In the Matter of the Arbitration between

Local 341 International Union of Electrical, Radio and Machine Workers, AFL-CIO

and

The Singer Company

Knitting Machinery Division

Award

and

Opinion

In accordance with Article XXIV of the Collective Bargaining Agreement dated June 19, 1968 between The Singer Company, Knitting Machinery Division, hereinafter referred to as the "Company," and Local 341, International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Has the Company violated the Collective Bargaining Agreement by assigning Production Dispatcher's work to employees outside the bargaining unit. If so, what is the remedy?

A hearing was held on February 3, 1969 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 Arbitrator's oath was expressly waived; the parties filed post hearing statements; and the hearings were declared closed as of February 28, 1969.

On the facts I agree with the Company's contention that the Dispatcher job is essentially clerical; that its duties are neither the same nor similar to those performed by a
former bargaining unit "inner plant Dispatcher;" that its duties are not the same as those presently performed by bargaining unit Expediter; and that its duties are among those previously handled by the non-bargaining unit personnel of the Production Control Group.

But despite these factual conclusions, I hold that under the contract, the Dispatcher job belongs within the bargaining unit.

Clearly the non-bargaining unit employees of the Production Control Group were not excluded from the bargaining unit because they did work now handled by the Dispatchers. Rather they were excluded because of other and more substantial duties which are incontestably managerial in nature. That the job duties of the Dispatcher are different from those presently performed by the bargaining unit Expediter and are significantly different from the assignments performed by the formerly active bargaining unit classification of Inner Plant Dispatcher, only means that the Dispatcher job is new. And therefore the question of whether it belongs within or has been properly structured outside of the bargaining unit, turns on its duties as a new classification and contractual recognition clause as it applies to those duties.

The Company relies on the exclusion in the recognition clause of "clerical (office) employees..."

I agree with the Company's interpretation that this exclusion is not limited to clerical employees located in "an office" away from the factory floor. Rather, though manifestly applicable to the clerical work force so located (such as in
the Company's front office) it extends as well to similar types of employees working elsewhere in the plant, even in departments on the factory floor (such as the secretary of the Inspection Department). In my judgment, the exclusion "clerical (office) employees" obtains to those employees who perform office type of clerical work. Or in other words those whose clerical duties fall within the scope of what is traditionally accepted as "office work," irrespective of where within the plant that work is performed. So, only if the duties of the Dispatcher are clerical within that meaning, has the Company acted properly in excluding that job from the bargaining unit.

As I see it the exclusion of clerical (office) employees applies to personnel and duties such as those of secretaries, file clerks, typists, office machine operators, bookkeepers, payroll employees and others of a similar class. I conclude that the Dispatcher does not fall within that class of employee. To my mind the distinction is both real and apparent. Though any number of explicit differences could be enumerated, I deem it significant that the end result or product of clerical work of a classical office type is the very clerical work itself; while the record keeping and reports of the Dispatcher are nothing more than tools in improving the manufacture and assembly of products on the factory floor.

The "clerical" duties of the Dispatcher are closely and inextricably related to the actual production and assembly of parts or the running of machines which produce parts, but relate only superficially if at all, to office type clerical work.
In short the Dispatcher is a key aide in the direct physical manufacture of the Company's product. By keeping and acting on certain records and reports, he assists in maintaining an efficient and uninterrupted schedule of production. As a means to this end, his work, albeit clerical, is vastly different in both nature and purpose than what is traditionally accepted as clerical work of an office type. And because it is the latter type which the Union sought to cover in the recent contract negotiations, the Union's failure to achieve that demand is not prejudicial to its position in this arbitration.

Consequently though the Company has proved the elements of its factual case, it has failed to establish a contractual basis for the exclusion of the Dispatcher job from the bargaining unit. As the duties of the Dispatcher are not clerical (office) within what I have deemed to be the meaning of Article I (Recognition) of the contract, the job of Dispatcher does not qualify as an exclusion thereunder.

Based on the foregoing I render the following AWARD:

The job of Dispatcher shall be placed within the bargaining unit and shall be filled in accordance with the terms of the collective bargaining agreement.

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.
In the Matter of the Arbitration between
Ford Instrument Division
Sperry Rand Corporation
and
International Union of Electrical, Radio & Machine Workers, AFL-CIO
Local 471 and Local 425, IUE.

Award
Opinion

This is a consolidated proceeding between Ford Instrument Division, Sperry Rand Corporation, hereinafter referred to as the "Company," and Locals 471 and 425 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter referred to jointly as the "Unions," involving a dispute arising out of the events of May 26, 1969.

In accordance with the appropriate arbitration provisions of the Collective Bargaining Agreements between the Company and the Unions, the Undersigned was designated as the Arbitrator.

A hearing was held at the offices of the New York State Board of Mediation on July 31, 1969 at which time representatives of the Company and the Unions, 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 and post hearings were filed.

The parties did not agree upon a precisely worded issue. Based on the record I deem the questions for determination to be:

Were the activities of the Unions (and the participating employees) on May 26, 1969 violative of the con-
tractual "no strike" clauses? If so should the Unions be enjoined prospectively from repeating those or similar activities?

The pertinent parts of the contractual "no strike" clauses in the two Collective Bargaining Agreements involved (respectively Local 471 and Local 425) read:

**Article XII**

During the terms of this Agreement, the Union agrees that there shall be no strikes, sit-downs, walkouts, slow-downs or any other cessation of work by the Union or by its individual members.

**Section 22**

The Union will not cause or permit its members to cause nor will any member of the Union take part in any sit-down or stay-in strikes, or sympathetic strike, or any other strike or stoppage, so long as the Employer complies with the terms of this Agreement.

There is no basic dispute over the meaning of these clauses. With the proviso "so long as the Employer complies with the terms of this Agreement" in the Local 425 contractual clause (a circumstance not alleged by that Union and hence not material in the instant case) the Unions and their members may not engage in any of the activities explicitly proscribed in those "no strike" clauses. Therefore it follows that any such action or activity by the Unions or their members, now, and during the life of the Collective Agreements, would be improper and are prohibited.

As the Collective Bargaining Agreements are matters of evidence before me in this proceeding, I have no hesitancy about making this interpretation and application of the "no strike" clauses of the contracts as an Award in this case. In my judgment that is the extent of my authority regarding
possible future, and therefore speculative, violations of Article XII and Section 22 of the respective Collective Agreements.

As the parties well know, the "no lock-out" and "no strike" provisions of Article XII and Section 22 are reciprocal protective devices. The former protects the employees from unwarranted disruption of their employment opportunity; and the latter protects the Company from interference with its normal work during the life of the contract. Disputes which might otherwise lead to either type of action are resolved instead only in the forum of the grievance procedure and arbitration.

Manifestly then, any waiver of, exception to or variation from the prohibitions against strikes or lock-outs (except for the previously mentioned proviso in the Local 425 contract) require the express consent or participation of the protected party. Therefore in the case of the "no strike" clause, any change or exception must be agreed to by the Company. And because the "no strike" clause (together with the reciprocal promise of "no lock-out") is traditionally viewed as a key element in the maintenance of industrial peace during the term of the contract, exceptions, variations or waivers must be limited to the specific and precise terms laid down, agreed to or accepted by the Company. In short, exceptions to the "no strike" clause may not go beyond those explicit steps which the Employer allows the Union or its members to take.

I find that in the instant case the Company did consent
to allow the Unions to engage in certain activities which, if engaged in without that consent might well be violative of the "no strike" clauses of the contracts. But on May 26, 1969 the Unions went materially beyond the bounds of that arrangement, and in so doing, whether unwittingly or not, encroached on the Company's right to protection under the "no strike" clauses.

Prior to May 26, 1969, the Company agreed to the following specific exception to the proscriptions of Article XII and Section 22. On a day by day basis, with prior notice to the Company, the Company released about five employee/members of each local Union whom the Company and the Unions agreed were less needed for work in the plant that day. Those employees then participated in demonstrations (in the form of picketing) led by the Unions, in front of the Sperry Rand corporate offices, in Manhattan, in opposition to the Corporation's announced plan to phase out and close down its operations. This arrangement embodied prior notice by the Union to the Company; prior agreement for each day involved on the employees to be released; and a release of about ten such employees on each occasion. It is these details, rather than the wisdom of the arrangements that are germane to this case. For whether or not the Company acted wisely in cooperating with the Union in the latter's planned picketing of the corporate offices the details of the arrangements nonetheless constituted agreed upon exceptions to the "no strike" clauses.

But the activity of the Unions and certain of its mem-
bers on May 26, 1969 went well beyond the scope of what the Company agreed to permit. It may well be that the Unions honestly viewed their activity that day as founded on the Company's prior authorization. If so the Unions erred. For on May 26, 1969 the Unions picketed the corporate offices in Manhattan without prior notice to the Company. The participating employees, although including many who had been released by the Company on prior occasions, were not released by the Company on or for May 26. And instead of involving about ten employees, 65 participated, and were away from their work duties for about 2-1/2 hours. In those significant respects the Unions went beyond the previously agreed upon exception to the "no strike" clauses. And because actual loss of production is not a necessary condition precedent to a breach of the "no strike" clause, whether or not production was lost during that period of time is immaterial.

As I have indicated, the Union may have concluded logically, that because the Company previously authorized similar types of demonstrations on a smaller scale under different conditions, it would not object to the events of May 26. But with this proceeding the Union is now on notice that the use of employees during their regular working hours to picket in front of corporate headquarters in Manhattan must conform to the detailed conditions under which the Company agrees to permit such activity as an exception to the prohibitions of Article XII and Section 22 of the contracts. If the conditions of that or any other exception are not followed precisely, as they were not on May 26, the activity of
the Unions would enjoy no immunity from the "no strike" clauses of the contracts and indeed would be violative of those clauses.

Accordingly the Unions are on notice that a repetition of such unauthorized activity would be improper. It would not only be violative of Article XII of the Local 471 contract and Section 22 of the Local 425 contract (again with the proviso "so long as the Employer complies with the terms of this Agreement") but also would be in violation of this Award.

DATED: September 26, 1969
STATE OF New York  )
COUNTY OF New York  )ss:

On this 26 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.
In the Matter of the Arbitration between

International Chemical Workers
Union Local 277

and

GAF Corporation

In accordance with the Arbitration provisions of the Collective Bargaining Agreement between GAF Corporation, hereinafter referred to as the "Company," and International Chemical Workers Union Local 227, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute involving the grievance #5-68 dated July 17, 1968.

A hearing was held at the offices of the New York State Board of Mediation in Albany, New York on January 7, 1969, at which time Mr. George Sedgewick, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. The parties expressly waived the Arbitrator's oath and the tri-partite Board of Arbitration, agreeing instead, to submit the dispute to the Undersigned as sole Arbitrator.

During the course of the hearing the parties reached a settlement of the dispute which was explained to the grievant and which he accepted. He signed an acknowledgment of his acceptance, under a written statement of the settlement, in the notes of the Undersigned. At the request of the parties and the grievant, the settlement is made a CONSENT AWARD as follows:
The positions of the parties regarding the merits of the case are preserved. The Company reiterates that the discharge was proper under the circumstances of the case. The Union takes the position that while some discipline was warranted, the penalty of discharge was too severe. Without prejudice to the respective positions of both sides, and without creating any precedent whatsoever for any subsequent case, the grievance of George Sedgewick, grievance #5-68, is settled on the following basis:

1. Sedgewick's retirement from the Company's employ shall be effective July 1, 1968.

2. His retirement, for pension and other benefits, shall be deemed as voluntary (as an active employee) as of that date, and all benefits of a voluntary retirement shall be accorded Sedgewick.

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 #AA68-92
With reference to the function of the case as presented:

The petitioner that the discharge was proper under the circumstances of the case. The U.S. takes the position that while some discipline was warranted, the penalty of discharge was for service — not a matter of the function of both sides to have created an incumbent which gains. For any subsequent case, the greater of the Federal grades go forward #3-6.

It is settled on policy basis. Federal retirement shall be effective July 1, 1965.

The retirement not being for the lesser of the two benefits, should be defined as voluntary as of that date, at all benefits of a voluntary retirement shall be decreed Federal.

Accepted.

George N. Seldin Jr.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the arbitration between

Local 761, International Union of Electric, Radio and Machine Workers, AFL-CIO

and

General Electric Company
Louisville, Kentucky

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

The warning and four week disciplinary suspension imposed by the Company on George D. Stapleton was for just cause and is upheld.

Eric J. Schmertz
Arbitrator

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. 52 30 0273-68
In the Matter of the Arbitration between

Local 761, International Union of Electric, Radio and Machine Workers, AFL-CIO

and

General Electric Company
Louisville, Kentucky

In accordance with Article XV of the Collective Bargaining Agreement dated 1966-1969 between General Electric Company, Louisville, Kentucky, hereinafter referred to as the "Company," and Local 761, International Union of Electric, Radio and Machine Workers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute involving the propriety of a warning and four week disciplinary suspension imposed on George T. Stapleton, hereinafter referred to as the "grievant."

Hearings were held in Louisville, Kentucky on March 18 and 19, 1969, at which time 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 expressly waived the Arbitrator's oath, and filed post hearing briefs.

The factual events that are relevant to this case arose out of the most recent election campaign for local Union officers. The particular events which resulted in the disciplinary action against the grievant occurred on the evening of March 8, 1968. The grievant was a candidate for Local
Union President. On that evening, during regular working hours, but outside of his regularly scheduled shift and without authorization, he entered the factory area of the Consumer Refrigerator Department for the conceded purpose of canvassing and soliciting votes amongst the employees then at work.

There is no serious quarrel with the fact that in so doing he violated a Company regulation which prohibited electioneering and distribution of literature within the plant during working hours (a regulation which the Company expressly reiterated to each of the candidates, including the grievant shortly before the election campaign began.) The grievant was not disciplined for this act, but rather for what the Company contends transpired thereafter.

The Company claims that soon after the grievant was observed in the factory area he was instructed by the Unit Manager to leave the building but refused to do so, stating that the Unit Manager had better "call plant protection," if he really wanted him to leave. When a Company guard was called, the grievant together with another accompanying employee again refused to leave, stating that the Company would "have to call more guards." During the time that followed, in which the guard sought additional assistance, the grievant and his companion moved to the rear of the building and disappeared. Later that evening, the Company asserts, the grievant reappeared in the same factory working area.

In addition to the foregoing, the Company charges that the grievant committed a further act of misconduct and insubordination by directing profane, abusive and threatening language and
statements to the Unit Manager when first asked to leave the premises.

In short, the Company deems the grievant's action on the evening of March 8, 1968, in the course of his confrontation with Company representatives, as constituting separately and cumulatively, "gross insubordination and gross misconduct," for which the disciplinary warning and suspension were justified.

The main thrust of the Union's case is that the grievant was singled out for a more severe penalty than ever before imposed under similar circumstances; and that because the Company failed to apply that discipline in a consistent and even handed manner, the grievant's penalty was discriminatory. Specifically the Union claims that during the election campaigns candidates for local Union officers have regularly entered factory areas during working hours and greeted, talked with and solicited votes among the employees, without objection from supervision. In other words, the Company's policy against that type of electioneering was honored in the breach; and foremen and Unit Managers (some of whom had once been bargaining unit employees) were sympathetic to the needs of the candidates to "get around the plant" and "looked the other way." The Union cited circumstances in which other candidates who electioneered in factory areas without authorization were not disciplined, though some failed to leave the plant when told to do so.

In addition, the grievant and the Union on his behalf, dispute the Company's version of the critical facts. The use
of profane, abusive and threatening language by the grievant to
the Unit Manager is denied in its entirety. Also denied is the
Company's claim that the grievant flatly refused to leave the
building. Rather, it is asserted that the grievant merely
stated that he "would not disrupt production and would leave
the building shortly."

Regarding the confrontation between the grievant on the
one hand and the Unit Manager and guard on the other, it is the
Union's position that any abrasive aspects thereof were merely
part of a "show," put on by the grievant to structure an advers-
ary posture vis a vis management which he thought would gain
him votes among the employees. Or in other words, any defiance
of or disrespect to the managerial representatives was more
form than substance. And finally the Union argues that if there
is to be any penalty at all, the Company may not exceed a sus-
pension of one week because of the contractual provisions of
Article XII Section 3 and a past practice of imposing no more
than that penalty for a first offense of insubordination.

Certain industrial relation principles are so well settled
by a long line of arbitration cases, that they need only be
enunciated here, and require no explanation. An employee's re-
usal to carry out the reasonable instructions and directives
of supervision constitutes an improper defiance of supervisory
authority. Also, unless justifiably provoked, the use of pro-
fane, abusive, disrespectful or threatening language by an em-
ployee to his superior, is equally impermissible. Both are
classical examples of insubordination. Insubordination of that
type, is grounds for severe discipline up to and including dis-
charge. But such penalty will not be upheld unless it has been consistently and evenly applied to all employees who have committed that offense under similar circumstances.

As a discipline case and with the burden on the Company to establish its charges by clear and convincing evidence, the question therefore is whether the facts in the instant dispute, as applied to these well settled principles, support the Company's action. I conclude that they do.

The Union's assertion that the grievant did not use abusive and profane language to the Unit Manager and did not defiantly refuse to leave the factory when instructed to do so, is just not consistent with its concession that the grievant was putting on a "show" for the purpose of gaining votes. Indeed unless a sharp adversary situation was created between the grievant and supervision, the basic ingredient for a "show" from which the grievant could expect to gain the votes of militant members, would be missing. And without defiance or words challenging supervisory authority, an adversary climate would not emerge. For that reason, together with the unshaken testimony of the Unit Manager and the guard, I must conclude that the grievant did refuse, and persisted in his refusal to leave the building when twice instructed to do so. And I am satisfied that he made his refusal expressly known to the Unit Manager and the guard in the open presence of fellow employees. For the same reason I must conclude that the statements testified to by the Company witnesses, in which they said the grievant used abusive and profane expressions to the Unit Manager, are an accurate reflection of what in fact took place. Even if the grievant's
intent was to put on a "show," and hence did not really mean what he was saying, I am unable to excuse him. First of all in no other situation, involving no other candidate who solicited votes in the factory area during working hours, was there a dialogue of this type between a candidate and a supervisory employee. In not a single other situation, at least so far as this record is concerned, was there a comparable exchange between the candidate and a Unit Manager in which the former used profane, disrespectful, abusive and threatening language. So in that respect the instant situation is significantly different from other campaign activities by other candidates. But even more significant to my mind is the obvious fact that despite the grievant's private reservations about what he meant, his outward intent was to embarrass if not hold up to ridicule, this particular Unit Manager, in the eyes of the employees under the Manager's supervision. So, though it may have been an "act" by the grievant, it is undisputed that neither the Unit Manager nor the guard were privy to, agreed to, or acquiesced in it. I find no reason why they should not have taken the situation seriously. And if the outward intent was designed or served to undermine the authority of the Unit Manager or stimulate disrespect for him among employees under his supervision, its inconsistency with the normal relationship between superior and employee and hence its impropriety is manifest. In short, in order to gain election votes the grievant took the calculated risk of creating an abrasive confrontation with supervision. By doing so in a manner much sharper and signifi-
cantly different from the acts of other candidates at other
times, he must or should have known that that risk included
the possibility that the Company would respond with discipline.
And having assumed the risk, without the willing participation
or acquiescence of the Company, he may not now avoid the re-
sponsibility.

