In the Matter of the Arbitration between
Perth Amboy Smelter & Refinery
Workers Union, Local 365
United Steelworkers of America
AFL-CIO

and

American Smelting & Refining Co.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated April 3, 1968 to June 30, 1971 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company violated Article IX Section 6 of the contract when it failed to give Anthony Nagy a chance to demonstrate his physical ability to work as a janitor. He shall be reinstated to a janitor's job with his seniority intact, in accordance with that seniority, but without back pay.

Eric J. Schmertz
Arbitrator

DATED: July 1970
STATE OF New York
COUNTY OF New York

On this day of July, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
Perth Amboy Smelter & Refinery
Workers Union, Local 365
United Steelworkers of America
AFL-CIO
and
American Smelting & Refining Co.

In accordance with Article III of the Collective Bargaining Agreement effective April 3, 1968 to June 30, 1971 between American Smelting & Refining Co., hereinafter referred to as the "Company," and Perth Amboy Smelter & Refinery Workers Union Local 365, United Steelworkers of America, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the Collective Bargaining Agreement by terminating and refusing to reinstate Anthony Nagy?

A hearing was held on April 21, 1970 at the Company plant in Perth Amboy, New Jersey at which time Mr. Nagy, 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 Arbitrator's oath was expressly waived. The parties filed post hearing briefs.

With the agreement of, and accompanied by representatives of the parties, the Arbitrator visited the plant on July 1, 1970.
and observed the jobs of yardmaster and janitor.

The pertinent contract clauses are Article XII Section 1 which reads:

The Management of the Plant and the direction of the working forces including the right to hire, suspend or discharge for proper cause and the right to relieve employees from duty because of lack of work and for other just causes is vested exclusively in the Company subject to the provisions of this Agreement.

and Article IX Section 6 which reads:

An employee sustaining permanent injury in the Plant will be continued in employment if possible and practical to do so, provided such employment does not constitute an unreasonable burden or hazard to the Company, and further, providing that the injury was not due to the personal carelessness of the employee or the infraction of any Plant safety rule.

The grievant's work record; the injuries to his back for which he received disability payments and workmen's compensation; that the injury occurred or was aggravated in the plant; and the periods of time he did not work because of that disability are not disputed and need not be recited herein.

What is in dispute is the propriety of his discharge, effectuated November 18, 1969, for the following reason, stated by the Company in the written notice of dismissal:

"Physical condition of such a nature that it is impossible and impractical to continue employment. It further would provide an unreasonable burden and hazard to the Company."

The grievant was last at work on August 25, 1965 as a yardmaster (a classification to which he was assigned that day for training.) Because of his back disability he did not return to active work with the Company thereafter. He remained out, receiving either disability benefits or workmen's compen-
sation thereafter, and was discharged in accordance with the foregoing dismissal notice on November 18, 1969.

The Union contends that the discharge was improper because the grievant was physically capable of returning to and performing the duties required of the yardmaster classification. And in the alternative, that he was physically capable of carrying out the duties of a janitor, to which the union claims the Company should have assigned him in accordance with past practice followed under Article IX Section 6 of the Agreement, if it concluded the yardmaster's duties were too demanding.

It is the Company's position that the grievant was and is physically incapable of performing the yardmaster job; that he has no right to claim a janitorial position, and in any event he was and is not physically capable of performing that latter job either. And to place him in either job would expose him to serious aggravation of his present back disability, which would constitute an unreasonable burden or hazard to the Company.

As I see it Article IX Section 6 is a unique contractual provision. Clearly it creates a presumption in favor of retention in the Company's employ, of an employee who has sustained an injury in the plant even though that injury be permanent in nature. I am satisfied that the intent and purpose of this contractual clause is not limited to the job or jobs which the injured employee held prior to his injury. For that would render the clause largely meaningless inasmuch as the injury would disable him from the job he then held. It does not state that he shall be continued in employment in the same job or in any
other job which he previously held, but rather uses the general phrase "continued in employment." To my mind that means that the parties agreed to make an effort where possible and practical, to place the injured employee in a different job within the plant which he could perform despite his permanent disability, so long as it did not constitute an unreasonable burden or hazard to the Company. So I cannot accept the Company's assertion that the grievant's rights under Article IX Section 6 are confined to the last job he held - that of yardmaster. Indeed the practices of the parties support the wider application of that contract section. In other situations, admittedly by mutual agreement, the Company and the Union have placed employees with various disabilities resulting from injuries in the plant in the janitorial classification. That they did so by mutual agreement does not mean that the Company must grant a janitorial position to an employee otherwise disabled from his regular classification, when his physical ability to perform the janitorial duties are in dispute. But rather that the janitor's job is one which an employee has the right to seek and for which he should be considered under Article IX Section 6.

