc.

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

There was just cause for the three day suspensions of George Mottola and Rudy Simolin. There was not just cause for the three day suspension of Vincent Licari. Licari's suspension is reversed and he shall be paid for the time lost.

The Arbitrator's fee shall be borne 2/3 by the Union and 1/3 by the Company.

DATED: October 1969
STATE OF New York )
COUNTY OF New York ) ss.: On this day of October, 1969, 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 #69A-13
In the Matter of the Arbitration between
Local 702, Motion Picture Laboratory Technicians, I.A.T.S.E.
and
De Luxe General, Inc.

The stipulated issue is:

Was there just cause for the three day suspension of George Mottola, Vincent Licari and Rudy Simolin? If not, what shall be the remedy?

A hearing was held at the Company offices on September 9, 1969, at which time representatives of the Company and Union appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath and the contractual time limit for the rendition of the Award. Post hearing briefs were filed.

The three grievants were suspended (together with seven others whose suspensions are not contested by the Union) for refusals to work overtime on Friday, February 21, 1969.

The Company contends that grievants Licari and Simolin agreed to work that day, as evidenced by their names appearing on a list prepared by the working foreman; but that they refused and failed to do so despite requests by the Company, and warnings of disciplinary action. The Company asserts that grievant Mottola was directed to report for work that day (as the Company needed one more employee in addition to those nine whose names appeared on the foreman's list) but
that he failed and refused to do so despite the Company's repeated requests and warnings of disciplinary action.

The Union contends that the names of Licari and Simolin were placed on the foreman's list without their authorization; specifically, that Licari, when asked by the foreman if he would be willing to work the overtime, responded that he first would have to check with his wife, and therefore neither gave nor was requested by the foreman for final answer; and that Simolin was not asked at all. The Union's position with regard to Mottola is that his selection was mandatorily imposed on him, contrary to the voluntary selection procedure agreed to by the Union and the Company for the compilation of the foreman's list.

These are disciplinary grievances, with the burden on the Company to establish the grievants' wrongdoing. I am persuaded that the Company has met this burden with regard to Mottola and Simolin but not in the case of Licari.

I agree with the Company's assertion that there is a presumption in favor of the accuracy of the list prepared by the working foreman. The presumption is that the names appearing thereon are of employees who voluntarily agreed to work the day in question, as solicited by the foreman. And having voluntarily agreed, the employees are so bound. But obviously the presumption cannot be irrebuttable.

Licari testified that when asked if he would work the overtime, he responded that he would first have to check with his wife to see if they had other plans. He stated that thereafter he did not tell the foreman that he would work,
nor was he asked for a final answer; and that accordingly his name, indicating an agreement to work, was improperly placed on the list. Standing alone this testimony rebuts the presumption. The Company offered no direct evidence contrary to Licari's testimony. The working foreman who prepared the list did not testify (and I am not persuaded that merely because he is a member of the Union he would not have testified truthfully if called) nor could any other Company witnesses place Licari (who worked the night shift) at any of the meetings between Company representatives and the affected employees at which the latter were urged, at the risk of disciplinary action, to perform the overtime work. So I find no direct evidence which would impute to Licari knowledge that his name was on the list and/or notice to him that he had better work or be disciplined. Therefore the Company has not established to my satisfaction any wrongdoing on the part of Licari.

The evidence is different with regard to Simolin. He worked the day shift. Testimony by the Company placed him at meetings, with the other affected day shift employees, at which those employees were requested and directed to work pursuant to the list compiled by the foreman, and were warned of disciplinary action if they refused. That testimony together with the presumption in favor of the foreman's list stands unrebutted. Simolin did not testify at the hearing (he is now retired). The Union offered only secondary evidence, namely testimony that Simolin advised
the Union that he was never asked by the foreman if he wished to work overtime. Weighing the evidence on this point, the testimony advanced by the Company is obviously more probative. Accordingly, I conclude that Simolín placed his name on the list, thereby agreeing to work, and thereafter despite requests by the Company and a warning of disciplinary action, refused to work the overtime. Therefore his three day suspension is upheld.