On a different but closely related ground, the grievant's
conduct was materially different from those prior examples
which the Union claims are similar. There is no dispute that
other candidates entered factory areas contrary to the Company
policy. But the evidence indicates that each time they were
instructed to leave they did so promptly and without any single
refusal, or they acted in such a way as to lead the Company to
believe that they had or would leave the premises. Such was
not the case with the grievant. He openly refused to leave
and defiantly persisted in that refusal when plant protection
was called. Therefore whether he ultimately left the plant is
immaterial. Also as distinguished from other incidents, there
is unrefuted evidence in the record that the grievant returned
to that factory area the very same evening; which can be con-
strued in no way other than a knowing disregard of the instruc-
tions he received earlier. In any event, no prior example ad-
vanced by the Union involved that latter circumstance. So I
cannot accept the Union's argument that the lesser penalties
(or the absence of penalty) which attached to certain prior
examples of electioneering, are applicable to the facts in the
instant case. As the facts are markedly different, the penalty
need not therefore be the same.
The Union's contractual argument that the penalty must be limited to no more than one week's suspension under Article XIII Section 3 of the contract, is just not supported by the language of that Section. What is set forth therein is the requirement that the Company provide an employee with one week's notice before imposing a disciplinary penalty "which is based upon the cumulative effect of written warning notices." To my mind that language applies to the "progressive discipline" type of infraction. It means that where the Company intends to impose a more severe disciplinary penalty not solely because of a single infraction, but based on a last violation together with prior infractions for which warning notices were given, the one week notice is required. But by its very language, Section 3 is limited to disciplinary penalties based on those cumulative warning notices. And therefore, other types of disciplinary penalties, namely those imposed for a new or single violation, and not based on the employee's prior disciplinary record, are excluded. The test in that event, in my view, is simply whether the Company's disciplinary action was for just cause, and Section 3 is inapplicable.

On the amount of penalty the Union takes the position that the Company is bound by past practice; that for a first offense of insubordination, the Company has consistently imposed, and therefore is bound by a penalty of no more than a one week disciplinary suspension. The Company concedes this practice only in part. It asserts that it has divided insubordination into two types - "simple insubordination and gross insubordination." That a one week disciplinary penalty applies to the
former, but the latter is subject to greater discipline including discharge. Though the record before me is quite sparse in providing examples of "simple insubordination," there is enough at least to persuade me that a distinction between two types of insubordination has been made. In 1966 an employee named Mallory was suspended for a month for the "gross insubordinate" act of refusing to carry out a work order, and in 1967 an employee named Downs was discharged for "gross insubordination." There was no Union challenge to the Company's assertion that in both cases the insubordination was the first committed by those employees. So while there may have been instances where only a one week suspension was imposed, it cannot be interpreted as a consistent and unvaried practice within the definition of a "past practice." Therefore, in the absence of a contract provision on the measure of penalty for any particular type of offense, (and there is no such provision in the contract between the parties here,) the general rules regarding insubordination must obtain.

Applying the general rule, I find it unnecessary to decide whether the grievant's conduct in this case was "simple insubordination" or "gross insubordination." Its substantive nature was severe and overt. And within the frame of the well settled rule for that type of insubordination severe disciplinary penalties up to and including discharge are proper, even for the first offense.

Accordingly I find no basis to fault the Company's decision to impose a disciplinary suspension of four weeks.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Local 282 IBT

and

Harris Structural Steel Company

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

The discharge of Carmelo Ventre was not for just cause. It 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.

Eric J. Schmertz
Arbitrator

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. 1330 0838 69
In the Matter of the Arbitration between
Local 282 IBT

and

Harris Structural Steel Company

The stipulated issue is:

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

A hearing was held at the American Arbitration Association on November 18, 1969 at which time Mr. Ventre, hereinafter referred to as the "grievant," and representatives of the above named Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The Company charges the grievant with absenteeism and an insubordinate outburst. These charges are the reasons for the discharge.

I do not find the grievant blameless, but I find the penalty of discharge to be too severe.

The grievant's attendance record is not one of chronic absenteeism. Absences upon which the Company relies occurred during the two weeks preceding his discharge. But those absences are well explained and appear not to be of a recurring nature. He was absent the entire week from August 26 to September 2 because of the illness of his wife, during
which time he was forced to care for his four children. He was again absent on Wednesday of the following week, September 3, apparently for the same reason. There is no evidence in the record which contradicts his testimony concerning his wife's illness and hospitalization. Also, though the Company asserts that during one of these two periods, he did not call in to advise he would be absent, it is not clear to which period the Company refers. And the grievant testified directly that he did notify the Company Time Keeper. The Company concedes that the grievant "usually does call in" and has been "pretty good" about notifying the Company when he is absent. Consequently I think there is a presumption in favor of his statement that he also called in prior to or during these two last periods of absence. So I am unable to attach as much seriousness to the grievant's absences as does the Company, particularly in view of his undisputed explanation and the fact that his absentee record is not, at least at this point, chronically excessive.

There is no doubt that the grievant lost his temper and used both disrespectful language and a disrespectful tone in his meeting with the Plant Superintendent on September 9. That meeting was called by the latter in response to the grievant's request for a leave of absence necessitated by his wife's illness, hospitalization and recuperation.

The grievant's outburst is not to be excused, but as an excitable man, he erroneously perceived a legitimate inquiry by the Company regarding the name of the hospital in which his wife was a patient, as an invasion of his private life.
I am persuaded that this angered him beyond a reasonable point, primarily because of his concern over his wife's health and the attendant disruption of his normal family life. That he should not have become so disturbed is obvious now, not only to an objective observer, but also to the grievant. He stated quite candidly at the hearing that he should not have become so excited; should not have argued disrespectfully with the Superintendent; though he still believes that the inquiry concerning the whereabouts of the hospital in which his wife was located, was not proper. As to the latter, he is wrong. But his intemperate outburst must be viewed in the context of the particular pressures on him at that time. As such it is just not enough to constitute the kind of insubordination for which the ultimate penalty of discharge is justified.

On the other hand some penalty is in order so as to put him on notice that he must hereafter control his temper not only in future dealings with Company representatives, but also with his fellow employees; and also as notice that while his present absentee record is not yet at an excessive point, an improvement is necessary to prevent it from reaching that point. Accordingly the penalty of discharge is reduced to a disciplinary suspension. The Company shall reinstate him without back pay and the period of time from his discharge to his reinstatement shall be deemed a disciplinary suspension.

[Signature]
Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
District 15 I.A.M.A.W.
-and-
Hertz Corporation

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

The discharge of Edward Schippan is upheld.

The discharge of Vito DiTuri is reversed. He shall be reinstated with back pay, less his earnings, if any, during the period since his discharge.

Eric J. Schmertz
Arbitrator

Acknowledgement:

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 same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 584, IBT

and

Hertz Corporation

Award

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

The discharge of Michael Randazzo is reduced to a suspension. He shall be reinstated but without back pay. The period between his discharge and his reinstatement shall be deemed a disciplinary suspension and so noted in his employment record. As explained in the attached Opinion, the grievant has the option of reinstatement either to his former position as a Utilityman or to an apprentice job in the Company's machine shop at the same rate of pay.

Dated: November 12, 1969

STATE OF New York )
COUNTY OF New York )

On this 12 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 # 1330 0831 69
In the Matter of the Arbitration between
Local 584, IBT
and
Hertz Corporation

Opinion

In accordance with the Arbitration provisions of the Collective Bargaining Agreement between Hertz Corporation, hereinafter referred to as the "Company," and Local 584, IBT, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute involving the discharge of Michael Randazzo.

A hearing was held at the offices of the American Arbitration Association on November 6, 1969 at which time Mr. Randazzo, 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 expressly waived the Arbitrator's oath.

The grievant, a Utilityman, was discharged by the Company following three accidents, the first two of which caused damage to Company trucks and the third, injury to himself. The Company blames the grievant for all three.

As a discharge case, the well settled burden is on the Company to prove the grievant's wrongdoing by clear and convincing evidence, and to establish that the penalty was justified. I see no reason why this burden and the standard of
proof required should be different in this case than in any other.

Under this test the Company's case is vulnerable because it relies essentially on allegations rather than direct evidence. This is not to say that what the Company alleges may not be true, but rather that it has not met its burden of proving the charges up to the standards required.

There is no dispute that the grievant was involved in at least three accidents. What is unproved is the Company's contention that all three were due to his carelessness. The Company submitted into evidence copies of the reports of the vehicular accidents of November 29 and December 11, 1968. Those reports, in and of themselves, do not establish the grievant's negligence, though they do indicate the extent of the damage. The Company offered no testimony or other evidence concerning how the accidents occurred or showing the grievant's responsibility for the accidents. Rather, the Company spokesman merely stated that as a result of an investigation by the Company and its underwriter, the grievant "was found at fault." But this is only a conclusion, not evidence. There is also testimony of a subsequent accident (not included among the specific three for which the grievant was fired) in which it was alleged that the grievant "side swiped" another truck. Yet again it was advanced not by a person who saw the alleged accident; nor even by someone who investigated it; but rather by one who merely heard of it. And absent other direct corroborating evidence, that kind of testimony
is not enough to impute liability or fault to the grievant.

The evidence in connection with the third accident is somewhat different. The grievant concedes that he was smoking a cigarette in a no-smoking area near gasoline tanks; that a flash fire developed, igniting his trousers and burning his leg, for which he was subsequently hospitalized. There is no doubt that this accident, serious as it was, was potentially much more serious, by endangering the Company's installation and the other employees. Clearly, the grievant's disregard of the no-smoking prohibition was a careless act, warranting punishment. But for two reasons I must conclude that the penalty of discharge is too severe.

First, as the Company has not proved the grievant's culpability with regard to the two prior vehicular accidents, those instances, upon which the Company relies in part, to support its decision to fire him, are not persuasive evidence of misconduct. And second, the Company did not refute the grievant's testimony that many other employees, including supervisory employees, smoke cigarettes in no-smoking areas, with impunity. In other words if there is a "no smoking" rule, not only should it be posted, as it is, but it must be enforced consistently and uniformly.

For all these reasons the grievant's discharge is reduced to a 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. But he should be aware of the fact that his discharge is not up-
held in this proceeding, not because I find him to be blameless for the accidents, but because the Company has not proved his culpability to the extent necessary, when it has the burden to do so.

Therefore the grievant is on notice that any further accidents, careless or negligent handling of equipment, violations of Company rules or any other misconduct, could constitute grounds for summary dismissal.

Also I wish to direct a suggestion to the grievant, because I perceive a basic incompatibility between him and his job as a Utilityman. Obviously, a directive separating him from that particular job is not within my authority. But I can and shall advance the idea as a piece of advice. I think it quite probable that if the grievant returns to his job as a Utilityman, as he has the right to do under this Award, he will soon find himself involved in new difficulties attendant to the driving and handling of the vehicles involved. And he may find himself discharged, for cause, without reinstatement rights; and hence without a job.

In the alternative I suggest that he give full and careful consideration to accepting a different job with the Company, specifically in the Company's machine shop, where he would learn a trade and be paid at a rate no less than what he would earn as a Utilityman. I believe his personality is better suited to work in the machine shop and that his future would be better protected if not enhanced by his acceptance of that assignment. The choice is with the griev-
ant. If he wants to return to his job as Utilityman, in accordance with my Award, he may do so. But I hope that upon reflection he will decide otherwise and choose the machine shop. If so the Company is directed to place him in the machine shop in an apprentice position at a rate of pay no less than what he would receive as a Utilityman. I solicit the Union's support for this recommendation and ask that it use its good offices to persuade the grievant to follow my suggestion.

ERIC J. SCHMERTZ
Arbitrator
The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated August 16, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Raymond Regiec was for just cause.

Award

DATED: March 27, 1969
STATE OF New York } ss.: 
COUNTY OF New York

On this 27 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 0594 68
In the Matter of the Arbitration between

United Papermakers and Paperworkers Local 800 AFL-CIO

and

Johns-Manville Products Corporation

Opinion

In accordance with Article XI of the Collective Bargaining Agreement dated August 16, 1968 between Johns-Manville Products Corporation, hereinafter referred to as the "Company," and United Papermakers and Paperworkers Local 800, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

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

Hearings were held at the Company office in Manville, New Jersey on March 17, 1969 at which time Mr. Regiec, 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 asserts that the grievant was discharged for insubordination; specifically using foul and abusive language to his supervisor, plus a prior disciplinary record which included several verbal and written warnings for various offenses.

The parties are in sharp disagreement over the precise
language which the grievant used; whether it was "shop talk" or personalized; and whether it was seriously intended or in jest. Also the Union contends that the issue turns solely on the alleged insubordination, because that was the reason set forth in the Company's notice of the grievant's discharge, and that the grievant's prior disciplinary record is not applicable.

It is well settled that the use of foul, abusive or contemptuous language by an employee, directed or personalized towards a superior within the employment relationship, constitutes insubordination. And it is equally well settled that a severe disciplinary penalty including the ultimate penalty of discharge is proper for any such offense, irrespective of the employee's prior employment history. Therefore the Company's action in discharging the grievant stands or falls on the charge of insubordination. If that charge is proved, the discharge must be upheld, and the grievant's prior disciplinary record is immaterial. If not, the Company would have failed to establish just cause for the discharge action.

There is no dispute that two incidents involving the use of some sort of objectionable language by the grievant took place between him and his foreman, Mr. Foland, during the third shift on June 22, 1968. For several reasons I find the foreman's testimony concerning the language used by the grievant more credible than the grievant's version. The grievant admitted during the course of his testimony that two exchanges occurred that evening, although during the processing of his grievance in the grievance procedure, he persistently denied the occurrence of the second incident. Moreover, he admitted
that he apologized to the foreman on both occasions, when the
foreman objected to the nature and tone of the language used.

Comparing the grievant's testimony concerning the lang-

uage he used, with that of the foreman, I find every reason
why the grievant should apologize if the language was of the
nature and type alleged by the foreman. But if it was as tem-
perate as the grievant claims, I very much doubt that the fore-
man would have demanded an apology, nor do I think an apology
on both occasions would have been normally warranted. There-
fore, by the grievant's own conduct, first in denying and
then admitting the occurrence of a second incident; and by
his apologies on both occasions, I must conclude that the
language he used was as recited by the foreman's testimony.
And without repeating it herein, that language was manifestly
profane and obscene.

I cannot accept the Union's contention that it was sim-
ply "shop talk." That phrase means the use of profane or un-
social language in the course of general conversation between
or amongst employees in a factory or even between employees
and supervision. But where that language becomes personalized;
where it is directed by an employee to his superior as an in-
dividual, and where it is hurled in an abusive contemptuous
or defiant manner, it becomes insubordination. Here I am
persuaded, the latter test has been met. To accept the fore-
man's version supports such a conclusion. Also the grievant
admitted that he thought the foreman was "on his back"
throughout the shift, and that he resented it. I consider
it doubtful in the extreme that if the grievant was of that
adversary view, and irritated as a result, his remarks on the second occasion would have been either non-personalized or in jest. Logic compels a different analysis - namely that the language was used in anger and was directed, on a personal basis, to the foreman.

On similar grounds I must reject the Union's contention that the exchange between the grievant and the foreman was merely "kidding around" or within an atmosphere of jest. This may have been true the first time it happened that evening. For there is some indication that on prior days, the foreman and his employees engaged in humorous banter which may have included "shop talk" language. But even if the grievant is given this benefit of the doubt, I find no way to apply it to the second incident nor can I therefore justify the grievant's conduct on that second occasion. When it happened the first time the foreman made it crystal clear that he objected to the language and considered it a personal attack. Indeed, as an indication of his unequivocal objection he then fired the grievant, and revoked the discharge only when the grievant apologized. So, if the grievant meant his words playfully I think of no set of circumstances which would have more forcefully disabused him of that notion thereafter. In short, he was placed on notice that a repetition of that type of language and the manner in which it was used was not to recur, and that his discharge was expressly revoked on that condition.

Therefore I think it both implausible and unsupported by the evidence to conclude that the second incident was either in jest or based on a misunderstanding by the grievant of the
foreman's attitude. Rather I see no alternative but to con-
clude that the grievant on the second occasion, wilfully
directed foul and abusive language at the foreman, on a per-
sonal and contemptuous basis. Hence if the first incident
did not meet the test of insubordination, the second most cer-
tainly did. And the second time it was not forgiven, nor
need it have been, despite the grievant's proferred apology.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Transport Workers Union of Philadelphia

and

Southeastern Pennsylvania Transportation Authority

The Undersigned Arbitrators, 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, Award, as follows:

Based on the evidence and the appropriate standard of proof, the condition of Robert Burton on September 7, 1968 while on duty was as charged by the Company and within the definition of Section 202(h) as defined by a well established line of arbitration cases between the parties here-to. Therefore the discharge of Robert Burton is sustained. The Chairman chooses not to write an explanatory Opinion.

March 27 1969

Eric L. Schmertz
Chairman

March 1969

Arthur Wilkins
Company Arbitrator
Concurring

March 1969

Ned LeDonne
Union Arbitrator
Dissenting

Case No. 14 30 0795 68
In the Matter of the Arbitration
between
United Papermakers and Paperworkers
Local 800 AFL-CIO
and
Johns-Manville Products Corporation

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated August 16, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

With respect to overtime for employees John Carlson and Francis Gannone, the Company did not violate the contract.

Dated: October 1969
State of New York  ss.: 
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 0719 69
In the Matter of the Arbitration between
United Papermakers and Paperworkers Local 800 AFL-CIO and
Johns-Manville Products Corporation

The stipulated issue is:

Did the Company violate the contract with respect to overtime for employees John Carlson and Francis Gannone? If so what shall be the remedy?

A hearing was held at the Company offices in Manville, New Jersey on October 7, 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.

The parties are in dispute over the substance of a "local department overtime agreement."

Article XXII Section 75 of the contract reads:

Overtime work shall be divided among employees in a given department in accordance with local department agreements. These agreements to be approved by the President of the Union and the Industrial Relations Manager. These agreements shall not be changed except by mutual consent. The record of all overtime shall be posted in the department. The overtime list will run perpetual.

There is no dispute that a written local department agreement was agreed to by the Union and Company on December 28, 1964. The pertinent part of that agreement, which applies to the Shipping Department (906) grants the employees of that Department a right to certain overtime work outside of the Shipping Department - namely clean-up work in the office
area of the plant, which is customarily done on Saturdays.

The parties recognize and agree that subsequent oral modifications of a written local department overtime agreement, or oral local agreements in lieu of those in writing, are enforceable under the foregoing contract clause. There is no dispute that several other departments handle their overtime assignments in accordance with oral agreements. And there is no effort in this proceeding to overturn the validity of such agreements. In the instant case both sides claim that the written agreement of December 28, 1964 was changed by a subsequent mutually agreed upon oral understanding, relating to the use of Shipping Department personnel on overtime for office clean-up work. But they disagree on the substance of what was subsequently discussed.

The Union claims that some time in August, 1965, the employees in the Shipping Department, through the Union, waived their right to claim clean-up work in the office areas on an overtime basis; agreeing instead that it be assigned consistently to the lead man ("Rocky"); with the proviso that such overtime work could be reclaimed by any member of the Shipping Department upon notice to the foreman. The instant grievance arose when grievant Gannone, after bumping into the Shipping Department some time in 1968 notified the foreman that he sought the clean-up work in the office areas on an overtime basis. Following denials of his request, the instant grievance was filed in April 1969.

The Company's version of the subsequent oral understanding is different. It contends that that understanding was
limited to a waiver by the Shipping Department employees of their right to claim the office clean-up work on an overtime basis and by their agreement to permit its consistent assignment to "Rocky," the lead man. The Company denies that the understanding included the proviso that Shipping Department employees could subsequently reclaim that work upon notice to the foreman.