In short an employee's physical ability to do a janitorial job certainly may be disputed by the Company, subject to the grievance and arbitration provisions of the contract, but that classification is properly within the scope of "employment" within the meaning of Article IX Section 6 of the contract.

So the issue before me is not simply whether the grievant
is physically capable of working as a yardmaster without placing an unreasonable burden or hazard on the Company, but also whether the same is true with regard to the janitorial position which he, and the Union on his behalf, seek in the alternative.

Article IX Section 6 is also unique in that it limits the continued employment of a permanently injured employee, where possible and practical, not if hazardous or burdensome to the employee himself, but only if burdensome and hazardous to an unreasonable degree to the Company. So a bare danger to the employee himself is immaterial. Only if the unreasonable burden or hazard is placed on the Company, may the employee be deprived of continued employment.

In the instant case there is no real dispute over the procedural possibility or practicality of placing the grievant in either the yardmaster or janitor job. Openings in both classification appear to have been available at the time that the grievant was terminated. The dispute centers on whether the grievant's assignment to one or the other would constitute an unreasonable burden or hazard to the Company because of the grievant's back disability.

I think it significant that the contract clause uses the phrase "unreasonable burden or hazard" not just "burden or hazard." Obviously this means that the Company should retain the employee even if there be some burden or hazard; but not continue him in employment where that burden or hazard reaches an unreasonable level.

There is no doubt that had the grievant been retained as either a yardmaster or janitor the Company would have been
faced with some burden or hazard. But as I see it, it was only in the form of additional potential monetary liability for disability insurance or workmen's compensation. The duties of the yardmaster and janitor are not of the type to have a critical effect on productivity. The Company would have been inconvenienced had it been required to assign some other employee to complete the janitorial tasks or yardmaster work if the grievant was unable to perform them. But I am not persuaded that that meets the test of a "burden or hazard." And even if the loss or interruption of productivity (which I have characterized as an "inconvenience") could be construed as a burden or hazard, I fail to see how it could reach the level of an "unreasonable burden or hazard."

Nor do I see how it can be argued (and the Company does not so argue) that the grievant's employment in either job would represent a burden or hazard to other employees. Both jobs are relatively isolated; with duties performed primarily alone. So if for physical reasons the grievant could not carry out a particular yardmaster or janitorial assignment, the work of other employees might be delayed or otherwise encumbered, but I do not find that other employees would be unduly burdened or endangered or otherwise placed in jeopardy. So the "unreasonable burden or hazard" is limited, in my judgment, to the Company's potential monetary liability for any aggravation of the grievant's back injury.

That the Company would be faced with a burden or hazard by the retention of the grievant in either job is manifest and not disputed. However that is not enough to deprive him of
continuing employment. Instead the burden or hazard must be of an unreasonable nature.

My task therefore narrows to determining whether the grievant's continued employment would have constituted an unreasonable burden or hazard or simply a burden or hazard. Limited to the facts in the instant case a distinction between the two turns on the probability of a re-injury. If re-injury to the grievant's back is probable, then disability and compensation liability is equally probable, and I would find that the burden or hazard to the Company was unreasonable. But if re-injury is speculative or contingent, depending upon the nature of the duties and what care the grievant takes in performing those duties, provided of course he performs them satisfactorily, then, though the burden and hazard remain, I would not be prepared to conclude that it was of unreasonable proportions.

I have considered the medical testimony, the rest of the entire record, and my personal observations of the two jobs in question. I have concluded that the chance of re-injury to the grievant's back is probable if he returned to the yardmaster classification, but possible rather than probable as a janitor. Though the yardmaster is called upon to break open freight car seals, slide open freight car doors and climb into gondolas only infrequently, any one such activity could seriously aggravate the grievant's back condition, and that could happen any single time he performs any of those duties. The frequency of those tasks is immaterial. The fact is that if he is required to do it at all, the probability of re-injury to his back any and each time he carries out those duties is highly
probable, in my judgment. So I find no fault with the Company's decision to foreclose the grievant from an opportunity to return as a yardmaster.