I find it immaterial whether or not Mottola's assignment was consistent with the Union-Company agreement on how the men would be selected. Confronted with a directive from the Company to work the day in question, Mottola should have obeyed that order, and grieved had he or the Union thought the order improper. This is such a well settled rule of industrial relations that it need not be reiterated here. And the conditions which permit certain exceptions to that rule were not present in the instant situation. So I must reject the Union's contention that Mottola had a right to refuse the assignment because his selection was not on a voluntary basis, or in accordance with agreed upon seniority. In doing so I make no decision one way or the other on the question of whether the assignment of overtime work is voluntary or may be mandatorily ordered; but only that a directive to work should be carried out, reserving to the grievant and to the Union the right to grieve the propriety of such a directive. Accordingly, Mottola's three day suspension is upheld.

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between
Local 702, Motion Picture Laboratory Technicians, I.A.T.S.E.
and
DuArt Laboratories

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

The grievances involved in these cases (69A-16 and 69A-17) are not arbitrable because they were not filed for arbitration within the time limit required by Section 15(b) of the contract.

The fee and expenses of the Arbitrator shall be borne by the Union.

Eric J. Schmertz
Permanent Arbitrator

DATED: October 1969
STATE OF New York )
COUNTY OF New York )

On this day of October, 1969, 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.

Cases 69A-16
69A-17
In the Matter of the Arbitration
between
Local 702, Motion Picture Laboratory Technicians, I.A.T.S.E.
and
DuArt Laboratories

The threshold issue is procedural, namely, whether the grievances filed by the Union are barred from arbitration on the merits by Section 15(b) of the Collective Bargaining Agreement.

A hearing was held at the offices of the American Arbitration Association on September 24, 1969 at which time representatives of the above named parties appeared and were afforded full opportunity to present their respective cases on the arbitrability issue. The Arbitrator's oath was expressly waived.

The Union's grievances were set forth in telegrams dated May 21 and 22, 1969 to the Company which read in pertinent part respectively as follows:

We are in dispute with DuArt Laboratories ... regarding C Printer in Color Printing Section.

We are in dispute with DuArt Film Laboratories ... regarding the elimination of a foremanship in Printing Room.

By letter dated June 25, 1969 to the Undersigned, Counsel for the Union referred these grievances to arbitration.

Section 15(b) of the contract reads:

Should the employer and the Union be unable to resolve the dispute within five working days after written notice of said dispute has been served, either party may refer the matter to Eric J. Schmertz, Esq., as permanent arbitrator.
In any event, the request for arbitration to the arbitrator must be made within thirty (30) days after the giving or receipt of written notice of such dispute, otherwise the right to arbitrate is waived. The permanent arbitrator shall render his decision within ten (10) days of the final hearing of the dispute. (Under-scoring supplied.)

Based on the foregoing contract language I have no choice but to uphold the Company's contention that the grievances are not arbitrable. There is no doubt that the "30 days" referred to in Section 15(b) means calendar days. For elsewhere in the contract where the parties intended a time limit to include only working days, or where Saturdays, Sundays and holidays are excluded, the language so states explicitly.

In the instant case the grievances were presented to the Company on May 21 and 22 respectively, but were not referred to arbitration until June 25, or beyond the 30 calendar days required by Section 15(b).

The language of Section 15(b), which the parties negotiated as part of their Collective Agreement, is not only clear but mandatory. It leaves no discretion in the hands of the Arbitrator, and allows for no exceptions. It states that the requests for arbitration must be made within 30 days after notice of the dispute. And it goes on to provide that failure to do so in any event constitutes a waiver of the right to arbitrate. The phrase "in any event" ousts the Arbitrator from considering the reasons or even extenuating circumstances which may have prevented the Union from filing for arbitration within the time limit.
I remind the parties that the language of Section 15(b) is what they themselves negotiated, and what they agreed to as part of the contract bargain. As the Arbitrator under this contract I am bound to the terms and conditions negotiated by the parties. It is my task to interpret and enforce those terms and conditions, not to vary them. In the face of the explicit language of Section 15(b), for me to allow these grievances to be arbitrated on the merits though they were not filed for arbitration within the required 30 days, would be to change the provisions of Section 15(b) of the contract, no matter if I felt the Union's explanation to be reasonable.

With the foregoing decision, Section 15(b) has been interpreted and applied as requested by the Company. Therefore there is no doubt as to the meaning and application of that Section in this case and in connection with the processing of future grievances to arbitration during my term as Permanent Arbitrator. In short, the integrity of Section 15(b) has been, and will continue to be preserved.