The evidence on the scope and substance of the subsequent oral understanding is in sharp conflict and represents a standoff. The Union official who participated in the negotiations testified in support of the Union's position. A Company representative, who was the Union Shop steward at the time, and who also was present when the oral discussions took place between the Union and the Company foreman, testified in support of the Company's version of what occurred. Frankly, without any other direct evidence of what took place at that time, I am constrained to find that there was no "meeting of the minds." The Union may well have thought that a proviso allowing the Shipping Department employees to reclaim the overtime opportunity was part of the agreement; and the Company might well have believed that it was not. The discussions at that time between representatives of the parties appear to have been informal and casual, and now difficult to reconstruct precisely. So, though written agreements may be changed by subsequent mutually reached oral understandings, those subsequent understanding must be proved in order to be effective. Here there is insufficient proof, one way or the other, of the elements of the subsequent agreement, and hence its effective-
ness cannot be established. It follows that if there was no effective subsequent oral agreement, the written agreement of December 28, 1964 still obtains and was in effect when the circumstances giving rise to this grievance occurred. That written agreement under Section 5C reads:

Clean-up or overtime of general nature.
Lowest overtime man or men.

Under the foregoing, the lowest overtime man or men of the Shipping Department may claim office clean-up work on an overtime basis. The record indicates that for the period of time involved, the grievants (especially Gannone who was the only grievant to appear and testify at the hearing) were not the lowest overtime men on the particular Saturdays involved. They would have been reached for the office clean-up work if other men in the Shipping Department, lower on the overtime list, declined that work. One can only speculate whether those other employees would have in fact declined that work had it been offered to them in accordance with the written overtime agreement. It is just as likely that one or some of them would have accepted the work, as to decline it, had they then known that no effective subsequent oral understanding had been reached to change the terms of the earlier written agreement. So I am unable to tell and therefore unable to conclude that either of the grievants would have been reached or were entitled to the overtime work during the period involved, had the provisions of Section 5C of the December 28, 1964 agreement been utilized. Accordingly, the Union's claim for pay for either of the grievants for any
of the Saturdays worked by the lead man in cleaning the office spaces, is denied.

Eric Schmertz
Arbitrator
Pursuant to Article XXXV of the Collective Bargaining Agreement, the above named parties have submitted to me for determination their unresolved disputes concerning minimum hourly wage rates and equalization of inequities for "inside men."

The pertinent parts of Article XXXV read:

**CLASSIFICATION AND EQUALIZATION**

Section 1. The Classification of all inside, service and maintenance personnel covered by the terms and provisions of this agreement, excluding taxicab drivers, shall be in the categories as already determined by the parties.

Section 2. Equalization as to inequities, if any, and minimum hourly wage rates for each Classification shall be determined by the Impartial Chairman at the earliest possible opportunity.

Hearings were held on December 10, 11 and 18, 1968 and January 6, 1969. Representatives of the parties appeared at all the hearings and were afforded full opportunity to present their respective cases. Both sides placed into the record a considerable quantity of testimony, argument, statistics, data, charts, and other documentary evidence in support of their respective contentions regarding minimum wage rates and the equalization of inequities for the "inside personnel."

**Scope of the Issue**

As part of the negotiations for the current Collective Bargaining Agreement, the parties agreed upon five job
classifications for the inside personnel, namely: Utilityman (unlicensed and licensed) Mechanic's Helper, Bodyman's Helper, Mechanic and Bodyman. Section 1 of Article XXXV makes reference to the agreement of the parties on these categories. However, though each inside employee has been placed within one of these five job classifications, and presumably is performing work within the job content of the classification in which he is slotted, there seems to be no industry-wide uniformity as to the precise nature of the work required of each classification or the relative skills of employees similarly classified, or the rates of pay which they receive. There is evidence that the work duties of any of the classifications may significantly vary from garage to garage and even within a garage. Also there are indications that employees within the same classification may differ significantly in their skills. As to wages, the hourly rates ascend from Utilityman to Bodyman in the order of the classifications previously enumerated. However, each classification has within it wide variations in pay rates, including, in some instances, a lesser rate for employees with greater seniority in the classifications as compared to the wages of newer employees in the same classification. This latter situation may be due in some cases, to a disparity in the duties performed or in the relative skills of the employees. But I am satisfied that it also reflects inequities which call for a remedy.

However, notwithstanding the possible need, this particular proceeding does not involve a re-structuring, a re-organ
ization or the effectuation of a re-negotiated wage structure for the inside men. Article XXXV does not give me such sweeping authority even if I concluded that a major overhaul of the wage structure for inside men was warranted. My authority is much more narrow. It is to fix minimum hourly wage rates for each classification and to equalize inequities if any.

If the parties intended to empower the Impartial Chairman under Article XXXV to re-study and totally re-organize the existing wage structure of inside personnel, that intent, by contract language, would and should have been included within Article XXXV. But it was not. Instead the parties limited the Chairman to two items - minimum rates and equalization of inequities. Indeed, if more had been intended, I consider it doubtful in the extreme that the parties would have negotiated the present wage structure (with its initial 5% increase) and especially the 5% across the board wage increases effective November 17, 1968 and November 17, 1969.

If the Chairman was to be empowered to re-organize the entire wage structure or to render an AWARD which in effect would constitute a re-negotiation of the wages, the 5% wage increases (or at least the latter two) would have been left to the Chairman's determination, and not agreed to as an unconditional contract provision.

Moreover, I am persuaded that my authority to fix minimums and to correct inequities, if any, are within the frame of the existing inside personnel wage structure. Certainly the language "equalization as to inequities, if any" (emphasis supplied) must refer if it is to have any meaning
at all, to an existing or present wage structure within which there may be inequities. In other words inequities cannot exist in a vacuum; but rather within a present frame of reference. Therefore I conclude that the parties intended to empower the Impartial Chairman to fix minimum rates for the five aforementioned classifications; but beyond that, not to change existing wage rates within the current wage structure except if and where he finds an inequity.

Accordingly I am satisfied that my authority to determine minimums and to correct inequities, if any, is an intra-taxicab industry matter. The questions therefore, are, within the frame of the present Taxicab Industry wage scale for inside personnel, what shall be the minimums for each job classification and what inequities may there be that required equalization? Consequently I do not find controlling, a comparison of the Taxicab Industry wages with wages paid other workers in entirely different fields of employment, even if the nature of the work is similar. Such comparisons, like a sweeping re-structuring or re-negotiation of the Taxicab Industry wages for inside personnel, is a matter for collective bargaining between the parties, but is not within the authority vested in the Impartial Chairman under Article XXXV of the contract. Therefore I must reject the Union's contention that the determination of proper minimums and the equalization of inequities can only be satisfied by lifting the wages of the five job classifications to levels paid workers in the Brewery Industry, the Retail Automobile and Truck Industry, the U.S. Post Office and other service industries.
such as bus transportation and utilities.

However, I do find the Union's evidence in this regard useful and relevant, not as a standard to which the Taxicab Industry wage rates must correspond in this arbitration, but rather as a guide to assist me in determining an appropriate proportionate wage ratio between and amongst the five classifications of inside personnel. To that extent, that data, together with other relevant evidence has been used in my determinations. The balance of the evidence presented by both sides bears directly on the question of minimums and inequities within the Taxicab Industry's present wage structure, and of course, was fully considered for that purpose in my final determinations.

Also the parties agree that minimums and inequities if any, relate only to wages. Hence, no matter how needed or desirable, this proceeding and my authority do not extend to establishing uniformity of duties and skills within each classification. These then must also remain as matters for collective bargaining between the parties.

Retroactivity

Article XXXV mandates the Impartial Chairman to do what the parties were unable to do by direct negotiation. If the parties had agreed upon minimums and the equalization of inequities, if any, there is no dispute that that agreement would have gone into effect as of January 29, 1968, the commencement of the present contract. And the inside personnel would have enjoyed new minimums and any adjustment in inequities for the entire period from January 29, just as the
drivers have been covered by agreed upon wage rates since that date. As I see it, if I am to do what the parties themselves were unable to accomplish, my decision should be effective as if the parties had themselves agreed. And that means as of January 29, 1968. The Employers knew there would be a period of negotiations on the question following consummation of the current contract and that that period would certainly result in some delay in deciding minimums and inequities. And it was also foreseeable that further delay would result if the parties could not agree in those subsequent negotiations and, as it turned out, the matter required submission to the Impartial Chairman as specifically prescribed by Article XXXV. Yet no limitation on retroactivity was negotiated.

And while I appreciate the fact that the Industry probably did not expect the delay to extend as it has beyond one year, I find no basis upon which the effective date of my basic decision can be later than January 29, 1968. For to deprive the inside personnel of minimums and other possible adjustments of inequities for the full term of the contract, would be to fashion an arbitral inequity, especially where there is no contractual basis for doing so and where the circumstances of delay were not unforeseeable. In short, I see my task as that of making decisions, on what in my best judgment, the parties would have agreed to as of January 29, 1968, if they had been able to do so. To do that my decisions should not only coincide with what I believe would have been substantively negotiated, but as to what the effective date
would have been as well. Therefore, my AWARDS in this case shall be retroactive to January 29, 1968, plus where appropriate, additional increases effective on November 17, 1968 and November 17, 1969, the dates of the negotiated 5% across the board wage increases.

No Diminution of Wages

Under the terms of my AWARDS in this proceeding, no "inside man" in any of the five job classifications shall suffer any reduction or diminution in the rates of pay he is presently earning; and I so AWARD.

Minimums

There is no real dispute between the parties over the meaning of a minimum wage rate. It means the hiring rate; the beginning rate for the particular job classification; and the rate below which no employee in that classification should be paid. Per force therefore, more present employees are and shall be paid more than the minimum rate. For it must be noted that a minimum rate, as defined, is not an average rate, or a median or mean rate. It is not the rate at which most of the employees are paid, nor some mid-point between a high rate and a low rate, but rather the lowest rate to be paid anyone working in that classification.

Therefore, the parties recognize I am sure, that my authority to fix minimum rates applies to the relatively lesser percentage of employees at the lower levels of the wage scale, but that that authority does not extend to other employees who are earning more pay, even if for some other reason they may be deserving of a wage increase. (Though
some may be eligible for wage increases under my ruling on inequities.)

Based on the foregoing and upon careful study and consideration of the entire record before me, I render the following AWARDS on minimum wage rates for the classifications indicated:

For the period January 29 to November 17, 1968 the minimum rates of pay are raised from their present levels as follows:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Hourly Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utilityman (unlicensed)</td>
<td>$1.79</td>
</tr>
<tr>
<td>Utilityman (licensed)</td>
<td>$1.84</td>
</tr>
<tr>
<td>Mechanic's Helper</td>
<td>$2.09</td>
</tr>
<tr>
<td>Bodyman's Helper</td>
<td>$2.29</td>
</tr>
<tr>
<td>Mechanic</td>
<td>$2.59</td>
</tr>
<tr>
<td>Bodyman</td>
<td>$3.24</td>
</tr>
</tbody>
</table>

Specifically for the period January 29 to November 17, 1968 the minimum hourly wage rates shall be:

<table>
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<td>Bodyman</td>
<td>$3.24</td>
</tr>
</tbody>
</table>

I am persuaded that had the parties been able to negotiate minimums, the 5% across the board wage increase effective November 17, 1968 would also have been applied to the minimum wage rate thereby increasing those rates by 5% as of November 17, 1968. Accordingly effective November 17, 1968 the minimum hourly wage rates (rounded off to the nearest cent) shall be:
Utilityman (unlicensed) ..................$1.88
Utilityman (licensed) .................. 1.93
Mechanic's Helper .................. 2.19
Bodyman's Helper .................. 2.40
Mechanic .............................. 2.72
Bodyman .............................. 3.40

The foregoing minimums effective November 17, 1968 respectively for each of the classifications represent increases of 28¢, 33¢, 44¢, 55¢, 62¢ and 70¢ an hour over the presently existing lowest rate.

It is my AWARD that any employee who was or is paid less than the foregoing minimum rates, during the periods specified, shall receive appropriate increases for his time of employment during the periods involved. The Employers shall have thirty (30) days from the date of this AWARD to make payments due hereunder.

Prospectively, and consistent with the foregoing, the 5% general wage increase effective November 17, 1969 shall be applied to the minimums as of that date. So that effective November 17, 1969 the minimum hourly wage rates shall be:

Utilityman (unlicensed) ..................$1.97
Utilityman (licensed) .................. 2.03
Mechanic's Helper .................. 2.30
Bodyman's Helper .................. 2.52
Mechanic .............................. 2.86
Bodyman .............................. 3.57

I am satisfied that these increases, for the periods referred to above, are sufficiently substantial to significantly raise the earnings of those at the lower wage levels; to serve as a step towards making inside work in the Taxicab Industry attractive to new hires; are equitably warranted;
and within the Industry's ability to pay. To have fixed higher minimums, especially with the mandated retroactivity, might well endanger the Employers financially, to the self defeating end that some of their businesses and the jobs of their employees may be jeopardized.

**Equalization as to Inequities**

Based on the record I find the following circumstances to be inequities warranting equalization:

1. An employee who is paid less than some other employee(s) in the same classification, though he is of substantially equal or greater seniority and possesses relatively equal or greater skills and performs substantially the same or more difficult work. In such case the pay of the former shall be increased to the level of the latter, and I so AWARD for the period of the time such condition obtained, retroactive to January 29, 1968.

2. Where an employee regularly or for significant periods of time, performs work or duties within a higher rated job classification, it is an inequity if he is not paid the wage rate of that higher classification. He shall be paid at the higher rate for the time spent on the work of the higher classification, and I so AWARD, retroactive to January 29, 1968. For example if a Mechanic's Helper regularly or for significant periods of time performs the work of a Mechanic,
he shall be paid the Mechanic's rate of pay for the period of time he so serves. The same applies to out-of-title work, on the same basis, to the other classifications of inside personnel. This AWARD does not apply where an employee is called upon to perform duties in a higher classification in bona fide emergencies; where he is undertaking training mutually agreed upon by representatives of the parties; or in the event of such short run necessities as "hacking up" and putting on and removing snow tires.

In connection with #1 and #2 above, no specific cases or examples of these inequities were presented during the arbitration hearings. But based on the evidence before me I think it probable that these two types of inequities do in fact exist, to some extent. Therefore I shall leave it to the parties to implement the AWARDS in #1 and #2 above to whatever specific situations they apply. Disputes or disagreements on the applicability of the AWARDS may be submitted to me for rulings on a case by case basis.
Though I appreciate the general theory that employees with greater longevity in a classification should receive, in recognition of that longevity, more pay than those with fewer years of service, I am not prepared to hold, within the scope of this proceeding, that longevity alone is the basis for a higher wage rate. In other words, because at present, skill and job duties are also relevant and proper factors in determining an employee's rate of pay within a classification, I cannot conclude solely on the basis of relative seniority that a lower rate of pay for more senior employees is an inequity.

To so conclude would involve the establishment of an "automatic progression," or a range of rates, which grant wage increases on the basis of years of service only. As such, because that would change the relevant factors upon which wages are based, and because I do not find the present factors, if properly applied, to be unreasonable, its introduction, no matter how desirable a benefit for long service employees, is a matter which I must leave to collective bargaining between the parties.

However, as I have held in Paragraph #1 above, it is an inequity if a senior employee is paid significantly less than a junior employee in the same job classification where the former possesses as much or greater skills and is performing substantially the same or more skilled work. And the same is true if their respective seniorities are substantially the same. My AWARD under Paragraph #1 fashions a remedy and a procedure for implementing that remedy where this inequity exists.
DATED: February 4, 1969
STATE OF New York  ) ss.:
COUNTY OF New York  )

On this 4th day of February, 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.
This is the first in a series of Awards adjudicating "past grievances," i.e. grievances which arose under the predecessor Collective Bargaining Agreement and which were pending when the present Collective Bargaining Agreement was negotiated. They are submitted to arbitration under Article XXV Section 13 of the current contract. It should be recognized that these disputes, having arisen from the predecessor contract which expired November 16, 1967, must be determined under the terms of that contract, irrespective of any contractual changes which were negotiated in the present agreement.

Hearings were held at the offices of the American Arbitration Association on February 5 and February 18, 1969. Representatives of the above named Union and Employer appeared. Also, the affected employees were given due notice of the hearings, and were afforded an opportunity to appear and be heard. All concerned were given full opportunity to present evidence and testimony and to examine and cross examine witnesses.

At the outset of the first hearing I denied the motion of counsel for the Board of Trade that the grievances be dismissed because they were untimely. I ruled that I would not foreclose the Union or the affected employees from seeking a
determination of these grievances on the merits merely because they were not submitted to me within 60 days after the effective date of the current contract or within 60 days of my appointment as Impartial Chairman.

My ruling was based on the fact that considerable time elapsed between the effective date of the contract and my appointment; and that the Union required some time to organize its grievance-handling procedures, to examine the large quantity of grievances pending in order to determine which were proper subjects for arbitration. For those reasons, I ruled that the time limit set forth in Section 13, was directory rather than mandatory. However, I stated that the lapse of time between the effective date of the contract and the ultimate submission of the grievances to arbitration would not be prejudicial to the Employers in those cases, if any, of "running" liability. Also I stated that my ruling was confined to Article XXV Section 13, and consequently only to those "past grievances" which arose under the predecessor contract and which were pending at the time that the current contract was negotiated. Accordingly my ruling may not be construed as a precedent with regard to any other time limits set forth elsewhere in the grievance procedure or in any other part of the contract.

Heard to completion, conceded or withdrawn, or heard and continuing were the grievances of Messrs. Carlos Souffront, Simon Semidei, Emanuel Crapanzano, John Bilgeshausen, Michael Burke, Peter Mitronick, Garland McMillan, Matteo Dionisio, Alfred Ruoff, George Ruoff, Dominick DeBellis, Ernest Collette, Paul Quartuccio, Fred Harland, Gerald Solomon,

Having duly considered the evidence, testimony and argument presented by the parties, I render the following Awards:

The grievance of Carlos Souffront is granted. Based on the evidence it is clear that he has met the eligibility requirements of the predecessor contract for a second week of vacation pay. Accordingly, the Employer (Cab Operating Co.) shall pay Mr. Souffront's claim for a second week of vacation.

The grievance of Simon Semidei is granted. His actual time worked during the second quarter-annual period of 1966 was 58 days. These 58 days were worked during the period May 17 through June 30. The Employer contends that Mr. Semidei is two days short of the required minimum of 60 days as set forth in the first paragraph of Article IV; and that because this Employer (Haso Maintenance) did not previously pay an attendance bonus, Mr. Semidei's eligibility commences with May 17. While I do not find that the Christmas bonus paid by this Employer in prior years constituted an "attendance bonus" within the meaning of Article IV, I do find that Mr. Semidei's eligibility, for the purpose of accumulating at least 60 days, shall be retroactive to May 12 to include credit for the strike days (May 12 through May 16.) The last paragraph of Article IV states unconditionally, that an employee shall be given credit for all benefits for the days he was scheduled to work from May 12 to May 16, 1966. That paragraph, by its own language, applies to all the benefits and all the circumstances set forth in Article IV. So whereas the other provisions of Article IV spell out the manner in which the attendance bonus is to be calculated, this last paragraph expressly entitles an employee, for purposes of determining his eligibility, to include the days he would have worked from May 12 to May 16 as well as the days actually worked from May 17 to the end of that quarter-annual period. As Mr. Semidei would have been scheduled for at least two days of work during the period May 12 through May 16, he thereby achieved the 60 days required for the attendance bonus. Accordingly, Haso Maintenance shall pay Mr. Semidei's claim for the attendance bonus.
The grievance of Emanuel Crapanzano is denied. Under Article VII, a threshold requirement for vacation pay is that the employee be "on the payroll on June 30 of each year." Mr. Crapanzano quit his job with the Employer (Carrick) on June 22, thereby terminating his employment that day. Thus, he was not on the payroll on June 30, and is not eligible for any vacation pay under the predecessor contract.