But the presumption in Article IX Section 6 of the contract, in favor of continued employment despite the permanence of the injury, has not been overturned in connection with the janitorial job. That the Company has not assigned that job to anybody in the past with a back condition does not mean that the test of unreasonable burden or hazard has been met simply by a back disability. So long as the janitor job falls within the scope of "employment" in the application of Article IX Section 6 of the contract, employees may not be excluded merely because they suffer from a back injury. The extent and nature of the injury and disability must be considered on a case to case basis, to determine whether employment as a janitor involves a probable chance of re-injury or aggravation to the injury; or whether re-injury is merely a conjectural possibility. It is my conclusion that if the grievant had been re-employed as a janitor the chance of re-injury, albeit possible and therefore a burden or hazard to the Company, has not been shown to be so probable as to constitute an unreasonable burden or hazard to the Company.

I observed the wash buckets, mops and other equipment which the janitor regularly uses and I think the grievant should be given an opportunity to demonstrate that he can use this equipment to the Company's satisfaction despite the permanence of his back condition. The wash buckets which are the heaviest pieces of equipment are on wheels and need not be lifted
while full. They are filled with a hose; emptied through
drains in the floor when tipped at floor level and lifted only
when empty. The heavy polishing and waxing machinery is not
used by the particular janitorial classification which the
grievant seeks. I am not impressed with the alleged heaviness
of the garbage cans. They are plastic, not metal. They con-
tain primarily paper debris and appear rarely to be more than
1/3 full. Consequently the task of moving and emptying them
periodically each day does not reach a level of probable risk.

Accordingly I direct that the Company afford the griev-
ant an opportunity to demonstrate his ability to perform the
duties of a janitor. He shall be reinstated to a janitor's
job with his seniority intact and in accordance with that sen-
iority. Because I am not certain how well or for how long he
actually would have performed those duties had he been so em-
ployed rather than discharged, the question of how much money
he lost is indeterminable. Therefore I find no grounds upon
which to grant back pay. Accordingly re-employment as a jani-
tor shall be without back pay.

Prospectively, if the parties are in dispute over whether
the grievant is performing the janitor job satisfactorily, as
well as his ability to do so, those questions may be referred
back to me if both sides choose to do so; or if not, shall be
matters for the grievance and arbitration provisions of the
contract.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Perth Amboy Smelter & Refinery Workers Union Local 365 and American Smelting & Refining Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named parties, and dated April 3, 1968 through June 30, 1971, and having duly heard the proofs and allegations of the parties, Awards as follows:

I accept the Company's version of the events of January 28, 1970. I find therefore that William T. Graham, hereinafter referred to as the "grievant," used physical force against Foreman Stutski, without justification. I do not find that the grievant was provoked in any manner that would warrant his action. If he felt the Foreman was improperly assigning him to work that day; or was not crediting him with the correct clock-in time; or was interfering with his meal period, or for any other complaint he could and should have made use of the grievance procedure for redress.

In deliberately shoving and pushing the Foreman from the room the grievant was manifestly insubordinate and defiant of supervisory authority. Accordingly, the Company's action in discharging him was for just cause and is upheld.

DATED: August 24, 1970
STATE OF New York )
COUNTY OF New York)ss.:

On this 24th day of August, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 69-465
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Wire Service Guild Local 222
American Newspaper Guild

and

Associated Press

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 1, 1969 through December 31, 1971 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Employer's act on March 12, 1969 of removing the disputed notice from the Guild's bulletin board in the Los Angeles Bureau was violative of Article XXVII Section 2 of the contract.

Eric J. Schmertz
Arbitrator

DATED: February 1970
STATE OF New York ) ss.: 
COUNTY OF New York )

On this day of February, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0615 69
In the Matter of the Arbitration between
Wire Service Guild Local 222
American Newspaper Guild

and

Associated Press

In accordance with Article V of the Collective Bargaining Agreement dated January 1, 1969 through December 31, 1971 between Wire Service Guild Local 222 American Newspaper Guild, hereinafter referred to as the "Guild," and the Associated Press hereinafter referred to as the "Employer," the Under-signed was designated as the Arbitrator to decide a dispute relating to Article XXVII Section 2 of the contract.

A hearing was held at the New York City offices of the American Arbitration Association on November 26, 1969 at which time representatives of the Guild and Employer, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs and the hearings were declared closed as of January 22, 1970.