With that done it seems to me that the Company might be amenable to a recommendation, applicable solely to the two grievances involved in this dispute. It is, without any change in my Award so far as the meaning of Section 15(b) is concerned, but in the interest of amicable labor relations, that these grievances now be arbitrated on their merits, without creating any procedural precedent whatsoever for the future. As this recommendation in no way alters my Award, it is for the Company, in its discretion, to decide whether it wishes to agree.
If not, arbitration of the instant two grievances is barred. If willing to accept the recommendation the Company would, solely for these two grievances, waive the application of my procedural Award.

In my view, since the Union's delay was not excessive, but only 3 and 4 days beyond the limit, the cause of sound labor relations might best be served if, in this instance, the Company agreed to permit these matters to be arbitrated on their merits; with the clear understanding that the Union is hereafter bound without exception to the time limits of Section 15(b).

I ask the Company to let me know what it wishes to do.

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

I find there is no presently effective agreement, either under the contract or otherwise, covering the performance of tape punching work. Accordingly I direct that the parties meet and attempt to negotiate a written understanding covering which employees are to be assigned to that work and their rate of pay. The parties shall have 30 calendar days in which to negotiate that agreement. If an agreement is reached, its wage provisions shall be retroactive to the date of the instant grievance. If an agreement is not reached within 30 calendar days the matter shall be referred back to me for a final and binding determination. Pending the negotiation of an agreement or my determination, the tape punching work shall continue to be performed by the expediters at the expeditor rate of pay.

The Arbitrator's fee and room rental expense for the first hearing, which was adjourned at the Company's request, shall be borne by the Company. The balance of the Arbitrator's fee and the room rental expense for the second hearing shall be shared equally by the Company and the Union.

Eric J. Schmertz
Permanent Arbitrator

DATED: November 2, 1969

STATE OF New York
COUNTY OF New York

On this 2 day of November, 1969, 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 # 69A-14
In the Matter of the Arbitration between

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

and

DuArt Film Laboratories, Inc.

The stipulated issue is:

Under the circumstances presented, may a man classified in one job occupation regularly perform duties of another job occupation? If not what shall be the remedy?

Hearings were scheduled or held at the offices of the American Arbitration Association on September 11 and October 20, 1969. Representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath and the contract time limit for rendition of the Award were expressly waived by the parties.

Specifically, the dispute involves the performance of "tape punching" by employees classified as "expediters."

It is conceded that tape punching is not one of the regular duties of the expeditor classification. The evidence discloses, however, that that particular assignment has been performed by the expediters at the expeditor rate of pay, since that classification was established in 1959. The Company asserts that its assignment of tape punching to expediters was and has been in accordance with an oral agreement reached in 1959 between the Company and the then Union leader-
ship; that the tape punching work has been performed primarily by expediters in accordance with that agreement consistently over the years; and that the Union is bound by it.

It is the Union's position that it knows of no such agreement; that a search of its files fails to disclose any notation or record of such an understanding with the Company. It contends that, as at certain laboratories cited, tape punching should be performed by employees of the timing department or by the Control Strip Cutters (Miscellaneous) at the rate of $3.34 an hour. (The expeditor rate, at which the employees are presently paid for tape punching, is $3.12 an hour.)

I conclude that there is not now an effective agreement, either under the contract or otherwise, covering the performance of the tape punching work.

Not only is it conceded that the work of tape punching is not one of the normal or regular duties of the expeditor classification, but the contract does not place it within any other classification or department. Consequently, except in situations involving a temporary transfer (which is not the case here) the assignment of tape punching work on a regular basis, to any job classification under the contract, including the expediters, changes the classification to which that duty is attached. But except for certain circumstances, also not present here, Section 4(h) of the contract prohibits changes in existing classifications "without the written consent of the Union."

The Company's reliance on an alleged 1959 agreement with
the Union for the assignment of tape punching to expediters is evidence of the Company's recognition that it could not unilaterally and regularly assign to any particular job classification, a duty not encompassed therein. I am persuaded that an oral understanding was reached in 1959 between the Company and the then Union leadership which authorized the performance of tape punching work by expediters at the expeditor rate of pay. I find that understanding to be valid and binding for the years that the employees worked under it, or until the Union complained by its instant grievance. In other words, though oral it was not void. But it is no longer enforceable. Because Section 4(h) of the contract requires the written consent of the Union to changes in classification, that oral understanding may now be avoided by the Union.