The grievances of Matteo Dionisio and Alfred Ruoff are denied. Under the predecessor contract there is no provision for industry-wide seniority, nor is there any "follow the work" provision which would preserve an employee's seniority if, as the result of a sale of a taxicab, he transferred his employment from one employer to another. Hence for purposes of accumulating time worked to meet the eligibility requirements for vacation pay, I am unable to credit these employees with the periods of time they worked for two separate employers. When they left the New Yorker Fleet and took jobs with Flex, their seniority with the former ended, and their seniority with the latter began as new employees. Though they transferred their employment apparently because taxicabs were sold by New Yorker to Flex, the predecessor contract does not allow the time worked at the former to be "tacked" to the time worked at the latter for purposes of vacation pay. Article VII provides for periods of employment with "the Company" which, in the singular, means an individual employer. It does not contemplate the merger of work periods between and amongst identifiably separate employers, even though there was no break in the employment of these employees within the industry. Therefore Messrs. Dionisio and Alfred Ruoff did not acquire the requisite 240 days of actual work "for the Company" to be entitled to vacation pay.

The grievance of A. Lopez is denied. Mr. Lopez also seeks to "tack" his employment at two separate employers in order to achieve the required 240 days of work for vacation pay. The rule enunciated in the Award immediately above is similarly applicable here. Also, as distinguished from Messrs. Dionisio and Alfred Ruoff, Mr. Lopez did not "follow the work" in transferring his employment from Frenat to Flex. So there is even less equitable argument, irrespective of the contract bar, to his claim. Moreover, the evidence does not support the assertion that the subsequent employer promised him credit for the days he worked at the previous company. Therefore Mr. Lopez
lacks the minimum number of days worked to be eligible for a vacation under Article VII of the predecessor contract.

The grievance of Charles Wexler is denied. My ruling on the absence of a contractual right under the predecessor agreement to industry-wide seniority is applicable to this grievance as well. Though given due notice, Mr. Wexler did not appear at the hearing. Consequently the Union was unable to present evidence in support of his claim that his Employer (Cab Operating Co.) promised to credit him for time worked from his prior employment with Haber Garage. Therefore Mr. Wexler lacks the required time worked for a vacation under Article VII of the predecessor contract.

The grievance of Sidney Stone is denied. The absence of industry-wide seniority or a provision for "following the work" from one employer to another, is also applicable to this grievance. Mr. Stone was discharged by Capital and thereafter, without delay, was hired by Mann. Though both employers are housed at one location, there is no evidence that they are not separate companies, independent of each other. They are separately owned by different persons (though brothers-in-law) and Mann is a tenant in Capital's garage. So, because Mr. Stone's days worked for Capital may not be tacked to the days he worked for Mann, he has not met the eligibility requirements for a vacation under Article VII of the predecessor contract.

The grievances of Paul Quartuccio, Fred Harland, Gerald Solomon and Blaise Noto were withdrawn from arbitration by the Union.

The grievance of George Robinson was conceded and granted by the Employer (Super). Therefore Mr. Robinson shall be paid his claim for a second week of vacation.

The grievance of Harry Berger was conceded and granted by the Employer (M & S Garage.) Therefore Mr. Berger's claim for one week vacation shall be paid.

The grievance of Gerald Martignette is granted. Under the second paragraph of Section 1 of Article VII, an employee is entitled to two weeks of vacation pay if he has worked at least 240 days for the company during the vacation year (July 1 to June 30) and has four years or more of credited service. The latter qualification (four years or more of credited service) is not limited to any
particular four years, but presumably may be acquired any time during the employee's service with the Company, provided his total period of employment has been continuous. I am satisfied that Mr. Martignette has met this condition. His employment with this Company continued unbroken, either on full time or part time, from 1960. From 1960 to near the end of 1962 he worked full time, thereby acquiring three years of full time credited service. From 1962 to 1966, though employed elsewhere out of the industry, he retained his employee status with the Company as a part time driver. At no time did he quit or leave the Company's employ, though his status changed from full to part time. In 1966 he returned as a full time driver, and by the end of that year had acquired his fourth year of credited service as a full time employee. There is no dispute that in 1966 he worked more than the requisite 240 days as a full time employee. Therefore, because I find his employment was continuous between 1960 and 1966, and that within that period of time he acquired four years as a full time employee; plus the fact that it is undisputed that he worked more than 240 days as a full time employee in 1966, he has met the eligibility requirements of Article VII for two weeks vacation pay. He was paid for one week. Therefore, the Employer (Cab Management) shall pay his claim for a second week of vacation.

The grievance of Ralph Esposito is denied. This claim for pay for a second week of vacation is advanced on the same basis as that immediately above (Martignette). But I find one significant and determinative difference. Unlike Mr. Martignette, Mr. Esposito did not maintain continuous employment with the Company (Main Operating). His acquisition of four years as a full time employee plus 240 days work during the vacation year involved, was not within a continuous period of employment. Therefore he cannot be credited with the requisite four years seniority. During some years before 1963 he worked full time. It is based on those years of service that his claim for all or part of four years credited service as a full time employee is based. But there is no dispute that he did not work at all for the Company between August 2, 1962 and February 18, 1963; nor from August 10, 1964 to February 14, 1965. I cannot interpret these periods of non-employment with the Company as anything other than quits. Therefore as late as August 10, 1964, he had terminated his employment with this Company, and under the terms of the predecessor contract lost all seniority thereby, including any service
credit as a full time employee prior thereto. When he returned to the Company's employ the last time, on February 14, 1965, he did so as a new hire. Because I cannot give Mr. Esposito credit for his service prior to the date that he was re-employed as a new hire, he is ineligible for a second week of vacation pay. The result would be the same even if I accepted Mr. Esposito's explanation that between August 10, 1964 and February 14, 1965 he was at work within the industry at another garage where he was sent by this Company because it had no cabs available for him. For if, as I must, deem his absence from work from August 2, 1962 to February 18, 1963 as a quit, he was a new hire on a full time basis no earlier than August 10, 1964. But even on that basis he cannot be credited for time worked as a full time employee in earlier years, and again would not have achieved the four years of credited service required to be eligible for a second week of vacation pay.

The grievances of Morris Sonenfeldt and Max Rennert were conceded and granted by the Employer (Metro). Therefore Mr. Sonenfeldt's claim for one week vacation and Mr. Rennert's claim for a second week of vacation shall be paid by the Employer.

The grievance of Joseph Markoe is denied. The question here is whether Mr. Markoe should be given credit, for purposes of vacation pay eligibility, for 18 days during which he was away from work due to an injury apparently incurred in the course of his employment. Though it is not part of the written contract there is no dispute that the parties agreed to give credit for "compensation days," among other specified absences. I am satisfied that in order to insure the bona fides of time to be credited due to injuries on the job, the parties agreed to limit such credit to days "on workmen's compensation," or in other words, only when and while an employee was drawing workmen's compensation payments. So, though not doubting the veracity of Mr. Markoe's contention that he was injured in the course of his employment; and without questioning the fact that that injury might have been the subject of a workmen's compensation claim; and further, without questioning Mr. Markoe's right to pursue his private remedy in a negligence action against the third party, the fact remains that he neither sought nor drew workmen's compensation benefits. Hence I cannot construe his absence of 18 days as "compensation days" within the meaning intended by the parties. Therefore, without credit for those days, Mr. Markoe did not work the
required 240 days during the vacation year and is not eligible for one week of vacation pay.

The remaining grievances, namely those of Messrs. John Bilgeshausen, Michael Burke, Peter Mitronick, Garland McMillan, George Ruoff, Dominick DeBellis, Ernest Collette, Abraham Glass and Edward Fischer are continuing, pending further hearings or additional information from either or both parties.

Hearings on other "past grievances" are scheduled for March 5, 11, 12, 13 and 14, 1969.

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.
The issue in dispute is whether those employees of the Columbia Garage who received a Christmas bonus for the year or years prior to 1968, but did not receive a Christmas bonus for 1968, are entitled to that bonus for that latter year.

A hearing was held at the offices of the American Arbitration Association on June 10, 1969, at which time representatives of Local #3036, hereinafter referred to as the "Union," and Columbia Garage, hereinafter referred to as the "Employer" appeared. A group of affected employees, hereinafter referred to as the "grievants" appeared as well. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses.

The Employer raised a threshold issue of arbitrability on which I ruled at the hearing. I held that the grievances were arbitrable and in compliance with the notice and time limit provisions of Article XXV (Adjustment of Grievances and Arbitration) of the contract. I ruled that the letter of November 27, 1968 from counsel for the Employer to the Impartial Chairman requesting a hearing on the dispute herein, constituted the filing of this matter for arbitration. Either
party may request arbitration of an unresolved dispute. That letter coincided with the date that the Employer notified his employees that Christmas bonuses would not be paid in 1968. Therefore the Union was entitled to assume that that letter noticed the dispute for arbitration and no further action under the provisions and time limits of the grievance procedure was necessary.

On the merits the dispute involves the application and interpretation of Article XVII (Continuing Benefits) of the current Collective Bargaining Agreement, which reads:

Benefits formerly granted on a regular basis to the employees covered hereby (which were granted prior to the present contract negotiations or prior to the contract which terminated on November 16, 1967) shall be continued, with the exception of vacation benefits, Christmas bonus and attendance bonus. In the event it is contended that the combination of attendance bonus and vacation payment, as set forth in this agreement, provides less, in total, than a previous combination of attendance bonus, vacation payment and Christmas bonus, the matter may be taken up through the grievance procedure, as there is to be no reduction in the combination of attendance bonus and vacation payment as provided by this agreement from a prior combination of attendance bonus, vacation payment and Christmas bonus.

Applied to the facts in the instant case, this provision is clear. It relates to "money" benefits. For obviously, unless "vacation payment ..... attendance bonus and Christmas bonus" means money payments, each would be meaningless as a benefit. Under the clear language of this Article, Christmas bonus for 1968 need not be paid to any employee who received through the combination of vacation payment and attendance bonus as much as or more money than he had received in a prior year from a total of vacation payment, attendance bonus
and Christmas bonus. Put another way, Christmas bonus for the year 1968 is payable only to an employee whose total money benefit from vacation payment and attendance bonus was less than what he had received in a prior year from the combination of the three benefits - vacation payment, attendance bonus and Christmas bonus.

With the exception of the grievance of Kesten et al, all other grievants who did not receive a Christmas bonus in the year 1968 exceeded or equaled in money payments from the combination of vacation pay and attendance bonus, the amount of money they had received in any prior year from the combination of vacation pay, attendance bonus and Christmas bonus. Hence the Employer's decision not to pay them a Christmas bonus for the year 1968 was in conformity with Article XVII of the contract. (Indeed those employees who fell below the payment received from a combination of the three benefits in the prior year or years, were paid a Christmas bonus in 1968 in order to bring them up to the level they enjoyed previously. Because they received a Christmas bonus in 1968, they are not grievants in this case.)

The Union advanced an interesting and understandable argument. It asserts that many of the grievants received more money in 1968 through a combination of only vacation payment and attendance bonus because of the legislated increase in taxicab fares (which increased the driver's bookings, and by consequence his attendance bonus) plus an improvement in the vacation plan, which for some, extended their entitlement from two weeks to three. The Union argues that these improve-
ments, achieved either by legislation or contract negotiations should be excluded from the calculations under Article XVII when comparing an employee's entitlement for 1968 with what he received in a prior year as the only way to insure against a real diminution in benefits. This theory however, is not supported by the language of the contract. Article XVII manifestly contemplates both the fare increase and the vacation plan improvement. It provides for a comparison of the combination of attendance bonus and vacation payment, as set forth in this agreement, with the combination of what had been received from attendance bonus, vacation pay and Christmas bonus under the prior contract. The phrase "as set forth in this agreement" means that the calculation of the attendance bonus and vacation payment is to be in accordance with the current contractual formula. And that formula, either expressly or by reference, includes the expanded vacation plan, plus in determining attendance bonus a percentage of gross receipts based on current taxicab fares. For the improved vacation plan or increased cab fares to be excluded would mean that attendance bonuses and vacation payments were calculated not "as set forth in the agreement," but rather on outdated rates; inapplicable gross receipts and a former vacation plan. And that would be directly contrary to what Article XVII prescribes.

Accordingly all grievances except those of Kesten et al are denied, and I so AWARD.

The grievances of Kesten et al (involving some 25 employees who received only Christmas bonuses in 1966 and 1967 but not vacation payments, attendance bonuses or Christmas
bonuses in 1966, 1967 and 1968) are granted. The Employer is directed to pay them a Christmas bonus for 1968. I find that those employees received a Christmas bonus in the prior years on a regular basis. Article XVII requires that they not suffer a diminution in 1968 as a result of a combination of vacation pay and attendance bonus, from what they received in total payments previously from the combination of those two benefits and Christmas bonus. As the Christmas bonus was the only benefit they received in the prior years, that was the extent of their total payment of the combination of the three benefits. In 1968, a combination of only vacation pay and attendance bonus would provide them with no money at all, which is less than what they received in the prior years from a combination of those two benefits and a Christmas bonus. Hence to bring them up to at least the level of the prior year or years, a Christmas bonus for the year 1968, equivalent to the amount they received in the previous years, shall be paid to those grievants and I so AWARD.

Eric J. Schmertz
Impartial Chairman

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.
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade on behalf of certain Employer members.

Certain disputes between the above named parties arising out of the current Collective Bargaining Agreement were heard by the Undersigned Impartial Chairman at the offices of the American Arbitration Association on August 5, 1969. Representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

Having duly considered the proofs and allegations I make the following AWARDS:

The grievances of Rubin Abraham and Onnie Denton (Metro) for breakdown pay are denied because neither claim was for a period of time exceeding one hour after notification to the Employer.

I am persuaded that the "breakdown" of the electric taxicab meter without fault of the driver, constitutes a "breakdown" within the purpose and intent of Article XIII of the contract. I recognize that when this contract was negotiated the electric meters (colloquially referred to as "hot seat" meters) were not yet installed in the taxicabs. But it is clear that the purpose of Article XIII is to protect a driver from loss of earnings in the event that his cab becomes inoperative on the road, through no fault of his own.

Based on this intent, I see no difference between a breakdown resulting from an engine or wheel failure, by example, or a broken meter. The effect is the same - the vehicle cannot be operated either
mechanically or legally as a taxicab. And the driver is unable to maintain his bookings due to a circumstance beyond his control or fault.

This conclusion is reinforced by the fact that the electric meters were unilaterally installed by the Employers as a managerial decision subsequent to the negotiations of the current contract; and the electrical or mechanical operation of the meters, together with repairs thereon are within the exclusive control of the Employer. In short, the decision to use these meters and how they operate were not responsibilities shared by the Union or the drivers. Consequently if the meter fails to work properly, making it impossible to operate the vehicle as a taxicab, the driver should not be accorded any less protection than if the vehicle suffered a type of breakdown undisputedly covered by Article XIII.

However in the instant cases, the loss of time between notification to the Employer, repair of the meter and the resumption of normal service did not exceed one hour. And under Article XIII breakdown pay does not begin to run until after the first hour following notification of the breakdown. That in the case of grievant Abraham the meter was inoperative for more than one hour before its repair is immaterial because he did not notify the Employer when that breakdown first occurred. As I have found that a meter breakdown is comparable to those contemplated by Article XIII of the contract, the notification provisions of that Article are equally applicable. For it was no more difficult for the grievant to notify the Employer by telephone of the breakdown of the meter than to notify him of any other kind of breakdown. Hence when grievant Abraham returned the cab to the garage for repair of the meter without an earlier call to his Employer, notification did not take place until then. And from that point to the time that the meter was repaired and the cab returned to the road, no more than one hour elapsed. So under the time provisions of Article XIII the grievant was not eligible for breakdown pay.

Similarly grievant Denton's claim is limited to a meter breakdown of only one hour duration, and hence for the same reason is precluded by the provisions of Article XIII which grants breakdown pay for time beyond the first hour.

The grievance of Vincent DiSanto (JoFan) for re-assignment of a steady cab is settled on the following basis:
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade on behalf of certain Employer members.

Certain disputes between the above named parties arising out of the current Collective Bargaining Agreement were heard by the Undersigned Impartial Chairman at the offices of the American Arbitration Association on August 5, 1969. Representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

Having duly considered the proofs and allegations I make the following AWARDS:

The grievances of Rubin Abraham and Onnie Denton (Metro) for breakdown pay are denied.

I have decided to await a subsequent case where employees would otherwise substantively qualify, before determining whether a "breakdown" of an electric (hot seat) meter, on the road, without fault of the driver, is a "breakdown" within the meaning of Article XIII of the contract.

Here, if Article XIII applied, the grievants would not qualify for the pay because either the total time lost and claimed was only one hour, or the time from notification did not exceed one hour. In the case of the grievant Denton, there is no showing that the total time during which his meter was inoperative lasted more than one hour (his claim is simply for one hour); and in the case of the grievant Abraham no more than one hour elapsed between the time he notified the garage of the broken meter (when he returned the cab to the garage) and its repair and return of the cab to service.

Under Article XIII, even if it applies, breakdown pay commences to run not from the time of the breakdown, but only after the passage of the first hour after notification of the breakdown.

The grievance of Vincent DiSanto (JoFan) for re-assignment of a steady cab is settled on the following basis:
The grievant agrees to work as a regular driver beginning work each day at 7 A.M. and continuing until 4 P.M. He will be given a steady cab for a trial period of one month. If during that time he fails to work the hours 7 A.M. to 4 P.M., the steady cab will be taken from him.

The grievances of Ed Zarr et al are in abeyance pending further word from the parties.

Erie J. Schmertz
Impartial Chairman

DATED: August /J~T969

ON THIS

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 Union #3036, New York City Taxi Drivers Union, AFL-CIO
and Metropolitan Taxicab Board of Trade, Inc.
on behalf of Yankee Service and the 6th Street Management.

A hearing on additional "past grievances" involving the above named parties was held at the offices of the American Arbitration Association on July 28, 1969. Representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The affected employees were afforded the opportunity to be present and to testify.

Having duly considered all the proofs and allegations I make the following AWARDS:

The grievance of Benjamin Krever (6th Street Management) was settled on the basis of payment by the Employer of the grievant's claim for two weeks vacation for the year 1966-1967.

The grievance of Andrew Camarado (6th Street Management) for one week vacation pay for the year 1966-1967 is denied. The records indicate that he actually worked 218 days within the eligibility period, and is entitled to credit for additional 15 days on Disability. His total of 233 days worked and credited is 7 short of the minimum requisite of 240 days within the vacation eligibility period.

The grievance of Harold Cohen (Yankee Service) for two weeks vacation pay for the year 1966-1967 was granted by the Employer.

The grievance of David Toback (Yankee Service) for two weeks vacation pay for the year 1966-1967 is denied. He actually worked 224 days within the vacation eligibility period. In addition the Company credited him with a period of 15 days on Workmen's
Compensation. The decision of the Workmen's Compensation Board introduced into the evidence indicated the period on Workmen's Compensation as between September 21 and October 10, 1966, or thirteen working days based on the grievant's work schedule. So whether he was entitled to only 13 days Workmen's Compensation credit or 15 days as accorded him by the Company, the total either way, (respectively 239 or 237 days) falls short of the 240 day minimum required by the predecessor contract for any vacation pay entitlement.