On March 11 or 12, 1969 the Guild posted on the Guild bulletin board at the Employer's Los Angeles office, a copy of a letter from the Guild Chairman, Los Angeles, to employee Howard C. Heyn. The letter related to the Guild's strike against the Employer which took place some time earlier; to the alleged conduct of Mr. Heyn during that strike, and to
Guild disciplinary proceedings against him. On March 12 a representative of the Employer removed that posting from the bulletin board. That action led to the Union's grievance and to the instant arbitration case.

The Union grievance in pertinent part reads:

The Wire Service Guild charges violation of Article XXVII Section 2 of the contract between the parties, by removal by the Associated Press on or about March 12, 1969, of a notice on the Wire Service Guild bulletin board in the Los Angeles Associated Press Bureau. The notice removed pertained to the filing of the internal disciplinary charges against listed members of the Wire Service Guild.

Article XXVII Section 2 reads:

Bulletin Boards. The Employer agrees to provide bulletin boards suitably placed in all bureaus for the exclusive use of the Guild.

The Employer justifies its action on the grounds that the notice or posting was "scurrilous, coercive, intimidating, threatening and derogatory;" that Heyn was not subject to the Guild's jurisdiction; that the disciplinary action referred to therein was not sanctioned by the Guild; and that the form of discipline referred to was improper. The Employer also cites Labor Board and other decisions which hold that a Union's right of free speech, either in distributing or posting literature within the plant or on an employer's property does not include the freedom to "insult, lampoon, defame, ridicule, threaten or hold up to contempt the employer or employees."

I agree with the Employer in connection with these restrictions on the Union's right to distribute and/or post notices and other material. But as I see it that is not the
question before me. The issue is of narrower scope. The griev-
ance specifically objects to the Employer's removal of the no-
tice from the Wire Service Guild bulletin board. The issue
then as I see it is:

Whether, if the Employer considers a Guild notice
posted on the Guild's bulletin board to be of a
proscribed type, he has the right to unilaterally
remove it?

Based on the explicit language of Article XXVII Section 2
(which is all that is pertinent to this case) I answer that
question in the negative. That contract clause grants the
Guild a bulletin board in all bureaus for the Guild's exclusive
use. Exclusiveness means that nobody other than the Guild may
use it. As negotiated, it means that the Employer relinquish-
ed both the use and control of that bulletin board to the
Guild, though it is located on his property. The right of the
Employer to physically remove a notice posted by the Guild on
that bulletin board is manifestly an interference with or a
restriction on a "right of use." To grant the Guild exclusive-
ness on one hand, while reserving on the other the right to
remove objectionable postings, are mutually incompatible.

I agree that the "Guild's use" relates to notices and
other documents involving the Guild's business or activities.
I find that the disputed notice in the instant case met that
test.

The Guild had reasonable grounds to believe that Mr. Heyn
was still a member at the time of the strike. That he had been
transferred from Los Angeles to New York I consider immaterial.
And obviously the strike and the activity of members during
that strike are matters well within the Guild's concern. But even if the notice had not met that test; or if as the Employer contends, it was defamatory, insulting, threatening and an improper exercise of the Guild's jurisdiction and disciplinary authority, the granting of exclusive use of the bulletin board to the Guild in Article XXVII Section 2 precludes the Employer from removing such a notice from the bulletin board.

This does not mean he is foreclosed from a remedy. As I see it he may instruct the Guild representative to remove the notice, which would place the substantive propriety of that notice in issue, or he may commence an action either through the grievance procedure of the contract, before the Labor Board, or in any other proper forum, to protest the notice and to seek an order directing its removal or authorizing him to remove it. Also, the Guild's rights under Article XXVII Section 2 of the contract do not foreclose Mr. Heyn from any civil action which he may wish to maintain if he believes the notice to be defamatory or otherwise actionable. So he too has a remedy if the disputed notice went beyond acceptable bounds.

In short, it seems to me that when the parties negotiated Article XXVII Section 2 and provided a bulletin board for the exclusive use of the Guild, it was well within the contemplation of the Employer, that occasionally some of the posted notices might be adversary, partisan, abrasive in nature, and even grossly inaccurate. Yet that section of the contract did not include any exceptions to the Guild's exclusive use. If
the Employer intended to reserve the right to unilateral removal notices which it deemed objectionable, that right could and should have been included in the contract. That it was not means that the Employer must pursue a different procedure in order to obtain the removal of objectionable or proscribed material from the Guild's bulletin board.

Of course, in an extreme situation, where the subject matter of a notice or other posted document is so unconscionable, unsocial or reprehensible as to warrant its immediate removal, and where any delay in its removal might cause irreparable damage, I would permit its forthwith removal by the Employer. But I do not find the notice in the instant case to be of that type.