This places the tape punching work in a "no man's land." It is no longer properly assignable to the expediters because the Union's grievance rescinds the prospectively unenforceable 1959 oral agreement. And neither the contract nor any other agreement permits its regular assignment elsewhere. Therefore, as the parties did in 1959, albeit imperfectly, and apparently as the employers and the Union have done at other laboratories throughout the industry, the parties must now negotiate an effective understanding covering the handling of the tape punching duties.

Accordingly I direct that the parties meet and attempt to negotiate a written understanding covering which employees are to be assigned to tape punching work and the rate to be paid for that work. The parties shall have 30 calendar days in
which to negotiate that agreement. If an agreement is reached its wage provisions shall be retroactive to the date of the instant grievance. If an agreement is not reached within 30 calendar days the matter shall be referred back to me for final and binding determination. Pending the negotiation of an agreement or my determination, the tape punching work shall continue to be performed by the expediters at the expeditor rate of pay.

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between
Motion Picture Laboratory Technicians
Local 702, I.A.T.S.E.
and
DuArt Film Laboratories, Inc.

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

Based on an agreed upon arrangement, the complement of the Gevachrome machine shall be three men.

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

DATED: December 1969
STATE OF New York )
COUNTY OF New York ) ss.:

On this day of December, 1969, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration
between
Motion Picture Laboratory Technicians
Local 702, I.A.T.S.E.
and
DuArt Film Laboratories, Inc.

Opinion

The stipulated issue is:
What shall be the proper complement of the Gevachrome machine?

A hearing was held at the Laboratory on November 4, 1969 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath and the contract time limit for rendition of the Award. The Union filed a post hearing memorandum on November 20, 1969.

The Union contends that the Gevachrome machine should be operated at all times with three men. The Company concedes that three men are necessary when the "applicator" on the machine is used, but that when the machine is run without utilizing the applicator, only a crew of two is needed.

The Company asserts that the Gevachrome machine, when operated without the applicator, is no different than the Ektachrome machine (Pako) which runs with a crew of two, pursuant to the arbitration decision of July, 1966 of my predecessor, Mr. McMahon.

The Union argues that because the Gevachrome machine does have an applicator it is different from the Ektachrome and the
McMahon Award therefore is not controlling.

As I have indicated in prior decisions, any conflict between the provisions of the contract or an agreement between the parties and the actual complement needed to run a machine must be resolved in favor of the former. So, if the contract requires, or if the parties reached a prior mutual agreement on the use of three men on this type of machine, it is beyond my authority to fix the crew at two men even if that is all that is necessary to run the operation.

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

As I see it the question before me is whether this latter referred to agreement applies to the Gevachrome machine, on which the applicator is utilized only infrequently. I conclude that it does. The testimony discloses that at the time color developing was introduced, the parties negotiated an arrangement providing for a minimum crew of three men on color machines with applicators producing one strand of devel-
opened film. Mr. Vitello stated and Mr. Kaufman conceded that
this arrangement applied to machines with applicators, irre-
spective of the amount of time that the applicator was in use.

Accordingly, though two men may be all that is necess-
are to run the Gevachrome machine when the applicator is not
in use, I must find that the arrangement expressly agreed to
by the parties, which was not conditioned upon when or the
quantity of time that the applicator is used, preempts any
actual need to the contrary. Thus the instant case is dis-
tinguished from the facts before Mr. McMahon which led to
his Award of July 14, 1966.

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between
International Association of Machinists and Aerospace Workers, Lodge #1717, AFL-CIO

and

Eaton, Yale & Towne, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 1, 1968 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The evidence falls short of establishing the grievant's third violation of Shop Rule (n). Accordingly, the discharge is reversed, and the grievant, Ralph DiFronzo shall be reinstated. However, the reinstatement shall be without back pay, and the period of time between the discharge and the reinstatement shall be deemed a formal disciplinary suspension and so noted in the grievant's employment record.

DATED: January 16, 1969
In the Matter of the Arbitration between
International Association of Machinists and Aerospace Workers, Lodge #1717, AFL-CIO
and
Eaton, Yale & Towne, Inc.