The grievance of Antonio Torres (Yankee) for two weeks vacation pay for the year 1965-1966 and for a second week of vacation pay for the year 1966-1967 was granted by the Employer.

The grievances of Joseph Campo, Ben Watman and Abraham Wild (Yankee Service) for attendance bonuses for the quarter July 30 to September 30, 1966 are continuing pending word from the parties on a proposed stipulation which may be dispositive of the issue.

The grievances of Charles Cohen (Yankee) for a second week of vacation pay for the year 1965-1966 and a second week of vacation pay for the year 1966-1967 are continuing to enable the Employer, within a reasonable time, to comply with my request that he produce the grievant's "re-employment or re-hire application" of July 26, 1965.

Eric J. Schmertz
Impartial Chairman

DA TED: August /5/1969
STATE OF New York ) ss.: 
COUNTY OF New York )

On this /5/ 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.

JOSEPH A. MAZUR
Notary Public, State of New York
No. 03-2598750
Qualified in Bronx County
Commission Expires March 30, 1994
In the Matter of the Arbitration
between
Local Union #3036
New York City Taxi Drivers Union
AFL-CIO

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of its Member Employers

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

and

Andrea Service Corp;
Zebra Service Corp;
Jaw Service Corp.

Additional hearings on "past grievances" (as defined in
my Award dated March 5, 1969) were held at the offices of the
American Arbitration Association on March 5, 11, 12, 13 and
14, 1969.

Having duly considered the proofs and allegations I make
the following Awards:

The Grievance of Edward Fischer is settled. His
claim for vacation pay is granted. His claim for
call-in pay is denied.

The grievance of Irving Pass is granted.
Article VII Section 3 of the predecessor contract,
must, because of its unique terms, have a specific
frame of reference. It provides for a "split vaca-
tion" between two employers on a pro rated basis,
to qualified employees who were terminated without
cause by the former employer, or were forced to re-
sign because of harassment by that employer. This
section, insofar as it relates to harassment (which
is the claim in the instant grievance) refers, in
my view, to complaints by the National Labor Rela-
tions Board against certain employers during the
Union's campaign for organization and recognition.
This Employer (A & A Maintenance) was among those against whom a Board complaint for harassment was issued. Based on this point of reference, I find that where the Union or an employee has made a prima facie case of harassment, a presumption favorable to that employee is created, which the employer has the burden to rebut. Here the grievant advanced testimony claiming incidents of harassment, and the Employer responded with testimony of denial. In other words, the evidence showing and denying harassment represents a stand-off. In that circumstance the Employer has not met his burden to convincingly overturn the presumption. Therefore the Employer (A & A Maintenance) shall pay Mr. Pass his claim for a pro-rated vacation for the vacation year 1966 in accordance with Article VII Section 3 of the predecessor contract.

The grievance of Abraham Litwin is denied. The grievant was involved in nine accidents between 1961 and 1967. The evidence discloses that following an accident on January 20, 1967, he was instructed by his Employer (Frenat) to make out an accident report, but refused. Irrespective of the grievant's prior accident record, it is normal and proper for an employer to direct a driver to prepare an accident report when or if an accident occurs. Even if there be a dispute between the driver and his employer over the accident or its extent, the driver may not flatly refuse to make out any report. This is especially true where, as here, the grievant was involved in several prior accidents. To state that he would not prepare an accident report, when directed to do so, represents a defiance of authority and is grounds for disciplinary action. I do not consider the three day suspension to be unreasonably severe. That the grievant did fill out an accident report on the following day is immaterial, for it is highly questionable that he would have done so had he not been disciplined.

The grievance of Joseph P. Pierro was conceded and granted by the Employer (Frenat.) Therefore Frenat shall pay the grievant's claim for one week vacation for the year 1966.

The grievance of Angel Rios was paid by the Employer (Rego) and is therefore settled.

The grievance of Morris Byer is denied. I am persuaded that on October 5, 1966, the day the grievant had an accident, he was told by the Employer's dispatcher not to report back to work until October 8, in accordance with a policy to suspend a driver who was at fault until his cab is repaired. There-
fore the grievant was notified by the Employer (Jackson Maintenance) not to come to work prior to October 8. Consequently his claim for call-in pay for October 6 and 7, days he reported for work despite such notice, is denied.

The grievance of Joseph Villano was conceded and granted by the Employer (Jackson Maintenance). Therefore his claim for call-in pay shall be paid.

The grievance of Miguel Robles is granted. The grievant testified that on Monday, March 22, 1967, after reporting for work, he was sent home because of a snow storm. The Employer testified that he instructed his manager to inform drivers that all those who wished to drive that day could do so; and that later in the day cabs were actually dispatched. However, the employer's manager did not testify, so there is no evidence that these instructions actually reached all the men including the grievant. Rather, the grievant's testimony that he was "sent home" stands unrefuted. Accordingly, the Employer (Metro) shall pay the grievant's claim for call-in pay for March 22, 1967.

The grievance of Hyman Baer is granted. I conclude that the Employer's (Helen Garage) payment of vacation pay to the grievant for his service between December 1962 and July 1, 1963 was not merely a token. Rather I deem it a recognition of a year's credited service as a full time driver under a policy to grant such credit, in that year, for less than 240 days worked. Therefore, coupled with his undisputed credited service for the vacation years, 1964, 1965 and 1967, the grievant acquired the requisite four years of credited service and is entitled to pay for a second week of vacation. Helen Garage shall pay the grievant's claim for a second week of vacation for the vacation year 1967.

The grievances of Thomas Williams, Philip Farley, et al (55th Street) (a "mass grievance" covering eleven grievants whose identities are known to the parties) is settled. The Employer will pay $6.00 call-in pay to each of the grievants without prejudice to the position of the Employer regarding the tires in use at the time the grievance arose.

The grievance of Chesta Sosna is conceded and granted. Therefore the Employer (Frenat) shall pay the grievant's claim for a second week of vacation pay.
The grievance of Dominick D'Agostino for a second week of vacation pay has been paid by the Employer (Cordi) and is therefore settled.

The grievances of Meyer Goldberg, Freddie Williams and Nat Kaye are conceded and granted. Therefore the Employer (Marby) shall pay the grievants their claims for a second week of vacation pay.

The grievance of Leon T. Dean for a second week of vacation pay has been paid by the Employer (T.M.I.) and is therefore settled.

The grievance of Jack Horowitz has been paid by the Employer (Zebra) and is therefore settled.

The grievance of Max Heidt is denied. The grievant is not eligible to a pro rata vacation from his former Employer (Jason) under Article VII Section 3 of the predecessor contract. Even if harassment be shown, it did not take place in the grievant's second or subsequent years of service after he had qualified for one week's vacation pay. Rather, the charge of harassment relates to his first year of service with Jason. And on the same basis (his failure to meet the threshold eligibility requirement), his claim for pro rata vacation against his present Employer (Forest) is denied. I do not find that his grievance encompasses a claim against Jason for wrongful discharge and for vacation pay as damages arising therefrom. The grievance seeks vacation based on a total of 280 days worked between the two employers. It goes on to state that he received vacation in the past on the basis of 210 days worked. Obviously, his claim for vacation pay is founded on days worked and not on a formula of damages for a wrongful discharge. Therefore I am unable to conclude that his grievance contains within it, even by implication, a charge of wrongful discharge under Article XIV Section 1(c) of the contract and for damages in the form of vacation pay arising therefrom. Instead he seeks vacation pay only for time worked, based on the explicit provisions of Article VII Section 3 of the contract. As to both scope and substance his grievance is denied.

The grievance of José Mercade (EN Garage) is denied. The grievant has not met the eligibility requirements of four years credited service as a full time employee. Therefore his claim for a second week of vacation pay is denied.

The grievance of Harry Hoffman is granted. His Employer (Zebra) who failed to appear after due
notice, shall pay Mr. Hoffman his claim for one week of vacation pay.

The grievance of Benjamin Zimmerman is granted. His Employer (Zebra), who failed to appear after due notice, shall pay Mr. Zimmerman's claim for two weeks vacation pay.

The grievance of William Saretsky is denied. (Cromwell) The records show that the grievant received vacation pay and was credited for a year of service only for the years of 1965, 1966 and 1967. Therefore as of 1967, he had not acquired the requisite four years of credited service to be eligible for a second week of vacation that year.

The grievance of Juan Ramos (Man Maintenance) is denied by default, because of the grievant's failure to appear after due notice.

The grievance of Julius Samuels is granted by default, because of the failure of the Employer (Jackson) to appear after due notice. Therefore Jackson shall pay Mr. Samuel's claim for a pro rata vacation for the year 1966 under the provisions of Article VII Section 3 of the predecessor contract.

The grievance of Harry Keenan is denied. I find that the grievant's termination by the Employer (Dover) was for just cause.

The grievance of Isadore Schechter for one week of vacation pay for the year 1966 is granted provided the records show that he was paid for one or more days of disability during the eligibility period. If so, his Employer (Helen) shall pay his claim. If the parties are in dispute over the records, the matter may be referred back to me for determination.

The grievance of Irving Koslow is denied. (Jason) The grievant has not met the requisite 240 days worked within the vacation year 1966-1967. He worked 214 days that year. And he cannot be given credit for approximately 40 additional days that he was ill because he was neither on disability nor workmen's compensation within the meaning of the agreement of the parties on those exceptions.

The grievance of Max Pittell is denied. The question here is whether the grievant was discharged or quit. I conclude that neither actually occurred.
But based on statements exchanged in the course of an angry argument, Mr. Groden of the Employer (Bebe) had reason to interpret the grievant's remarks as a quit and the grievant had reason to interpret Mr. Groden's remarks as notice of discharge. I am convinced that in their anger they misinterpreted each other.

Under this circumstance the question is whether the grievant should receive any benefits as if he had been discharged, or whether his status should remain as if he had quit. Since the misunderstanding arose out of a heated argument, the answer turns, in my judgment, on who was primarily responsible for that argument. Though it takes two to argue, I am persuaded that it would not have occurred had the grievant complied with a reasonable request made of him by Groden. I find no reason why an employer may not ask a driver involved in an accident for the details of that accident. And I think an employer has this right even if the driver has filled out an accident report. Therefore Groden's request that the grievant inform him of the details of the accident was proper even though the grievant had filled out an accident report. The grievant did not act properly when he refused to respond to Groden's questions; stating instead that Groden could read the accident report. This precipitated the argument and the final angry words between them which each misunderstood. Therefore though the grievant was not actually discharged, I do not find an equitable basis upon which his status should be so construed for any benefits which might flow therefrom. Accordingly, his claim for pro rata vacation from the Employer (Bebe) is denied.

The grievance of Alfred Feaster is denied. (Super). The grievant worked 232 days during the eligibility period for a vacation in the year 1966. If he is credited with five additional strike days and one extra day for a "single," his total would be 238, or two days short of the minimum for the vacation eligibility. Therefore his grievance for one week vacation pay is denied.

The grievance of Lawrence P. Brown (Helen) is denied by default, because of the grievant's failure to appear after due notice.

The grievance of Charles Raphenberg (Iota) is denied by default because of the grievant's failure to appear after due notice. As in the grievance immediately above (Brown) I deem the failure of the grievant to appear as an abandonment of his grievance.
The grievance of James Lloyd (Ilex) is denied on the same basis as the two Awards immediately above.

The grievance of Jerome Levine (Fare) was withdrawn from arbitration by the Union.

The grievance of Julius Rosensweig for two weeks vacation pay (Frenat) was withdrawn by the Union.

The grievance of Irving Davis was paid by the Employer (55th Street) and is therefore settled.

The grievance of Harvey Goldring is conceded and granted by the Employer (Dover). Therefore Dover shall pay Mr. Goldring's claim for two weeks vacation pay.

The grievances of Michael Levine and Allie Levine are granted. Though technically the grievants were first on the payroll of one Employer (Prospect); and thereafter were employed by a different Employer (Tyrone) when Prospect sold its cabs and went out of business, I find that by practice the grievants worked interchangeably during the earlier period for both. Indeed both Employers were garaged at the same location and were members of a group of twenty companies which made up "The Independent Owners Taxi Association." There is no dispute that this group shared mechanics, certain expenses, ownership of the building and some trucks. I conclude that by practice, they also shared drivers, and that the grievants worked back and forth between both Prospect and Tyrone (before the former went out of business), though the records may not indicate the full extent of the interchangeability.

I consider the amount of vacation pay which Tyrone paid the grievants for the year 1965 to be significant. Whereas the Employer testified that it was "his program" to grant $35 or $40 in vacation pay to first year drivers, the grievants in 1965 (which the Employer claims was their first year of service with him) received $50 each. I am not persuaded that they received this greater amount merely because they were "good bookers." That was part of it no doubt, but I believe it also reflected the fact that they had worked more than casually for Tyrone prior to 1965 while officially on the payroll of Prospect. On this basis, by the vacation year 1966, the grievants should be credited with at least four years of service with Tyrone. Therefore, together with the undisputed fact that they worked at least the required 240 days during the eligibility period, they are entitled to a second week of vacation pay for 1966.
The grievance of David Cohen for a second week of vacation has been paid by the Employer (Garr) and is therefore settled.

The grievance of Wilbur Haywood is denied. The evidence indicates that the grievant had not acquired four years of credited service as a driver with the Employer (EN) to be eligible for a second week of vacation pay in the vacation year 1966.

The grievance of Diego Aranely is conceded and granted. Therefore the Employer (Tedman) shall pay the grievant's claim for one week vacation pay.

The grievances of John Lopez, Irving Davidoff, et al (Dynamic) covering 22 grievants whose identities are known to the parties) are granted. The parties are in dispute over the Employer's (Dynamic) policy regarding eligibility for one week's vacation pay. The grievants, and the Union on their behalf, contend that the policy was to grant vacation pay to those drivers who worked at least 200 days between July 1st of one year and June 30th of the next. The Employer asserts that his policy for the year in dispute (1965-1966) required 200 days of work within a shorter period of time, namely September 1, 1965 through June 30, 1966. The Company states that it established its policy in September 1965 and posted a sign on the garage bulletin board to that effect.

The disagreement centers on a claimed change in policy when the Employer moved from its location in Brooklyn to the Bronx in 1965, and when, simultaneously, it absorbed another Company (Forest) which had also been located in Brooklyn. The record discloses that while Dynamic operated in Brooklyn its policy was to grant one week of vacation pay to those drivers who worked 200 days within the period July 1 of one year to June 30 of the next. And it is the position of the Union that the grievants were led to believe, and had every reason to believe that that policy continued when Dynamic moved to the Bronx.

The Union's position is meritoreous. If the Employer intended to change his vacation policy in 1965 by requiring the same number of days worked, but within a shorter period of time, it was his obligation to provide and disseminate clear notice thereof to and among his employees. Otherwise the employees would be entitled to rely upon the
previous practice. I am not satisfied that the sign which he says was posted in 1965 met the test of such notice. Indeed the Employer's representative at the hearing was unable to testify of his own knowledge about the wording of the sign because his employment post dated both the date that the sign was posted and the date it was removed. So there is no direct evidence to support the Employer's version of what the sign said, and the sign is not now available.

Contrarywise the grievants who were then employed, testified that the sign did not reduce the period of time within which to acquire 200 days worked, and that it bore the name of the liquidated Company (Forest). Therefore regardless of what it said about the period of eligibility, the employees had good reason to believe that it was not applicable to them, since they worked for Dynamic. In short, if Dynamic attempted to change its vacation policy, it failed to give the kind of notice universally required to effectuate a change in a previously established practice.

Accordingly, those grievants who worked 200 days or more between the period July 1, 1965 and June 30, 1966 shall be paid their claim for one week's vacation pay for that year.

The following grievances are continuing, pending further hearings, or additional information from either or both parties:

(Americo Saccavino (Willow Maintenance);
Leo Lazarus (Ted Fre); Robert Weiss AAR);
Louis Wile (Jar Service); Samuel Regans (EN);
Stanley Rosenthal (Cordi); Efrain Endujar (EN); the estate of Vincent Madonna (Iota); Ben Acocella et al (Worth Taxi)(covering eleven grievants whose identities are known to the parties); Joseph Baglione, Emilio Ramos; Salvatore Salerno; Julius Rosenzweig; Nikos Kolaitis (Andrea Service);
Arthur Goldberg (Zebra).

Also continuing (per my Award of March 5, 1969,) pending further hearings or additional information from either or both parties are the grievances of:

John Bilgeshausen, Michael Burke, Peter Mitronick, Garland McMillan, George Ruoff, Dominick DeBellis, Ernest Collette, Abraham Glass.
With the understanding of the parties, the following grievances, which involve interpretation and application of Article VII Section 1 and Article XII of the predecessor contract are continuing pending further word from the parties:

"Solomon Frielich, Salvatore Barraco, et al (Columbia) (a "mass grievance" covering twelve grievants whose identities are known to the parties;); Walter Scott et al (55th Street) (a "mass grievance" covering grievants whose identities are known to the parties;); Max E. Smook, Benjamin Schulman, Burton Stark (Chase); Henry Feldman, Abraham Nemeroff, Nathan Opal, Seymour Rothchild (Willow); Sidney Binder et al (Garr) covering eighteen grievants whose identities are known to the parties.)

A further hearing is scheduled for April 30, 1969.

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

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.

Eric J. Schmertz
Impartial Chairman
In the Matter of the Arbitration
between
Metropolitan Taxicab Board of Trade, Inc.
on behalf of Tone Operating Corp.

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

The Undersigned, as Impartial Chairman under the
Collective Bargaining Agreement between the above named parties
makes the following AWARD.

The refusal on September 30, 1969 of about thirty-eight employees of Tone Operating Corp. to take out taxicabs at the beginning of their regular shift was a work stoppage in violation of Article XXIV of the Collective Bargaining Agreement. The Union's claim for pay for the time lost is therefore denied.

I am satisfied that the Union officials at the Union's central office attempted diligently to end the work stoppage and that those officials complied substantially with the Union's obligations under Article XXIV. The role of two Union officials at the scene of the work stoppage is unclear. The evidence does not show conclusively that they made a good faith effort to prevent the stoppage or to persuade the men to return to work. On the other hand there is not sufficient evidence to hold that those two officials either led, encouraged or supported the work stoppage. Accordingly, the Employer's request for money damages is denied.

The Employer's request for an order enjoining any repetition of the work stoppage and for an order prohibiting any further breaches of Article XXIV of the contract, during the term of the Collective Agreement, is granted. Therefore, on penalty of disciplinary action including discharge, and money damages where warranted, I enjoin any future breach of Article XXIV (Industrial Peace) of the contract between the parties.
Other directives which I issued orally at the conclusion of the hearing, and not covered by the foregoing, are also made part of this Award; namely that there shall be no violence of any type between any representative of the Employer and the employees; and that there shall be no reprisals against any employee who appeared at the arbitration hearing because of that appearance.

Dated: October 6, 1969
STATE OF New York  )ss:
COUNTY OF New York  

On this 6 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.
In the Matter of the Arbitration between
Metropolitan Taxicab Board of Trade, Inc. on behalf of Tone Operating Corp.
-and-
New York City Taxi Drivers Local Union #3036, AFL-CIO

Based on the direct evidence (i.e. the testimony of witnesses on the scene) I conclude that about 38 employees of Tone engaged in a work stoppage on the afternoon of September 30, 1969 in violation of Article XXIV of the Collective Bargaining Agreement.