Accordingly the Employer's act of removing the disputed notice from the Guild's bulletin board at the Los Angeles office was violative of Article XXVII Section 2 of the contract.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
District Council 37 and its affiliated
Local #1482, American Federation of State,
County and Municipal Employees, AFL-CIO

and

Brooklyn Public Library

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated June 6, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Union's grievance that Bookmobile drivers are performing job functions outside of their job specifications is denied.

Award

DATED: June 29, 1970
STATE OF New York ) ss.: 
COUNTY OF New York )

On this 29 day of June, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 1200 69
In the Matter of the Arbitration
between
District Council 37 and its affiliated
Local #1482, American Federation of State,
County and Municipal Employees, AFL-CIO
and
Brooklyn Public Library

Opinion

In accordance with Article XVII of the Collective Bargaining Agreement dated June 6, 1969 between the Brooklyn Public Library, hereinafter referred to as the "Library" and District Council 37 and its affiliated Local #1482, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Whether the Bookmobile drivers are performing the job functions outside of their job specifications? If so, what shall be the remedy under the contract?

A hearing was held on April 24, 1970 at which time representatives of the Union and Library, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs.

The job functions in dispute are of a clerical nature. For approximately 30 years the Library has had in existence the services of a Bookmobile - a library on wheels. This mobile unit brings library services to neighborhoods by traveling to, and positioning itself at various community locations.
At these locations the public may borrow and return books in accordance with usual library procedures. The Bookmobile is staffed by a driver and one or more librarians and clerks.

Since the institution of the Bookmobile the Library has assigned the drivers (classified as Motor Vehicle Operators) clerical duties as follows: handling books returned by patrons; discharging books to patrons; collecting fines for overdue materials; charging patrons for lost transactions and book cards; filling out forms for unpaid fines and charges and for messenger books; preparing interchange material and checking reserve panels.

The Union contends that the foregoing clerical duties are not properly within the job classification of the Bookmobile driver. It seeks an Award deleting those duties from his job assignment.

The Union's case is argued in the alternative. It asserts that because the City of New York both approved or affixed the title of "Motor Vehicle Operator" to the Bookmobile driver, and provides a substantial amount of the money used to run the Library and pay its personnel, the "job specifications" of a "Motor Vehicle Operator" employed by the City of New York is binding on the Library and controls the job duties properly assignable to the Bookmobile driver. Also the Union contends that in May 1969, the Library promulgated an announcement of staff vacancies which constituted a "job description" for Motor Vehicle Operators employed by the Library, to which the Library must be bound. The Union points out that neither the
New York City job description for its Motor Vehicle Operators, (dated November 29, 1965) nor the Library's announcement in May, 1969 include the disputed clerical duties, and that therefore those duties are not a proper part of the job of the Bookmobile drivers, classified as Motor Vehicle Operators.

I cannot accept either contention advanced by the Union. Employment with the Library is not employment with the City of New York, despite the fact that the City provides substantial financial support to the Library, both for its general operation and to pay the drivers. Also there can be no dispute that the function of the Library differs from that of any agency of the City of New York. Hence a Motor Vehicle Operator working for the former may well have duties indigenous to the Library that are different from those required of a Motor Vehicle Operator for a City agency. Indeed, in my view, for a City "job description" to be applicable to or binding on non-City employment at the Library, there must be some explicit provision, either in the Collective Bargaining Agreement, or in some rule, regulation or procedure, which actually or by reference, mandates such coverage. Especially so when, as here, the General Statement of Duties and Responsibilities in the City Motor Vehicle Operator "job description" expressly limits the enumerated vehicles to those "used by City Departments." By its own terms, the job description upon which the Union relies is confined to City departments. And I find no provision in the contract or elsewhere which includes this job description as applicable to the Motor
Vehicle Operator who drives the Library Bookmobile.

As a matter of fact I am not certain that the delineation of duties set forth in the City Motor Vehicle Operator "description" constitutes a job specification at all. Rather it may be only a set of duties common to the Motor Vehicle Operators as an "occupational group" without any specific reference to the special duties that may be required of operators handling different types of vehicles enumerated under the General Statement. But that is immaterial, because whether a job specification or not, I cannot find it binding on the Library as a limitation on the duties that may be assigned to the Bookmobile driver.