Opinion

In accordance with the Arbitration provisions of Article XXIV of the Collective Bargaining Agreement dated September 1, 1968 between Eaton, Yale & Towne, Inc., hereinafter referred to as the "Company," and International Association of Machinists and Aerospace Workers, Lodge #1717, AFL-CIO, hereinafter referred to as the "Union," the Under-signed was designated as the Arbitrator to hear and decide the following stipulated issue:

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

A hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on December 19, 1968 at which time Mr. DiFronzo, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses.

The grievant was discharged for an alleged third viola-
tion of Shop Rule (n), of Article XVI of the contract. Said Rule reads:

The following breaches of regulations shall be subject to a warning before disciplinary action is taken:
(n) visiting, loitering or loafing during working hours.

The Union does not dispute, in this proceeding, the Company's practice of discharging employees after three violations of any of the Shop Rules (m) through (u). Nor does the Union dispute the fact that the grievant was disciplined twice before for breach of Rule (n); by written warning on October 12, 1967, and by a two day suspension of February 2, 1968. The Union only disputes the alleged third violation of May 15, 1968 which triggered the grievant's termination.

Therefore, the issue is joined over the events of May 15. If the grievant is guilty of the third offense, his discharge must be upheld, because the practice of terminating employees after three offenses is not challenged by the Union. On the other hand, if that offense is not established, per force he has not committed a third breach, and discharge would be unwarranted.

Because this is a discharge case, the burden is on the Company to establish the grievant's culpability to the satisfaction of the Arbitrator by clear and convincing evidence. Neither the Union nor the grievant must assume the initiative to prove the former's innocence.

By the evidence presented, the Company has established to my satisfaction that on May 15, the grievant was away from his work area several times during his shift, for more than normal periods of time. But the evidence falls short of proving that his absences were improper, or constituted loafing or loitering within the meaning of Shop Rule (n). The
Company has shown that the grievant was away from his work place, but it has not shown where he was and what he was doing. The Company concedes that if the grievant had been in the men's room or at one of the two tool cribs seeking a tool, or seeking a blueprint at the area where blueprints are filed, his absence from his work area would have been neither improper nor violative of Rule (n). The Company is unable to show that the grievant was not in one of these places.

Rather, the Company concludes, based on the grievant's two prior breaches of the Rule and the length of time he was absent from his work area, that on May 15 he left his work place to loiter or to loaf, or for some other purpose unrelated to his work assignment. This may well be so, but there is no hard evidence to support the conclusion. Frankly, I too am suspicious about the grievant's whereabouts. That he could have been in the men's room or obtaining a tool or a blueprint, are possible. But the number of times he was away; the length of his absences and the fact that when he returned to his work area he was carrying neither a tool, nor a blueprint, cast some doubt on these possibilities. Yet the evidence falls short of dispelling those possibilities, and I hold that the Company should do so to support the ultimate penalty of discharge. So though I am not prepared to find that the absences from his work area were proper or related to his work assignments, I am unable to conclude, based on the record before me, that he was away from his work area "visiting, loitering or loafing during working hours" as
proscribed by Shop Rule (n).

However, by no means do I hold the grievant blameless. I am not satisfied that he met his basic obligations as an employee and Shop Steward. The employment relationship is not a guessing game. The Company pays the grievant for a full and fair day's work. When, as here, the Company had good reason to question his whereabouts, and confronted him with an accusation of "loafing, etc." he should have accounted fully and precisely for his time. But when supervision first questioned him about his whereabouts, his answer was vague at best. And later, when he was told of his discipline for the Rule violation, he neither responded nor offered any explanation. To withhold a response; to equivocate; or to adopt a cavalier attitude regarding lengthy absences from his work area; so as to leave the Company no choice but to discipline him in order to test the propriety of his absences, is inconsistent with the special duty of a Steward to seek adjustment of disputes amicably, and incongruous with his status as an employee who is paid for work performed. And it adds further fuel to the fires of suspicion concerning his actual whereabouts.

Accordingly, though the evidence falls short of establishing a breach of Shop Rule (n), I am not prepared to reinstate him without some penalty. Accordingly, under my authority to fashion a remedy, I direct that the grievant's discharge be reduced to a suspension. He shall be reinstated without back pay. The period of time from the date of his discharge to the date of his reinstatement shall be deemed a
formal suspension and so noted in his employment record.

The grievant is warned that a continuation of excessive or unexplained absences from his work area would create, in the opinion of this Arbitrator, a strong if not irrebuttable presumption of a third violation of Shop Rule (n) warranting summary discharge; which because of the grievant's prior record, including the suspension imposed in this case, should be upheld by any subsequent arbitrator.