Despite requests from Tone's owner and other managerial employees, as well as an effort by the Dispatcher to dispatch cabs, those approximately 38 employees (out of a total of 54) refused to take out their taxicabs at the beginning of their regular shifts, and thereafter. Clearly that concerted action which prevented all but sixteen cabs from working that day, was in direct violation of Article XXIV of the contract which reads:

INDUSTRIAL PEACE

During the term of this agreement, the Union, its officers, representatives, agents and members agree that they shall not authorize, instigate, cause, aid, encourage, support, condone or participate in any strike, slowdown, work stoppage, boycott or picketing or patrolling directed against, or any curtailment of work, or restriction of, or interference with, the operations of the Employer or any of its affiliated companies. In the event of a strike, slowdown, work stoppage, boycott or picketing or patrolling directed against, or any curtailment of work or restriction of, or interference with, the operations of the Employer or any of its affiliated companies, the Employer shall not be required to negotiate on the merits of the dispute which gave rise to the stoppage or curtailment or other such action until the same has ceased.

In the event of a strike, slowdown, work stoppage, boycott or picketing or patrolling directed against, or any curtailment of work or restriction of, or interference with, the operations of the Employer or any of its affiliated companies, the Union shall immediately instruct the involved employees, in writing, that their conduct is in violation of the agreement, that they may be disciplined up to and including discharge, and
instruct all such persons to quit the offending conduct.

The Employer shall have the unrestricted right to discipline, up to and including discharge, any employee who instigates, participates in, or gives leadership to any activity herein prohibited. If Employer discipline in this regard is challenged through the grievance procedure and the same proceeds to arbitration, the arbitrator shall have power to review the reasonableness of the penalties imposed, but he may order back pay only upon a finding of innocence. The failure of the Employer to discharge any such employee or group of employees shall not be construed as a waiver of the right of the Employer to discharge other violators thereof or as an indication that such activity is condoned by the employer.

The Employer will not lock out any employees during the term of this agreement so long as this agreement is not violated.

The meaning of the foregoing contract clause is unequivocal and explicit. It is an absolute prohibition against strikes, slowdowns, work stoppages and the other enumerated proscribed activities therein during the life of the Collective Agreement. It provides for no exceptions. It means that without exception, work stoppages may not be used as a method to redress grievances or to protest the action or conduct of the Employer, or to resolve any dispute between the parties. If this prohibition is not respected, the penalty of disciplinary action up to and including discharge for the guilty employees, is proper. Implicit, in my view, also is a penalty of money damages under appropriate circumstances for lost business. And so that the picture is complete, because Article XXIV also prohibits "lock-outs" by the Employer under the conditions stated, a breach of this latter provision by the Employer would, in my view, make him liable for payment of loss of earnings and other benefits to the affected employees.
Read together with the immediate succeeding contract section, Article XXV (Adjustment of Grievances and Arbitration), the proper method for redressing alleged wrongs, and/or for the resolution of any and all disputes arising out of the employment relationship, is manifest - by using the grievance and arbitration provisions of the contract. In other words, there is only one proper way to settle disputes between the employees (and the Union on their behalf) and the Employer, and that is through the grievance procedure, including arbitration, as mandated by Article XXV. Put another way, so that there is no mistake, strikes, slowdowns, work stoppages (and the other actions prohibited by Article XXIV) may not be resorted to where there is a dispute between the parties, or for any other reason, during the life of this contract; instead disputes must be resolved through the grievance procedure, and by arbitration, if necessary.

As this is the first case of this type which has required an Award during my term as Impartial Chairman, I take this opportunity to emphasize the foregoing interpretation and application of Articles XXIV and XXV, not just as notice to the employees at Tone, but to everyone else on both sides covered by this industry-wide contract.

As the Impartial Chairman I am bound to the terms of the contract as negotiated by the parties. It is my obligation to interpret, apply and enforce those terms. I have no authority to vary those terms or legislate new provisions. Therefore I must and shall strictly enforce the "no strike" and "no lock-out" provisions of the contract, and shall require that any and all disputes between the parties be resolved in a peaceful and responsible manner through the grievance procedure and in
arbitration. Indeed this interpretation is such a well settled principle of sound and orderly labor relations during the term of any collective bargaining agreement, that it should hardly need further enunciation here. The fact is that I can conceive of no dispute whatsoever which cannot be fully and adequately resolved through the grievance procedure and/or arbitration.

Where the Employer has committed a wrong, the Impartial Chairman will redress that wrong in arbitration, if the parties are unable to settle it in the grievance steps. If, as a result an employee has suffered a monetary loss, or any other benefit loss and is entitled to reimbursement or restoration, the Impartial Chairman will make him whole.

Specifically, with reference to discharges (which apparently precipitated the work stoppage in the instant case), the propriety thereof are matters which may be properly brought to arbitration before the Impartial Chairman. And if the discharges were improper, the affected employees will be reinstated with back pay and full benefits. So there is no need for any other action or "self Help" by the employees in that type of dispute or any other.

Having found that about thirty-eight employees engaged in a work stoppage, the events that followed are largely immaterial, so far as Article XXIV is concerned. It may well be that the Employer's handling of the Union Committee thereafter was inept or provocative or even delayed the return to work. I make no judgement one way or the other because none of the heated exchanges at the scene would have taken place had there not been first an illegal work stoppage by a substantial number
of the employees. Similarly, in view of the stoppage, and, as I have found a continued refusal by the employees involved to start their shifts, the Employer's "close down" of his garage at about 7:30 P.M. was not improper. For his action in doing so would not have occurred had not the employees first breached the provisions of Article XXIV. Consequently, the Union's request for pay for the employees for the time they did not work, is denied.

And for reasons already discussed, mainly that the grievance procedure and arbitration is the proper forum for any and all disputes, the employees are not relieved of the work stoppage prohibition because the Employer owes a large sum of money to the Health and Welfare and Pension Funds, though I can appreciate how this might anger and exasperate both the employees and the Union. But that specific dispute has been adjudicated in arbitration. I have rendered an Award determining the Employer's indebtedness and directing full payment with interest forthwith. I understand that that Award is now before the court for confirmation as a judgement, which the trustees of the Funds may execute. So the proper manner for handling that specific case has been followed and any other rights which the Union and the employees may have because of that indebtedness, in any other proper forum, are reserved. As that case is not before me as part of the instant proceeding I find no need here-in to respond to certain requests by the Union for additional orders relating to that situation. The same is true with regard to any other motions made by the Union not expressly ruled on either in the Award or this Opinion.
The obligation of the Union under Article XXIV is explicit. The Employer contends that two Union officials at the garage also breached Article XXIV, by leading, encouraging and supporting the employees' work stoppage. On the other hand the Employer concedes that top Union officials at the main office, namely two who are Vice Presidents/Administrative Assistants to the President, worked diligently and in good faith to terminate the stoppage and return the employees to work. The evidence on the latter is clear, determinative and uncontroverted. Messrs. Pancaldo and Goldberg spared no effort in attempting for hours after the commencement of the work stoppage to bring it to an end. Their efforts finally succeeded in time for the first shift the next day, October 1. So in that respect the Union (though it did not instruct the employees of the contract violation in writing) did comply substantially with its obligations under Article XXIV. The evidence regarding two Union officials on the scene, Messrs. Bono and Petses is inconclusive. There is no evidence that they instigated or led the work stoppage. The evidence is contradictory and indecisive one way or the other on whether they encouraged, supported or condoned the stoppage, or took all possible steps to end it. So, though the evidence does not establish that they did what is required of them under Article XXIV to either prevent or halt a work stoppage (neither of them testified at the hearing) there is not sufficient evidence to conclusively find that they defaulted in their responsibilities, either willfully or negligently. Accordingly, and under the particular circumstances involved herein, I shall
deny the Employer's request for money damages for losses sustained from the work stoppage. But for future breaches of Article XXIV, depending on where the responsibility lies I shall not hesitate to Award money damages where I consider it warranted.

The Employer's request for an order enjoining any further breaches of Article XXIV is proper and granted because it is consistent with my authority under the contract, my holdings herein, and with the binding provisions of Article XXIV. Accordingly such an order is made part of my Award in this matter. Also I shall make as part of my Award, those directives I issued orally at the conclusion of the hearing, which are not already preempted. Hence I order that there be no violence of any type between the owner (or any representative of the Employer) and the employees; and that there be no reprisals of any type by the Employer against employees because of their appearance at this arbitration hearing. My directive that the status quo of the normal work schedule be maintained is now fully covered by and merged into my Award enjoining any future breach of Article XXIV.

Eric J. Schmertz
Impartial Chairman
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade
on behalf of certain member Employers

*****

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

and

Andrea Service Corp.

Further hearings on "past grievances" were held at the offices of the American Arbitration Association on June 19 and June 25, 1969.

Having duly considered the proofs and allegations, I make the following AWARDS:

The grievances of Abraham Glass and Charles King are settled, based on payment by the Employer (55th Street Garage) in accordance with my prior Award concerning the "snow tire grievance."

The grievance of Jack King (Frenat) is withdrawn.

The grievance of Sam Levine (Dover) for break down pay is withdrawn.

The grievance of Roosevelt Chance (Haso) for two weeks vacation for the year 1965-1966 is denied. The grievant worked 235 days during the vacation eligibility period and is entitled to credit for three strike days. The total of 238 days is two days short of the required minimum of 240 days worked or credited during the vacation eligibility period.

The grievance of Samuel Berger (Ann Service) for two weeks vacation for the year 1965-1966 is denied on the same basis as the Award immediately above. The record shows that the grievant can be
credited with only 238 days during the eligibility period, or two days short of the requisite number of 240.

The grievance of Mercadio Calero (Tedman) is settled on the basis of payment by the Employer of one week's vacation pay for the year 1965-1966.

The grievance of Murray Smith (Tedman) is settled on the basis of payment by the Employer of one week's vacation pay for the year 1965-1966.

The grievance of Pasquale Chiarello (Chad) is settled on the basis of payment by the Employer of a second week of vacation pay for the year 1965-1966.

The grievance of Bitello Rosario (Lauren) for two weeks vacation pay for the year 1966-1967 is denied. The records indicate that he is entitled to credit for a total of 239 days worked (226 days actually worked and 13 days on disability) or one day short of the required minimum of 240 days worked within the vacation eligibility period.

The grievance of Robert Weiss (AAR) for two weeks vacation pay for the year 1965-1966 is granted. The Employer's payment of that claim shall close out all "past grievances" of vacation claims at the AAR Garage.

The grievance of Cupertino Bernal (Andrea) for two weeks vacation pay is settled on the basis of payment by the Employer of the sum of $50.00 to the grievant.

The grievance of Leo Lazarus (Tedfre) for a second week of vacation pay for the year 1965-1966 is denied. The work records indicate that the grievant had not received vacation pay in any three years prior to the year 1965-1966. Hence the year of his claim does not constitute the fourth year he received vacation as a regular employee as required by the contract.

The grievance of Frank Lauri (Level-Sandan) for two weeks vacation pay for the year 1965-1966 is denied. The grievant's actual days worked plus credit for strike days during the vacation eligibility period totals 238, or two days short of the required 240 days minimum. As he did not meet the eligible requirements for any vacation in the year 1965-1966,
his claim for two weeks vacation must fail even if he received vacations in three prior years.

The grievance of Harry Paris (Lawn Cab Corp.) is withdrawn by the Union without prejudice. This grievance may be re-submitted to the Impartial Chairman when the Union ascertains a better identity of the Employer involved.

The grievance of James Brown, Jr. (Checker) is withdrawn.

The grievance of Charles Steffen (Checker) for a second week of vacation pay for the year 1965-1966 is granted. The record discloses that not only did the Company grant the grievant vacation pay in at least three prior years for periods of service less than 240 days worked, but that its vacation plan prior to the first Union contract provided for two weeks vacation after two years of full time service. I am persuaded that this latter policy obtained in the year 1965 (Vacation year 1964-1965.) Accordingly the last sentence of Section 1 of Article VII of the predecessor Collective Bargaining Agreement is applicable. That sentence reads:

If the Company in 1965 granted a greater vacation plan than said one week for one year and two weeks for four years (for example two weeks for three years) such greater benefit shall continue.

Consequently because the Company did grant a greater benefit, namely two weeks vacation pay after two years, that benefit shall obtain to the grievant's vacation in the summer of 1966 (vacation year 1965-1966.)

There is no dispute that he had worked as a full time employee and received vacation pay for at least two previous years as well as one week vacation pay for the year 1965-1966. Accordingly the Employer (Checker) is directed to pay the grievant's claim for a second week of vacation pay for the year 1965-1966.

The grievance of Saul Taub (Checker) for a second week of vacation pay for the year 1966-1967 is settled by the Employer's agreement to pay that claim. But the grievant's claim for a second week of vacation pay for the year 1965-1966 is withdrawn.

The grievance of Solomon Dinker (Checker) for a second week of vacation for the year 1966-1967 is withdrawn.
The grievances of Garland McMillan, Dominick De Bellis and Peter Mitrovick (Flex) for a second week of vacation pay for the year 1965-1966, are continuing pending further information.

The grievance of Benjamin Azrikan and Alphonso D. Killens (Checker) each for a second week of vacation pay for the year 1966-1967 are continuing pending further word from the parties on the basis of the following stipulation:

If the Company records show that the grievants received three prior vacation payments, they are entitled to a second week of vacation pay for the year 1966-1967 and the Company will make this payment. If not the claim or claims will be denied.

Eric J. Schmertz
Impartial Chairman

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

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of certain member Employers.

A further hearing on "past grievances" was held at the

Having duly considered the proofs and allegations I
make the following AWARDS:

The grievance of Stanley Rosenthal (Cordi) is de-
nied. The contract between the Union and that
Company, as distinguished from most others in the
industry, was expressly effective as of July 28, 1966, or subsequent to the vacation period July 1, 1965 to June 30, 1966. Because the contract has
no provision for retroactivity, the grievant's claim
under the contract for additional vacation pay for
the year 1965-1966, based on the eligibility per-
iod July 1, 1965 to June 30, 1966 is disallowed. I
find that the benefits of the contract were to be
applied prospectively from July 28, 1966 and there-
fore the grievant's entitlement under the contract
would be applicable to the vacation period after
July 28, or in other words for the vacation year
1966-1967. The provision of the last paragraph of
Article IV which reads:

An employee shall be given credit for all
benefits for the days he was scheduled to
work during the period from May 12, 1966 to
May 16, 1966,

is not inconsistent with the foregoing holding. It
means that in determining any benefits under the con-
tact on and after July 28, 1966, credit (in terms
of service) shall be given for those five days in
May of 1966. But absent express language applying
the contract terms retroactively, especially in view
of the express effective date of July 28, 1966, the
foregoing provision cannot be interpreted to grant a
vacation payment for and during a period earlier than
the effective date of the contract.
The grievance of Ben Acocella et al (Worth) is settled and dismissed as follows: The Employer (Worth) shall pay Mr. Acocella the sum of $42.00 in full settlement of his claim. All other claims involving any other employees under this grievance, are dismissed.

The grievance of Samuel Regans (EN Garage) is settled. The Employer (EN Garage) has paid the grievant's claim for one week vacation pay for the year 1965-1966.

The grievance of Efrain Endujar (EN Garage) is denied on two grounds. The grievant failed to appear after due notice and the available records failed to show that he achieved the requisite 240 days worked within the applicable vacation eligibility period even if he is given credit for time on disability as claimed in his written grievance.

The grievance of Ernest Collette (Vernon-Circle-Lod) is settled by the Employer's payment of the grievant's claim for vacation pay for the year 1966-1967.

The grievance of Michael Burke (Flex) was settled prior to the hearing by the Employer's payment to the grievant of a second week of vacation pay for the year 1965-1966.

The grievance of George Ruoff (Flex - now operated out of Jaycee) is denied. The grievant achieved only 237 days worked including credit for the strike days, and therefore failed to work the minimum 240 days within the vacation year as required by the contract.

The grievance of Joseph McKenna (Cadet) is denied on the same basis as the immediate foregoing Award. The grievant is credited with only 232 days worked including the strike days and therefore fails 8 days short of the minimum requirement of 240 days worked within the eligibility period of the vacation year 1965-1966.

The grievance of John Bilgenhausen (Flex) is denied. The grievant actually worked 235 days during the vacation eligibility period 1965-1966. In order to achieve the requisite minimum of 240 days, he would have to be credited with all five of the strike days. But credit for the strike days is accorded under the contract only if an employee would have been scheduled to work those days. Based on the griev-
ant's work records, and especially his work pattern the weeks shortly before and following the strike days, I consider it highly improbable that he would have been scheduled or would have worked all five of the strike days, Wednesday, May 12 through Sunday, May 16. Though he did work on some other Saturdays and Sundays during that year, his most consistent practice was to be off on either Saturday or Sunday (if not both) in most of the weeks involved. Consequently, I cannot conclude as a likelihood, that he would have worked both Saturday and Sunday, May 15 and 16, 1966.

The grievance of the Estate of Vincent Madonna (IOTA) is granted by default because of the failure of a representative of the Employer to appear after due notice. I direct that the Employer involved, who was a part of the IOTA Association, pay to the estate of Vincent Madonna the claim for two weeks vacation pay for the year 1965-1966.

The grievance of Americo Saccavino (William Maintenance) is granted. The grievant is now deceased. But his testimony at a prior hearing and the available work records disclose that he actually worked 222 days within the vacation eligibility period, and is also eligible for 18 days credit on Workman's Compensation, in accordance with the agreement of the parties to credit such time as days worked. This meets the requisite 240 days worked. Therefore the claim for vacation pay for the year 1966-67 is allowed. When I indicated my intention at the hearing to grant this grievance, the Employer agreed to make payment of the claim to the widow of the deceased grievant.

The grievance of Foster Williams (Londal) is granted in part as follows: The charge against the grievant is that he used foul and profane language to the Employer's lady bookkeeper. As a discharge case, the burden is on the Employer to prove the charge by clear and convincing evidence. He has not done so. Only the bookkeeper involved testified about the alleged incident in which certain foul language (undisclosed at the hearing) was directed at her by the grievant. The grievant in his testimony, flatly denied that he did so. There is no doubt that the grievant and the bookkeeper were in a discussion initiated by the former who sought an itemization of his weekly pay deductions on his pay envelope (as required by law). Both agree that the discussion began in the bookkeeper's office and continued as the grievant left that office and entered an adjacent dispatcher's office. The bookkeeper contends that the grievant used the foul language after he entered the dispatcher's office.
A fellow employee who testified that he was in the dispatcher's office at the time and heard the grievant and the bookkeeper in conversation, stated that he did not hear any loud, foul or abusive language used by the grievant. He was certain that if such language had been used, it would have come to his attention. Obviously none of this testimony can be determinative one way or the other.

But the Employer's equivocation in meting out the discharge penalty suggests that he too was not sure of what had actually transpired. The bookkeeper testified that the incident occurred on either July 21 or July 28, 1967. Thereafter the grievant continued to work until August 18; then went on vacation until August 25; and was discharged not until he returned from vacation on August 28. So if the incident occurred on the last possible date, namely July 28, the Employer permitted the grievant to work more than two more weeks without taking any disciplinary action against him. And he also permitted him to go on and return from vacation before he acted to terminate him. It is well settled that if discipline is warranted, it should follow without delay the incident for which it is imposed. If not, as in the case here, two conclusions are possible. One is that employer has either condoned or decided to overlook the offense and the other is that the employer is not certain about the merits. Either way, absent any other conclusive evidence, it works to cast a serious doubt on the propriety of any discharge ultimately but tardily imposed. This is not to say that the grievant did not use foul and abusive language to the bookkeeper. Rather it is to say that the Employer has not met his burden to show, by the quantum of convincing evidence required in this type of case, that the grievant committed that act.