Moreover, if the Library was bound by the City's Motor Vehicle Operator job description, its right set forth in Article III (Management Clause) to determine "the methods, processes and means of its operations including the introduction of new methods and facilities and changes in existing methods and facilities ..." would be rendered meaningless. The Management Clause vests this right in the Library except as "expressly modified by the written terms of this Agreement" (Emphasis added). But I find nothing in the written contract which includes the City's job description, nor any provision making that description applicable to the Bookmobile driver. Neither that description nor its substance can be deemed a limitation on the exercise of the Library's rights with regard to "methods, processes, means of operation and facilities."

Had the Union been able to show that in approving or affixing the job title "Motor Vehicle Operator," and in appropriating money for its salary, the City of New York was unaware of
the disputed clerical duties required of the Bookmobile driver, I might have been inclined to find an implicit requirement of consistency between the duties assigned, and those for which money was appropriated.

But I do not find, at least after 1958, that the City was unaware of the particular clerical work regularly assigned the Bookmobile driver. On September 15, 1958 a Motor Vehicle Operator acting as a driver for the Bookmobile completed a "Position Classification Questionnaire" for the Bureau of Classification and Compensation of the New York City Department of Personnel. It included specific reference to and an explanation of most if not all of the disputed clerical duties; indicating that this took 63% of his time. So from 1958 on at least, the City had notice, actual or constructive of the clerical duties assigned to Bookmobile drivers, and related to the work of that vehicle. Consequently I cannot conclude that thereafter the City appropriated funds for this job title without knowledge that its duties differed from those of a Motor Vehicle Operator employed by the City of New York.

I am persuaded that the announcement of May 16, 1969 was nothing more than what the Library contends it purported to be - a posting of vacancies in the job classification Motor Vehicle Operator; a request for applications to fill those vacancies; and a Summary of Duties common to all Motor Vehicle Operators driving vehicles for the Library. (The same posting included similar information regarding the jobs of Special Officer and Assistant Library Maintainer). In short, I am not satisfied that it meets the traditional test of a "job description."
That the "Summary of Duties" did not include the clerical work assigned to the Bookmobile driver in no way misled the Union or those employees from whom applications were sought. The Union admits that for many years since the inception of the Bookmobile, its driver has been required to perform these or related clerical duties. So by consistent past practice the Union and those in the employ of the Library as of May 1969 knew or should have known that certain clerical work was part of the Bookmobile driver assignment. Indeed the Motor Vehicle Operators who testified at the hearing stated that though they were not told of those clerical duties when originally interviewed and hired, they were trained in the operation of the Bookmobile including the clerical duties soon after employment, and when assigned to the Bookmobile, performed those duties.

So on May 16, 1969 when the notice of staff vacancies was disseminated to "All Staff" (i.e. those then in the Library's employ) there is every reason to believe that the affected employees and the Union knew, by long practice, that any Motor Vehicle Operator assigned to the Bookmobile would have to perform clerical duties specially related to that vehicle. Therefore, considering the fact that the notice of May 16, 1969 was obviously for the purpose of advertising vacancies in the job of Motor Vehicle Operator; was directed to employees then in the Library's employ; and at the time it was posted no change or variation in the long standing practice of assigning clerical work to the Motor Vehicle Operator driving the Bookmobile had taken place, I cannot construe that posting as a "specifi-
cation" which eliminated those clerical tasks from the work of the Bookmobile driver.

In the light of this long standing past practice, I do not attach significance to the fact that Motor Vehicle Operators when first hired or interviewed for those jobs, were not told by the Library that clerical work would be assigned when they drove the Bookmobile. Any such omission was and has been cured by the unvaried practice subsequent to their hiring. They were trained to operate the Bookmobile and to perform the clerical work involved. And for many years without variation performed the disputed or similar clerical duties.

That this was known or should have been known to the Union when it negotiated the current Collective Bargaining Agreement effective June 6, 1969 cannot be seriously disputed. If the Union disagreed with the scope of the Bookmobile driver's job, it should have negotiated either a specific job description or limits on that job during the last negotiations.

In other words, because I find no contract violation by the Library, I must conclude that the substance of this dispute is a matter for negotiations and not arbitration.

Eric J. Schmertz
Arbitrator
In the Matter of the Proceedings
between
Carle Place Teachers' Association, Inc.

and

Carle Place Board of Education

Findings and Recommendations

In accordance with Article XV of the Collective Bargaining Agreement dated July 1, 1969 to June 30, 1970, the Under-signed was designated as the Mediator/Fact Finder "to study and advise both parties as to what is the proper solution" to a dispute involving the application and interpretation of Article X Paragraph A of the contract.