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

Trustees, Taxicab Industry Health & Welfare Fund and Trustees Taxicab Industry Pension Fund

and

Fathom Service Corp.

This proceeding was instituted by the Trustees of the Taxicab Industry Health & Welfare Fund and the Trustees of the Taxicab Industry Pension Fund, hereinafter referred to as the "Trustees", for a determination of the amounts that Fathom Service Corp, hereinafter referred to as "Fathom" owes said Funds, and for an order directing payment thereof.

On due notice a hearing was held at the offices of the American Arbitration Association on May 20, 1969 at which time representatives of the Trustees and Fathom appeared and were afforded full opportunity to present their respective cases.

Having duly heard the proofs and allegations of the Trustees and Fathom, the Undersigned, as Impartial Chairman under the Industry Contract, renders the following AWARD:

As of December 31, 1968 Fathom owed and still owes the Taxicab Industry Health & Welfare Fund the sum of $21,198.

For the period January 1 through April 30, 1969 Fathom owes the Taxicab Industry Health & Welfare Fund the sum of $13,076.63

For the period January 1 through April 30, 1969 Fathom owes the Taxicab Industry Pension Fund the
The aforementioned sums owed by Fathom to said funds are past due and conceded by Fathom. Accordingly Fathom is directed to pay the amounts due to said Funds forthwith.

Eric J. Schmertz
Impartial Chairman

DATED: May 20 1969
STATE OF New York ) ss.
COUNTY OF New York )

On this 20 day of May, 1969, 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.
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration between

International Union District 50
United Mine Workers of America

and

P. Feiner & Sons, Inc.

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

1. Juan Resto is entitled to and shall be paid holiday pay for July 4, 1969.

2. Hans Toborg, Joseph Richards and Henry Rosenbaum were not discriminatorily denied merit increases.

3. The discharges of Hans Toborg and Joseph Richards were not for just cause. They shall be reinstated with back pay and full benefits.

Eric J. Schmertz
Arbitrator

DATED: October 1969

STATE OF New York
COUNTY OF New York

On this day of October, 1969, 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 # A69-1070
The stipulated issues in dispute are:

1. Is Juan Resto entitled to holiday pay for July 4, 1969?

2. Were employees Hans Toborg, Joseph Richards, and Henry Rosenbaum discriminated against in the giving of merit increases?

3. Were the discharges of Hans Toborg and Joseph Richards for just cause? If not what shall be the remedy?

A hearing was held at the offices of the New York State Board of Mediation on October 6, 1969 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. Post hearing data was filed and the hearing was declared closed on October 10, 1969.

During the week in which July 4, 1969 fell, Juan Resto was on his honeymoon. Prior to leaving Resto notified the Company of the reason for and duration of his absence from work. The Company raised no objection; nor does the Company contend that his absence was improper. I find that Resto did what would customarily be expected of him in order to obtain the Company's approval for his absence and that the Company in no way indicated that the time off for the stated purpose was not approved. I conclude that under
those circumstances Mr. Resto's absence the day before and the day after the July 4, 1969 holiday was for an "acceptable reason" within the meaning of Article VI Section 2(a) of the Collective Bargaining Agreement. Accordingly he is entitled to holiday pay for July 4, 1969.

In June 1969 the Company granted merit increases to all employees except Hans Toborg, Joseph Richards and Henry Rosenbaum. The Union contends that the failure to grant merit increases to those three employees was discriminatory. The Company claims they were not granted increases because they did not merit them. It asserts that Rosenbaum's work is unsatisfactory; that Messrs. Toborg and Richards have a record of excessive absenteeism; and that Toborg is "accident prone."

The main thrust of the Union's case centers on Toborg who is the Union steward. The Union claims he was denied a merit increase because of his aggressive activity on behalf of the Union; that his absentee record includes hours on legitimate Union business; and to penalize him for that activity, by a denial of a merit increase, constitutes discrimination against him for his proper work as a Union representative. Further the Union disputes the propriety of any penalty to or adverse reflection on Toborg for his two lost time accidents which occurred, respectively in August 1965 and February 1966.