However, I fail to see how the full remedy sought by the grievant can be granted. Neither the grievant nor the Union on his behalf seek reinstatement. Instead the damages sought is 52 weeks pay at his mechanic's rate of pay, representing the period of time between his discharge and his employment as a mechanic elsewhere. I am not at all persuaded that the grievant was unable for a whole year to find a mechanic's job comparable to the work and pay he received at Londal. I am satisfied that at that time skilled mechanics were needed both in the taxicab and other industries in the New York Metropolitan area, and with some reasonable diligence the grievant could have found comparable mechanic's job within a much shorter period of time. I think he could
and should have done so within at least 2 months. Therefore as a measure of damages I Award him two months pay at the mechanic's rate of pay he received from Londal. Londal shall pay that amount of money to the grievant in disposition of this grievance.

The grievance of Nathan Weinstein (TMI) which was heard at this hearing is continued pending further word from the parties, on the same basis, and together with other similar grievances, as noted in my prior Award dated May 7, 1969, which involve the interpretation and applicability of Article VII Section 1 and Article XII of the predecessor contract.

A further hearing on other "past grievances" as well as "present grievances" is scheduled for July 19, 1969.

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.
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of its Member Employers

Award

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

and

Andrea Service Corp.
Zebra Service Corp.
Jaw Service Corp.

A further hearing on "past grievances" (as defined in my Award of March 5, 1969) was held at the offices of the American Arbitration Association on April 30, 1969.

Having duly considered the proofs and allegations I make the following Awards:

The grievances of Joseph Baglione, Emilio Ramos, Salvatore Salerno, Julius Rosenzweig and Nikos Kolaitis have been settled by payment by the Employer (Andrea Service Corp.) of call-in pay to each of the grievants. The additional grievance of Mr. Kolaitis was withdrawn.

The grievance of Julian Ponce is settled. The Employer (Cross County) shall reinstate the grievant, who agrees to work a regular shift on a full time basis, starting each morning between 6 and 7 A.M. The reinstatement shall be without back pay, but deemed as uninterrupted employment with this Employer. For purposes of vacation pay, the grievant will receive credit for those days actually worked and credited as worked under the contract for this Employer within the vacation year.
The grievance of Sam Levine (Dover) for an attendance bonus for the second quarter 1966 is granted. The grievant actually worked 56 days during the eligibility period. If he received credit for 4 of the 5 strike days he would achieve the requisite 60 days for the attendance bonus. In a prior Award I held that under the contract eligible employees are entitled to credit for the strike days they would have been scheduled to work in determining their eligibility for an attendance bonus. In the instant grievance I conclude that the grievant was entitled to receive credit for at least 4 of the strike days. He was a full time driver. Though his work pattern was irregular, in that he scheduled his own days off, which were not necessarily the same each week, his pattern of work both before and after the strike, including the days he did not work during that period, leads me to find it highly probable that had the strike not occurred, he would have worked at least 4, if not 5 of the strike days. And inasmuch as the grievant's work pattern was acceptable to the Employer, I find that the days that the grievant worked or would have worked are the days on which he was scheduled to work within the meaning of the contract. Accordingly, he shall receive credit for 4 of the 5 strike days, which makes him eligible for the attendance bonus for the second quarter 1966. His Employer (Dover) shall pay his claim for that bonus.

The grievance of Ruby Foreman (Jaw Service Corp.) is granted on the basis of a default because of the failure of the Employer to appear after due notice. Accordingly Jaw Service Corp. shall pay the grievant's claims for one week vacation pay for 1965-1966 and one week vacation pay for 1966-1967.

The grievance of Louis Wile (Jaw) is granted on the basis of a default because of the failure of the Employer to appear after due notice. Accordingly Jaw Service Corp. shall pay the grievant his claim for a second week of vacation pay for 1966-1967.

The grievance of John Garcia (Jaw) is granted on the basis of a default because of the Employer's failure to appear after due notice. Accordingly Jaw Service Corp. shall pay the grievant's claim for $1.50 break-down pay for August 6, 1966 and an additional $1.50 break-down pay for November 5, 1966.

The grievance of Arthur Goldberg is granted on the
basis of a default because of the failure of the Employer (Zebra) to appear after due notice. Accordingly, Zebra Service Corp. shall pay the grievant his claim for call-in pay for February 9, 1967.

The following grievances are continuing pending further hearings, or additional information from either or both parties:

Robert Weiss (AAR); Sam Levine (Dover) (claim for break-down pay; Cupertino Bernal (Andrea); Nathan Weinstein (TMI); Joseph McKenna (Cadet); Foster Williams (Londal); Americo Saccavino (Williams Maintenance); Leo Lazarus (Ted Fre); Samuel Regans (EN); Stanley Rosenthal (Cordi; Efrain Endujar (EN); the estate of Vincent Madonna (Iota): Ben Acocella et al (Worth Taxi) (covering 11 grievants whose identities are known to the parties.

Also continuing on the same basis (per my Award of March 5, 1969) are the grievances of John Bilgeshausen, Michael Burke, Peter Mitronick, Garland McMillan, George Ruoff, Dominick DeBellis, Ernest Collette, Abraham Glass.

With the understanding of the parties, the following grievances, which involve interpretation and application of Article VII Section 1 and Article XII of the predecessor contract are continuing pending further word from the parties:

Solomon Frielich, Salvatore Barraco, et al (Columbia) (a "mass grievance" covering twelve grievants whose identities are known to the parties); Walter Scott et al (55th Street) a "mass grievance" covering 4 grievants whose identities are known to the parties; Max E. Smook; Benjamin Schulman, Burton Stark (Chase); Henry Feldman; Abraham Nemeroff; Nathan Opal; Seymour Rothchild (Willow); Sidney Binder et al (Garr) covering 18 grievants whose identities are known to the parties; Alfred Vitale; Percy Glassmen, et al (Butler) (a "mass grievance" covering 17 grievants whose identities are known to the parties.)

Further hearings are scheduled for June 4 and June 5, 1969.

\[Signature\]
Eric J. Schmertz
Impartial Chairman
DATED: May 7, 1969

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

On this 7th 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.

[Signature]

[Name]
In the Matter of the Arbitration between
Local Union #3036, New York City Taxi Drivers Union, AFL-CIO
and
Metropolitan Taxicab Board of Trade, Inc.
on behalf of certain member Employers.

This proceeding is for a determination of those "past grievances" for vacation pay arising from the "continuing benefits" provisions of the predecessor collective bargaining agreement. Specifically they are the grievances of:

Solomon Frielich, Salvatore Barraco, et al (Columbia) (a "mass grievance" covering 12 grievants whose identities are known to the parties); Walter Scott et al (55th Street) a "mass grievance" covering 19 grievants whose identities are known to the parties); Max E. Smook; Benjamin Schulman, Burton Stark (Chase); Henry Feldman, Abraham Nemeroff, Nathan Opal, Seymour Rothchild (Willow); Sidney Binder et al (Garr) covering 18 grievants whose identities are known to the parties); Alfred Vitale, Percy Glassmen, et al (Butler) (a "mass grievance" covering 17 grievants whose identities are known to the parties); Nathan Weinstein (TMI).

Each grievance is for vacation pay (either one or two weeks) for the vacation year 1965-1966 based on vacation plans in force at the Employers involved, prior to the predecessor collective bargaining agreement, and which, in terms of eligibility requirements or pay were more favorable to the employees than under Article VII (Vacations) of the applicable predecessor contract.

The pertinent part of that Article requires that full time employees acquire '240 days worked or credited within the vacation eligibility period, July 1 to June 30th, in order to be eligible for any vacation pay.
The grievances however are based on prior vacation plans which granted vacation pay for a lesser number of days worked within that eligibility period or a comparable period, or which paid more in percentage earnings as vacation pay than the pay formula under Article VII of the contract. It is undisputed that the grievants met the eligibility requirements of those particular prior vacation plans. But either they did not receive vacation pay for the year 1965-1966 because they failed to achieve the 240 days worked or credited, or they received less in vacation pay than they had received previously under a prior plan.

On behalf of the grievants the Union seeks a continuation of those more favorable plans, under Article XII (Continuing Benefits) and Article VII, Section 1 of the predecessor contract. The Employer places a different and contrary interpretation on those contract clauses.

In deciding these disputes I find no need to interpret those contract provisions (now expired) because over-riding equitable factors impel a resolution favorable to the grievants. But as an inextricable and therefore necessary part of this case, my Award must and shall include also a direction on what the "continuing benefits" provision of the current collective bargaining agreement (Article XVII), effective November 17, 1967 to November 16, 1970, means and how it shall be applied during that term. In short, this Award is both dispositive of the foregoing "continuing benefits" grievances arising from the predecessor contract and, so as to be complete, mandates how the continuing benefits clause of the present contract shall be enforced in disputes substantively similar to those of the instant grievances.
There is no dispute that the eligibility period within which to accumulate days worked or credited for a vacation during the summer of 1966 (vacation year 1965-1966) was July 1, 1965 through June 30, 1966. But the predecessor contract was not signed until the middle of May 1966, ten and one-half months after the applicable eligibility period had begun. So, for almost the entire eligibility period the employees had no idea what the contractual vacation eligibility requirements would be. It is both logical and reasonable therefore that they would and did work at a pace and with regularity based on the vacation plan they enjoyed in the prior or earlier years. For they had no reason to know or expect that their particular plans would be changed by contract negotiations; that more might be expected of them as a condition for vacation pay than previously; or that their pay entitlement might be less. Of course where Article VII as negotiated in May 1966, and applied in principal part retroactively to cover the eligibility period July 1, 1965 to June 30, 1966, coincided with or improved on prior plans (as was the case with the vast majority of the employees), no inequity in the form of a diminution of a prior benefit occurred. But as to the grievants the effect was different. Unable to anticipate different or more demanding vacation eligibility requirements throughout the first ten and one-half months of the one year period, they were confronted for the first time in May with the need to achieve a greater number of days worked to be entitled to any vacation. And they had less than two remaining months, May and June to acquire those additional days. Or again, not until May 1966 were some put on notice that a lesser percentage of bookings would be the base for calculating the vacation pay.
The basic unfairness of that condition, as an ex post facto application of a more demanding requirement or a lesser benefit, without prior notice of its retroactive application, is manifest. It should not therefore, deprive the affected grievants of the vacation pay they reasonably expected to earn, especially where, as here, for the year 1965-1966 each met the eligibility requirements of the plan under which he received vacation pay in prior years, and which for the first ten and one-half months of 1965-1966 he had no reason to know or believe would be changed.

Accordingly on that compelling equitable ground I resolve the foregoing grievances in favor of the grievants. I Award and direct the Employers involved to pay the claims for vacation pay that are the subject of those grievances.

In view of my ruling on the arbitrability of "past grievances", which I made at the first hearing on February 5, 1969 and recited in my Award of March 5, 1969, no further "past grievances" involving claims for "continuing benefits" arising from the predecessor contract will be arbitrable.

As the Impartial Chairman I deem it essential that the parties know how Article XVII (Continuing Benefits) is to be applied and enforced during the life of the current contract in disputes of this type. My view in that regard is based on the conviction that the time has come for uniformity and equality in the eligibility requirements for vacation benefits and attendance bonus. I can think of nothing more inequitable, unwarranted or damaging to orderly industrial relations than for drivers, similarly situated, not to meet the same threshold eligibility standards. Any significant discrepancy between what one regular driver must do to earn a vacation or bonus from that of another, is totally inconsistent with the regularized
standards and equality of treatment for which this collective bargaining agreement was negotiated.

Therefore, those vacation plans and attendance bonus formulae which existed prior to the collective bargaining relationship shall no longer be applicable under the current collective agreement, and shall not be enforceable or perpetuated under Article XVII of the present contract as I interpret that Article below.

Article XVII reads:

CONTINUING BENEFITS

Benefits formerly granted on a regular basis to the employees covered hereby (which were granted prior to the present contract negotiations or prior to the contract which terminated on November 16, 1967) shall be continued, with the exception of vacation benefits, Christmas bonus and attendance bonus. In the event it is contended that the combination of attendance bonus and vacation payment, as set forth in this agreement, provides less in total, than a previous combination of attendance bonus, vacation payment and Christmas bonus, the matter may be taken up through the grievance procedure, as there is to be no reduction in the combination of attendance bonus and vacation payment as provided by this agreement from a prior combination of attendance bonus, vacation payment and Christmas bonus.

It shall be applied and administered under the present contract as follows:

To receive any vacation pay, a driver must first meet the requirements of Article XII (Vacations and Vacation Pay) of the present contract. In other words, to receive full vacation pay he must achieve 230 days worked or credited within the eligibility period July 1- June 30th. For seventy-five percent vacation pay he must achieve 225 days on the same basis; and for fifty percent vacation pay he must work or be credited with 200 days on the same basis. Whether he receives one, two, or three weeks vacation with pay depends on his eligibility under
sub paragraphs (b), (c), or (d) of Section 1.

The same shall apply to attendance bonus. Under the current contract an employee shall be entitled to an attendance bonus only if he meets the conditions of Article XI.

The terms of Article XII for vacation pay, and those of Article XI for attendance bonus having been met, the Continuing Benefits clause (Article XVII) shall then come into play on the following basis:

If the combination of the vacation payment received under Article XII together with the attendance bonus received under Article XI provides less in total payment than what the employee received previously (before the collective bargaining relationship) from a combination of vacation payment, attendance bonus payment and Christmas bonus, he is then entitled to and shall receive a sum of money from the Employer to bring him up to the prior level. In other words, a comparison with the previous combination of vacation pay, attendance bonus and Christmas bonus shall only be made when and if the driver first meets the eligibility requirements of both the vacation provisions and attendance bonus provisions of the current contract.
So, where an employee is eligible for 100% vacation pay under Article XII, that payment together with the attendance bonus he receives under Article XI may be compared with what he received previously in total from that Employer from the combination of vacation pay, attendance bonus and Christmas bonus. But it should be recognized that if he is only eligible for 75% or 50% of vacation pay under Article XII, that payment together with his attendance bonus shall be compared with only 75% or 50% of what he received in vacation pay previously, plus his previous attendance bonus and Christmas bonus.

DATED: July 1969
STATE OF New York )
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.
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of Ann Maintenance Corp.

The Undersigned, as Impartial Chairman under the Collective Bargaining Agreement between the above named parties, renders the following Award:

The record before me does not establish justifiable cause for the discharge of Angel C. Cintron. He shall be reinstated but without back pay.

Eric J. Schmertz
Impartial Chairman

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.
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade, Inc. on behalf of Ann Maintenance Corp.

The stipulated issue is:

Was Angel C. Cintron discharged for justifiable cause? If not, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on December 2, 1969, at which time Mr. Cintron, hereinafter referred to as the "grievant," and representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The grievant, a driver, was discharged for "accidents." He was involved in nine accidents from 1967 to the date of his discharge, October 14, 1969, three of which took place during the last three months of his employment.

On the face of it the grievant's accident record would appear to be excessive, especially in view of the fact that during the latter months of his employment he worked only portions of each week. But this is a discharge case, with the burden on the Employer to establish justifiable cause by clear and convincing evidence. In my judgment that requires a closer look at the nature and circumstances of that accident record.

To meet its burden of showing cause for the penalty of
discharge, I believe that the Employer must prove that the grievant was at fault or otherwise careless in at least more than one of those accidents, together with some probative evidence as to their nature and seriousness. In this regard the Employer's case falls short.

Based on the testimony advanced by the Employer, it appears that the two accidents which immediately preceded the last, were not the grievant's fault. Also the Employer concedes that he requires his drivers to complete accident reports (which are filed with the insurance carrier) on every type of accident, including minor scratches, dents or damage which may occur while the cab is parked and without its driver.

As to the remaining earlier accidents (the six in the years 1967 and 1968, and three others between 1961 and 1966) the Employer was unable to offer any direct testimony regarding their nature or circumstances, including the extent of damage, liability or fault. The only evidence is a written compilation from the Employer's insurance carrier indicating the dates of the accidents and whether there was a "property damage" or "personal injury." But no testimony of any probative nature was offered by any representative of the insurance company to explain that bare information.

Accordingly though the number of accidents within the period of time suggests possible negligence on the part of the grievant, the evidence in this regard is not enough for me to reach that conclusion definitively. It is quite possible that in several of the accidents the grievant was entirely blameless, or they were minor, or even occurred when he was not driving.
The facts of the last accident on October 14, 1969 are known. The grievant ran into the rear of another cab. Liability or carelessness could be imputed to him, and therefore I do not find him totally immune from the consequences of his accident record. Also, I am not satisfied with his efforts to obtain other compensable employment after his discharge. For these latter two reasons, though I order the grievant's reinstatement, it shall be without back pay.

He is placed on notice however, that his discharge has been reversed because of the inconclusiveness of the Employer's proofs. The grievant is warned that any continuation of this type of accident record could quickly vitiate the doubt in his favor upon which this present decision is based, and would impel me to look with more favor on the Employer's theory that he is "accident prone" and a danger to himself and the public.

Eric J. Schmertz
Impartial Chairman
January 15, 1970

Mr. Gerald W. Cunningham
Ann Maintenance Corp.
248 West 60th Street
New York, New York 10023

Re: Local #3036 - and - Ann Maintenance Corp;
Angel Cintron

Dear Mr. Cunningham:

I have carefully considered your letter of January 2, 1970 regarding my Award in the above matter.

At the outset let me say that in the ten years of my arbitration practice I have never had an attorney appear before me who is more able, competent or conscientious than Mr. Goetz. Indeed he disagrees with my Award no less than do you, and has expressed that disagreement to me most vigorously.

But I suggest that disagreements of this type are inevitable from time to time, considering that arbitration is an adversary proceeding, and that with the rendition of each Award there is a losing side as well as a winning side. And occasionally, the losing party remains in sincere disagreement with the Arbitrator's decision. I have no doubt that that is the situation here.

However, I am fully satisfied that my Award is consistent with the evidence. You confuse procedural "rules of evidence," which do not necessarily prevail in an arbitration hearing with "standards of proof," which are compellingly present, especially in discharge cases. If there is one arbitration rule that is well settled it is that in discharge cases the Employer has the burden of proving the dischargee's culpability or responsibility for the offense charged by clear and convincing evidence. It is that standard for the reasons clearly stated in my Award which I found your company failed to meet.
I believe Mr. Goetz would advise you that my Award is dispositive only of the Cintron case. Relating exclusively to the unique facts and circumstances of that case, it is not res adjudicata to any other disciplinary case based on an employee's record of 'accidents.' A reading of my Award should indicate that I did not find that a record of excessive accidents was not grounds for discharge, but rather that the Company failed to prove the excessive extent of Cintron's accident record because of lack of evidence of the nature of and responsibility for any of the accidents but the last.

In short, I did not vacate any Company policy, but rather found that the Company's proof failed to show by clear and convincing evidence that Cintron was responsible for a violation of that policy.

You state that as a fleet insured with an insurance company you are limited in the evidence you can present. You say that "the only actual information available .... is an accident report which is prepared by the driver." Yet at the hearing the Company presented only one accident report (covering the last accident.) Where were the earlier accident reports? No doubt if presented, they would have helped your case. Also, the Company conceded that some of the other accident reports could well have been based on minor damage to the cab while it was parked and without the driver. So, as I have indicated in my Opinion, there was no probative evidence upon which I could determine the kinds of accidents in which Cintron was involved (other than the last) or whether or not he was actually responsible to any degree.

Also, I am not persuaded that the records of your insurance company are not available in an arbitration. There was no indication that you made an effort to obtain such information from it, or that they refused to supply it; or refused to make a representative available to testify.