A hearing was held at the Carle Place High School in Carle Place, New York on February 10, 1970. Representatives of the Carle Place Board of Education, hereinafter referred to as the "Board" and the Carle Place Teachers' Association, Inc., hereinafter referred to as the "Association" appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Board and the Association, hereinafter referred to jointly as the "parties" expressly waived my oath of office.

The disputed contract section reads:

The Board of Education agrees to remain a participating member of the State Employees Health Insurance Program and will furnish 100% health coverage.

The Association contends that this provision obligates the Board to pay the full cost of the "State wide plan" (basic Blue Cross and Blue Shield), or GHI, or HIP, whichever is
selected by the participating teacher. It is the Board's position that the 100% health coverage" referred to above applies only to the "State wide plan" and that the difference between the cost of that plan and the higher cost of the GHI or HIP options must be borne by the employee who selects either of the latter two plans.

Based on the entire record before me I find the Association's contention to be contractually meritonous.

Standing alone the wording of Article X Paragraph A supports the Association's position. Representatives of the Board, who participated in the contract negotiations between the parties, conceded at the hearing that the "State Employees Health Insurance Program" embodies three health insurance plans, namely the "State wide plan (Blue Cross and Blue Shield), GHI and HIP. It follows then that if, as the contract provides, the Board "will furnish 100% health coverage," all of the costs of any or all three of the plans must be borne by the Board, without any deductions from the pay of a participating employee.

This conclusion is further reinforced by juxtaposing Article X Paragraph A with its counter part in the predecessor contract between the parties. The latter section (Article X) read:

The Board of Education agrees to remain a participating member of the State Employees Health Insurance Program.

The Board of Education will furnish each employee health coverage in the amount of $3.96 per month and coverage of $5.97 per month for the family plan.

There is no dispute that under the predecessor contract the above sums of money were granted not just to those employees
under the "State wide plan" but also those who had elected the GHI or HIP option. It is clear therefore, that by making those specified sums of money available to defray the cost of any of the three options the Board recognized that all three plans were part of the "State Employees Health Insurance Program." And consequently, by changing Article X in the current agreement, to provide for "100% Health Insurance Coverage" by the Board, it must perforce mean that instead of paying a specified sum of money toward the cost of any one of the three options, the Board is now required to pay the full cost of each of those plans. Or in short, neither under the predecessor or current contract is there language or conduct which limits the application of Article X to the "State wide plan" alone.

The Board asserts that during the most recent contract negotiations it intended and informed the Association that the 100% Health Insurance Coverage was to apply only to the "State wide plan," with the differential between the cost thereof and the more expensive GHI and HIP options paid by the employees. This may well have been the Board's intent, but I find no basis upon which to impute such a limitation to the Association, either by knowledge or acceptance. Throughout the written contract proposals submitted by the Association to the Board, is the Association's consistent demand for "100% district paid health insurance." The Board's negotiated position, as evidenced by the written counter proposals was first, a continuation of Article X as it existed in the expired contract; then an increase in the monthly employee and family coverage as re-
ferred to in Article X of the prior agreement and finally acceptance of the Association's demand for 100% health insurance coverage to be paid by the district. It seems to me that if the Board intended only the "State wide plan" to be paid for totally by the Board, the final "sign off" memorandum dated April 23, 1969 and signed by Mr. Moehle, the Board's chief Negotiator and Mr. LaBombard, the Association's President, would and should have expressed such a limitation. But it did not. Rather, next to the total phrase "100% Health Insurance" is written the word "agreed." Moreover, assuming arguendo that the "sign off" memorandum was in "short hand" form, the Board's limitation of "100% of the cost" to the "State wide plan" could and should have found its way into the final written language of Article X Paragraph A of the current agreement. Again it did not.

Accordingly, for all the foregoing reasons it is my finding that under Article X Paragraph A of the contract, the Board is obligated to pay the full cost of either the "State wide plan," GHI or HIP depending upon which plan an eligible teacher selects. Therefore those teachers who suffered deductions from their pay to cover the costs of any of these plans are entitled to reimbursement. However, in those instances where the Board enrolled a teacher earlier than as provided under the terms and conditions of the particular plan, the cost of early enrollment shall be borne by the teacher. Therefore payroll deductions limited to the period of early enrollment are not subject to reimbursement.