The attendance record of Richards contains significantly more absences than any other employee except Toborg. Also the Union does not refute the Company's claim that Rosenbaum's work has not been satisfactory. As work performance and attendance are proper matters for consideration in determining
an employee's merit, especially in the exercise of management's discretion in granting merit increases, I find that the Company's decision to withhold those increases from Rosenbaum and Richards was not discriminatory. Therefore the grievance on behalf of Messrs. Richards and Rosenbaum for merit increases is denied.

There is no showing by the Company that Toborg's accidents were willfully incurred or due to his negligence. Hence I find no basis upon which they should be held or used against him in determining his merit as an employee, even if, as a result, the Company's compensation rate was increased.

Toborg's absenteeism includes time spent on Union business. But the latter amount of time is only a relatively small portion of the total. The net amount of time that he has been absent or away from his work duties (excluding the hours spent on legitimate Union business) is significantly in excess of any other employee who received a merit increase. Therefore I cannot conclude that he was denied a merit increase because of absences (or a substantial part thereof) due to Union business. Rather, though the Employer candidly admits that Toborg has been a "thorn in his side" as a Union representative, I must conclude, as the Company asserts that the denial of the merit increase was properly based on the quantity of absences, other than for Union business. And, as it is well settled that an employee's attendance record may be considered in deciding his eligibility for a merit increase, the Company's determination that Toborg was ineligible because of the magnitude of his record of absenteeism, was not
discriminatory. Therefore Toborg's grievance for a merit increase is denied.

Hans Toborg and Joseph Richards were discharged because of "violations of Company rules and absenteeism." Though the Company claims that Toborg has violated many Company rules, the only one specified in this proceeding occurred on September 12, 1969 when Toborg used the wrong plant door to leave the factory. The charge of a rule violation against Richards is that he "accompanied Toborg." In addition, both men are charged with absenteeism.

It is well settled that violations of Company rules and absenteeism constitute grounds for disciplinary action including discharge. But both offenses - absenteeism and the type of rule violations involved herein - do not warrant summary dismissal. Instead they represent circumstances to which the well recognized rule of "progressive discipline" should apply. In other words, formal warning and/or suspension should first be imposed in order to place the employees on notice that their conduct is improper and to afford them an opportunity to rectify it. Thereafter, if there is no improvement in their record or conduct, discharge would be warranted. So far as the record before me is concerned, neither Toborg nor Richards were previously warned or disciplined, on a formal basis, either for violations of Company rules or for absenteeism. Accordingly, even if they are guilty of offenses charged, their discharges were premature and precipitous. On that basis I find it unnecessary to decide whether the Company rules, unilaterally promulgated by the Company, are vitiated by the pro-
visions of Article VII Section 5 of the contract. Toborg and Richards shall be reinstated with back pay and full benefits.

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

Local 471, International Union of Electrical, Radio and Machine Workers AFL-CIO

and

Ford Instrument Division
Sperry Rand Corporation

The Undersigned Arbitrator, having been designated in accordance with the Collective Bargaining Agreement dated June 3, 1967, and having duly heard the proofs and allegations of the above named parties, makes the following Award:

When the grievant, Joseph Vesey was laid off on February 7, 1969, the work then being performed by Leonard Green was essentially that of mechanical engineering and within the scope of the Senior Engineer classification. I find that Vesey possessed the technical, scientific and educational qualifications to perform that work. I need not decide whether a "tight schedule" imposed by the Air Force, or time to obtain inoculations for overseas work are relevant to determining "qualifications to do the work available," under Section 3(D) (1) of the contract because I do not believe that either represented an impediment to Green's replacement by Vesey. With engineer Jaffee as "lead engineer" (who performed the same type of work alone for a significant portion of the regular 35 day time lim-
it at an earlier installation) I am not persuaded that Jaffee and Vesey (as a replacement for Green) could not have performed and completed the available work within the shorter time limit as fixed by the Air Force. Within the two week period between notice of his layoff and the date of his actual layoff, Vesey could have substantially completed his inoculations, and even if the time to obtain inoculations is relevant, I do not consider it unreasonable to require the Company to retain Green an additional week, if necessary, in order to afford Vesey, who was otherwise qualified, a third week for the inoculations "to take."

Accordingly, the Company erred when it retained the junior employee, Green and laid off Vesey who possessed greater seniority. Mr. Vesey shall be reinstated and made whole for the time lost.

DATED: March 1969
STATE OF New York )
COUNTY OF New York )

On this day of March, 1969, 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.