Some of the things you say in your letter together with the attached statement from the Shamrock Casualty Company are matters which should have been advanced as evidence and testimony during the arbitration hearing. But they do not constitute "newly discovered evidence" or information which was not within your knowledge or available to you at the time of the hearing. Therefore
I deem it inappropriate and improper for me to grant your request for a re-hearing or appeal unless both parties to the arbitration agree. The general principles of arbitration law, which attach finality to the Arbitrator's Award, fully support that view.

Finally, let me again make it clear that Cintron was not exonerated. Though reinstated, it was without back pay, and he was admonished that a continuation of his involvement in accidents could result in his summary discharge.

Very truly yours,

Eric J. Schmertz
Impartial Chairman
January 2, 1970

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

Re: Award of the Impartial Chairman
in the Case of Ann Maintenance Corp.
Discharge of Angel Cintron.

Dear Mr. Schmertz:

I am writing to you regarding the above award because I believe that the decision is outrageous, and you have been absolutely unjust in this case.

a) If rules of evidence prevail in arbitration proceedings then our counsel has been grossly negligent in not making sure that proper evidence was brought to the hearing. This is not meant to be personal but incisively factual. I don't believe that rules of evidence as such do prevail, and as a result you have established a devastating precedent without affording all parties the right to present all pertinent evidence necessary to establish a proper basis for your decision. This can only be remedied by hearing re-arguments or by permitting an appeal.

b) As impartial chairman you cannot render equity in this industry nor contribute to more harmonious relations in the establishment of decent and reasonable standards if you do not understand the critical nature of auto insurance liability in this industry -- self insured as compared to insurance company coverage. A self insured fleet can present reams of information regarding any accident because that company controls the claims. A fleet insured with an insurance company cannot present such a body of information because that company does not control the claims, nor have available to it all of the information ... an outside party does. The only actual information available to us is an accident report which is prepared by the driver. All private information obtained by the insurance company is not available to us.

c) Under the above decision you have not only failed to promote reasonable guide lines of safety which should be firm and fairly well defined but instead your award is conciliatory
indecisive and would appear to blur what reasonable driver safety requirements may exist.

d) The grievant above is a union committee man and should be an example for the other men for safe driving rather than given "special consideration", for his deplorable accident record. This employee was told to attend a driver safety school and did not. His attitude is all wrong and the arbitrator recognizes this as a possibility but dismisses it.

e) The arbitrator has set a precedent here which vacates a company policy of more than 25 years standing.

f) A letter from the Shamrock Casualty Company who is our insurance carrier is enclosed herewith, which indicates that this driver has actually cost our carrier $2,750.00 in cash paid out in 3 years with reserves on open cases in the additional sum of $1,500.00.

g) Is the impartial chairman aware that the insurance company can refuse to insure my company if Mr. Cintron drives a cab, and it is my understanding of insurance law that they are perfectly within their rights if they refuse to do so?

The potential impact of this decision is so serious that it must be reversed. We respectfully request a re-hearing or appeal or whatever other method you deem appropriate to enable us to have this decision reversed.

Very truly yours,

ANN MAINTENANCE CORP.

BY: /s/ Gerald W. Cunningham
December 23, 1969

To Whom It May Concern:

Re: Angel G. Cintron

Our records indicate that Angel G. Cintron was involved in nine accidents from the period of February 3, 1967 to date. The value of the claims closed approximate $2,750.00 and the total amount of reserves on the open claims is $1,500.00.

Very truly yours,

SHAMROCK CASUALTY COMPANY

Robert W. Gaynor
President

RWG:EM
In the Matter of the Arbitration between
Local 702, Motion Picture Laboratory
Film Technicians, AFL-CIO
and
Movielab, 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 to October 1, 1971 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The discharge of Richard Heid is reduced to a suspension. He shall be reinstated without back pay. The period of time between his discharge and his reinstatement shall be deemed a disciplinary suspension.

Neither party is "the losing party." Therefore the fee and expenses of the Arbitrator shall be shared equally.

DATED: February 21, 1969
STATE OF New York )ss.: COUNTY OF New York

On this 21st day of February, 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 702, Motion Picture Laboratory Film Technicians, AFL-CIO
and
Movielab, Inc.

This is the first case before me in my capacity as the new permanent Arbitrator under the Industry Collective Bargaining Agreement.

The stipulated issue for determination is:

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

A hearing was held at the offices of the American Arbitration Association on January 29, 1969 at which time Mr. Heid, hereinafter referred to as the "grievant," and representatives of the above named 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 waived the Arbitrator's oath and the time for the rendition of the Arbitrator's Award as set forth in Section 15(b) of the contract.

The Company charges the grievant with violations of the Company Rules; specifically excessive absenteeism and being away without authorization from his work station during his shift on September 19, 1968. The Company states that in addition to these violations, it imposed the ultimate penalty of discharge because of the grievant's prior disciplinary record, which includes warnings and a suspension for previous
infractions.

Irrespective of the magnitude of the grievant's prior disciplinary record, I am persuaded that but for the specific incident of September 19, together with the charge of absenteeism, he would not have been discharged. Therefore, unless those two specific violations are established up to the standard required in discharge cases - by clear and convincing evidence - the extreme penalty of discharge cannot be upheld.

Based on the record before me I am persuaded of the excessive nature of the grievant's record of absenteeism. And because the Union does not dispute the days he failed to report for work, for the periods involved, I see no need to recite the specifics of that record. However, the Company has not proved, to the standard that I require, that the grievant was away from his work station improperly on September 19. It has proved that he was away from his work area an unusual number of times and for lengthy periods, but it has offered no hard evidence to show where he was or that there was no excusable reason for his conduct. The Company's judgment that his absences from his work station were improper and violative of the Rules is merely a conclusion based on the grievant's prior disciplinary record. But that conclusion is founded on mere suspicion, and though the Company may be right, I am not prepared to uphold a discharge based on mere suspicion. The grievant's explanation that certain personal needs compelled him to leave his work station several times during his shift on September 19, although questionable when viewed in the light of his prior disciplinary record, is not
implausible, nor is it overturned by any evidence supporting the Company's view. And with the burden on the Company to prove the charge by clear and convincing evidence, I shall not resolve the doubt to the prejudice of the grievant.

It is well settled that a record of chronic absenteeism, no matter what its cause, is grounds for an employee's termination if that record continues following warnings and lesser disciplinary penalties. But as I have indicated, I believe the Company would not have fired the grievant on September 20 for his record of absenteeism, even if it may have had grounds to do so. Rather its decision was prompted not just because of a continuing absentee record, but more specifically because of the grievant's absences from his work station during the course of his shift. Consequently, as the Company has not proved the grievant's culpability with regard to the latter offense, I shall not uphold the discharge action simply because I do not believe that absent the latter charge, the Company would have imposed that penalty.

But manifestly, because the grievant's excessive absentee record is well established; because of the well settled rule that an employer may discipline and need not indefinitely retain employees who fail to report for work regularly; and for a reason unique to this grievant (to which the balance of this Opinion relates) a disciplinary penalty in the form of a suspension is warranted under the circumstances of this case.

It is critical to his continued tenure with this Company for the grievant to forthwith disabuse himself of the notion that he is entitled to unreasonable special privileges beyond
those accorded other employees. He compiled an admirable military service record in Vietnam; was wounded; and suffers a partial disability as a result. But this does not mean that the Company must for long tolerate irregular and inadequate job attendance. The dilemma for the Company and the grievant would be most pronounced if the grievant's absences were in fact necessitated by his disability. But I am not persuaded that that is the case. No doubt a few of his absences were due to visits to the Veterans Hospital for periodic examinations and medication. But these represented only a small percentage of his total absentee record, and I see no reason why these visitations, with notice to and approval by the Company, may not continue. For I do not consider his request to be absent for those few times each year to be an unreasonable special privilege.

But I am not satisfied that the balance of his absences were required by his disability. Frankly I think that because of some discomfort, perhaps at times connected with that disability, and for other reasons at other times, the grievant decided to remain away from work, when he actually could have reported, in the mistaken belief that he was entitled to special consideration. His testimony at the hearing tended to disclose this erroneous, albeit honestly held attitude.

So let me take this opportunity to try my hand at directing the grievant toward an understanding of the rules of employment and a rehabilitation of his attendance record. He has been warned by the Company; and I believe has undergone instructional discussions with his Union. As the permanent
Arbitrator, I shall add my admonition, in the hope that as the objective and final word, it will be heeded.

The grievant is expressly advised, and the suspension imposed by my Award shall serve as notice, that regular attendance is an absolute requisite to continued employment. This applies not only to coming to work, but also to attending to his duties and remaining at his work station when he is at work. For whatever reason, even if it is beyond his control or does not involve misconduct, his inability to regularly attend to his job and duties, would constitute just cause for dismissal. But I believe that the grievant has the ability to maintain a normal and satisfactory attendance record. Accordingly, he is directed to do so. Visits to the Veterans Hospital for regularly scheduled examinations and medication shall be worked out with notice to and consent of the Company. If he must leave his work station to take medication, he shall notify and obtain the permission of supervision.

If the grievant's attendance record does not improve; or if without satisfactory explanation he leaves his work area at times and for periods beyond normal bounds; or for other breaches of Company Rules or normal work requirements; I would then be confronted with a strong if not irrebuttable presumption that he is unable or unwilling to meet his obligations as an employee. And I would have no choice but to uphold any subsequent discharge action taken by the Company.

For all the foregoing reasons the grievant's discharge is reduced to a suspension. He shall be reinstated but without back pay. The period of time between his discharge and
his reinstatement shall be deemed a disciplinary suspension.

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

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

and

Movielab, 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 present assignment of duties to the Raw Stock Clerks is neither violative of Section 17(b) of the Collective Bargaining Agreement nor of established custom and practice. The Company may continue the present operation of the Raw Stock Room with one clerk on each shift, pending an early hearing before me on the question of whether the work load of the clerks is normal or excessive.

Eric J. Schmertz
Permanent Arbitrator

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 #69-Al(d)
In the Matter of the Arbitration between
Motion Picture Laboratory Film Technicians
Local 702, I.A.T.S.E., AFL-CIO
and
Movielab, Inc.

The stipulated issue is:

Do the present assignments of duties to the
Raw Stock Clerks violate the contract? If
so, what shall be the remedy?

A hearing was held on April 4, 1969 at which time repre-
sentatives of the parties appeared and were afforded full
opportunity to offer evidence and argument and to examine and
cross examine witnesses.

Prior to March 1968 the Company operated two Raw Stock
Supply Rooms, one for black and white raw stock and the other
for color. The former was located on the 7th floor and the
latter on the 8th. Each was manned by Raw Stock Clerks. In
March 1968, the two Stock Rooms were combined into one on the
8th floor. Though the rooms were consolidated, the work of
the two Raw Stock Clerks on each of the first two shifts re-
mained divided; one distributed color stock and the other dis-
tributed black and white stock. On the third shift the single
clerk distributed both types of stock.

Effective March 31, 1968 the Company laid off the two
junior clerks and re-arranged the assignments so that one
Raw Stock Clerk manned each of the three shifts. As a conse-
quence both of the single clerks assigned to the first and
second shifts were and are required to handle both black and
white and color stock. In other words, before the layoff,
a clerk on the first or second shift handled either black and white or color stock; but since the layoff the remaining clerk is required to do both. The Union contends that the Company's action is violative of Section 17(b) of the contract and contrary to established custom and practice. Also it claims that the layoff is not supported by a bona fide diminution in work within the Raw Stock Clerk classification, and that consequently the present work load is excessive.

I agree with the Company that Section 17(b) is not applicable. That Section, both by title and content relates to the operation of machines. Though the first sentence of Section 17(b) begins with the phrase "The parties agree that present methods of operation within the laboratories shall continue without change ...," the balance of the clause, together with a full reading of the entire Section, including paragraphs (a), (c), (d), makes it clear that "methods of operation" relates to the operation of machines. As the job involved in this case is neither a machine job nor part of a machine operation, Section 17(b) does not apply.

Nor can I agree with the Union's assertion that the present arrangement, requiring the clerk to handle both color and black and white stock is contrary to practice and custom. The only present variation is on the first and second shift. The third shift work, all along, required the clerk to do both. And the third shift clerk is classified no differently than the clerks on the first and second shifts.

Moreover, I find nothing in the contract which prohibits the Company from requiring the Raw Stock Clerk to perform
both assignments. The contract provides for a single classification at a specified rate of pay. It makes no distinction between Raw Stock Clerks who handle color stock and those who handle black and white. There is no dispute that responsibility for black and white stock and color stock are both properly within the single classification of Raw Stock Clerk. Therefore, just as a clerk has been called upon to perform either duty, he may now be required to perform both, provided the work load involved is not excessive.

The last point, namely the quantity of the present work load of the clerks on each of the three shifts, relates to the Union's final charge that the layoff was unsupported by any significant diminution of work, and hence is improper. The Company has a contractual right to reduce its work force when the available work falls off. In the instant case the Company claims that the available black and white and color stock work is sufficient to support only one full time clerk on each shift. And that this resulted from a diminution in the work of the Printing Department (which the Stock Room services) and a re-assignment of "cinexing" and splicing. I make no determination now of this question, simply because the evidence offered by both sides was insufficient. The Company may continue the present operation of the Raw Stock Room, but the parties shall come before me at an early hearing on the question of whether the present work load of the Raw Stock Clerks is normal or excessive.

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

In the Matter of the Arbitration between

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

and

Movielab, 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 discharge of Renaldo Ojeda is changed to a layoff effective December 23, 1968, the date he was terminated. Pursuant to the recall procedure he is entitled to be recalled to fill open jobs he can perform. As of the date of the hearing a job as Wet End Black and White Developer on the third shift was open or available. Therefore Mr. Ojeda may elect to come off layoff immediately and claim that job, at the regular rate of pay for that classification, without back pay. In the alternative he may remain on layoff, subject to his right of recall to a job he is qualified to perform, without back pay, in accordance with the established recall procedure, when and if such job becomes available.

The fee and expenses of the Arbitrator shall be shared equally by the parties.

DATED: April 1969
STATE OF New York )ss.: 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 No. 69-A5
In the Matter of the Arbitration between
Motion Picture Laboratory Film Technicians
Local 702, I.A.T.S.E., AFL-CIO

and

Movielab, Inc.

Opinion

The stipulated issue is:

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

Hearings were held on March 3 and March 31, 1969, at which time Mr. Ojeda, hereinafter referred to as the "grievant" and representatives of the above named 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. Also, with the agreement of the parties, Samuel Miller, Esq., a personal attorney for the grievant, was present at both hearings as an observer.

Based on two "negligence reports" and four warning letters, including a suspension, all during the year 1968, and all for certain alleged errors in his work as a Relief Color Developer, the grievant was discharged.

I am persuaded that the grievant made the mistakes which are the subject of those negligence reports and letters of warning. It is obvious to me that the grievant was not and is not able to perform the duties of a Relief Color Developer, especially the specific task of operating the Applicator which develops sound track, under the methods the Company pre-
scribes for the third shift. Specifically, the evidence, including the grievant's own testimony, reveals that the grievant is unable to adjust to the procedure of interchanging sound and silent (dailies) developing, which requires activating or disengaging the Applicator more frequently than if long unbroken periods are devoted to either sound or silent. And there is no challenge by the Union in this proceeding to that method of operation. Also, it appears that some personality conflict exists between the grievant and the third shift color developing supervisor, Mr. Marino, at least on those occasions when the grievant is under what he considers to be the pressures of the Relief job. In my judgment, therefore, there can be little serious dispute with the wisdom of removing the grievant from that particular assignment.

The classic approach, is to uphold the discharge of an employee, who, following warnings and a suspension, is unable to perform his job duties satisfactorily. And this Arbitrator has so ruled in a long line of ad hoc cases. However, there are times when the classical rule is either inappropriate or unfair because of other overriding equitable considerations. In my view the instant case is such an exception.

Prior to 1968 the grievant worked for the Company for ten years as a Developer without any recorded trouble whatsoever. For ten years his work was totally satisfactory, and the Company does not dispute his present competence as a Developer. In short, he has established his ability as a Developer over many years of service; but the Relief job on the Color Developer he cannot do satisfactorily. His ten years
of satisfactory service and his established competence as a Developer are not the only equitable factors. Additionally, is the total absence of misconduct or wilfull neglect on his part in his failure to adequately perform the Relief job. He did not refuse to perform his work assignments. He did not leave his work area without permission. He did not extend break or lunch periods beyond prescribed limits. He has no record of excessive absenteeism or tardiness. He did not engage in proscribed activities while on duty. And there is no evidence that he did not try, to the best of his ability, albeit inadequately, to perform the duties required of him. In other words, he tried but failed on this particular job; whereas he had succeeded on others. And it follows that though he may be unsuited to the Relief job, he has not been and is not unsuited to this Industry.

For these reasons, unique to this case, I do not find the penalty of discharge to be appropriate or fair. Though the grievant must be removed from the Relief job, he and his competence in other capacities should not be lost to the Industry. Nor, as would be the case if the discharge was upheld, should the Industry be lost to him as a source of employment after he has devoted so many satisfactory years to it.

What is proper is to disqualify the grievant from the third shift Relief Color Developer Job as it is presently constituted. And assuming other jobs were filled when he was removed, to place him on layoff because of inability to perform available work. Thereafter he would be entitled to recall, without back pay, in accordance with the established recall
procedure, to a job he is qualified to perform.

That then is what I direct. The grievant's discharge is changed to a layoff effective December 23, 1968, the date he was terminated. As of the date of the hearing a job as Wet End Black and White Developer on the third shift was open or available. Therefore, the grievant may elect to come off layoff immediately and claim that job, at the regular rate of pay for that classification, without back pay. Or in the alternative, he may remain on layoff, subject to his right of recall to a job he is qualified to perform, without back pay, in accordance with the established recall procedure, when and if such job becomes available.

[Signature]
Eric J. Schmertz
Permanent Arbitrator
MOVIELAB, INC. - LOCAL 702

KXS^K SETTLEMENT AGREEMENT - CASE NO. 69 A 2 (d)

On April 30, 1969 on the first shift, there was an alleged work stoppage in the developing department arising out of a dispute over the company's right to temporarily transfer a black and white negative developer into positive developing. On May 2, 1969 the company brought a quickie arbitration to secure a determination of the union's claim that the temporary transfer violated the contract, and on May 5, 1969 the company made a claim for damages. On May 8, 1969 the matter came on for hearing before the Impartial Arbitrator as Case No. 69 A 2 (d).

The parties hereby settle Case No. 69 A 2 (d) as follows:

a. No less than fourteen days in advance of a developer going on a scheduled vacation, the company shall notify the union in writing how it proposes to schedule other employees to perform the work he otherwise would perform - whether by overtime, temporary transfer or a combination of the two.

b. Within three days after said notification, if the union makes request, the parties shall confer for the purpose of affording the union an opportunity to present to the company alternative schedules for the company to consider.
c. Within six days after said notification, the company shall inform the union in writing which schedule it has adopted. The company may implement that schedule unless (1) within nine days after said notification the union refers the dispute to "quickie" arbitration and (2) within twelve days after said notification the Impartial Arbitrator determines that the schedule violates the contract.

d. The union acknowledges that the procedure (a) through (c), shall be its sole recourse respecting any claim that a schedule violates the contract and that it shall not engage in or encourage any stoppages or concerted refusals to accept assignments arising out of such schedule.

e. Changes of such vacation coverage schedules may be made for reasons other than men going on vacation if and as permitted by the industry agreement.

f. This agreement shall and may not be used by either party as a precedent for any other department or in any other arbitration or other legal proceeding or in contract negotiations.

Dated: New York, N.Y. May 1969

MOVIELAB, INC.

By __________________________

MOTION PICTURE LABORATORY
TECHNICIANS LOCAL 702, I.A.T.S.E.

By __________________________

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