Eric J. Schmertz
Mediator and Fact Finder
DATED: March 1970
STATE OF New York  )
COUNTY OF New York ) ss.: 

On this day of March, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the Individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated July 1, 1969 to June 30, 1970, and having duly heard the proofs and allegations of the parties, Awards as follows:

The Association's request that a summer sabbatical taken under Article XXII Paragraph A6 of the contract, be charged against the quota for the school year only in proportion to the amount of the sabbatical exercised each summer, is denied.

Eric J. Schmertz
Arbitrator

DATED: August 3, 1970
STATE OF New York ss.
COUNTY OF New York

On this 3rd day of August, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1339 0518 70
In the Matter of the Arbitration between
Central Islip Teachers Association
and
Central Islip Board of Education

In accordance with Article IV of the contract dated July 1, 1969 to June 30, 1970 between Central Islip Board of Education, hereinafter referred to as the "Board" and Central Islip Teachers Association, hereinafter referred to as the "Association" the Undersigned was selected as the sole Arbitrator to hear and decide a dispute involving the application and interpretation of certain sections of Article XXII of the contract.

A hearing was held at the offices of the Board on July 7, 1970 at which time representatives of the Association and the Board, 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 waived the Arbitrator's oath.

The parties seek a declaratory judgment on the question of how a sabbatical leave taken under Paragraph A6 of Article XXII should be charged against the quota set forth in Paragraph A4 of the same Article.

Paragraphs A4 and A6 read:

The number of sabbaticals shall be distributed from the buildings within the District as follows: Three (3) from the High School, one (1) from each Elementary School and two (2) from Middle School and/or Junior High School.

A teacher may elect to take this sabbatical in the following manner: The teacher will receive one third...
(1/3) of two thirds (2/3) of his annual salary for three (3) consecutive summers for sabbatical leave as defined herein. The teacher who elects this option will continue to accrue years toward his next sabbatical commencing with his eighth year in the district. Any teacher who elects to take the sabbatical leave provided for in this paragraph will be charged against the overall quota for the school from which he originates as provided in Section 4 of this Article.

It is clear that quotas set forth in A4 above are quotas for each year.

The Association contends that sabbatical leaves taken under Paragraph A6 should be no less in quantity than available under Paragraph A4. It argues that inasmuch as a summer sabbatical under Paragraph A4 is equivalent to only one third of a full year sabbatical, a summer sabbatical should be charged each year only one third against the quota or only in proportion to the percentage of a full sabbatical that the summer leave represents. The Association points out that because the quotas referred to in Paragraph A4 are undisputedly full year sabbatical leaves, three teachers, not just one should be allowed summer sabbaticals at the same or during overlapping times as the equal of one teacher taking a full year off under Paragraph A4.

The Board, relying on the express language of Paragraph A6 asserts that a summer sabbatical, albeit equivalent to one third of a full year sabbatical, is properly chargeable as a full sabbatical each year against the quota set forth in Paragraph A4. And that this is the correct interpretation of Paragraph A6 even if it means that a sabbatical during the summer months, when no replacement is necessary, is significantly less expensive for the Board than the one full year
sabbatical of the Paragraph A4 quota. It asserts in contrast, however that a summer sabbatical is more desirable and attractive to the teachers.

There is no question but that a sabbatical under Paragraph A6 is of lesser duration than a sabbatical under Paragraph A4; and that if each are treated alike as a charge against the quota, a teacher electing to take his sabbatical one third each summer for three consecutive summers under Paragraph A6, will reduce the quota of full year sabbaticals by one full sabbatical each year.

That this is viewed as an inequity by the Association is manifest in its grievance. But inequitable or not I find the Board's view supported by the provisions of Article XXII of the contract. The last sentence of Paragraph A6 reads:

Any teacher who elects to take the sabbatical leave provided for in this paragraph will be charged against the overall quota for the school from which he originates as provided in Section 4 of this Article. (Emphasis added).

By express reference to Section 4, the word "quota" means the amount authorized each year. And the parties deliberately use the word "overall" which by dictionary definition means covering or including everything. (The Random House Dictionary of the English Language - Unabridged Edition). The only logical interpretation is that the sabbatical leave taken under Paragraph A6, albeit at one third each summer, shall be contractually deemed equivalent to an overall or full sabbatical each year, and so chargeable against the Paragraph A4 yearly quota.

For if the parties intended the summer sabbatical of one
third each year to be charged against the quota as one third or in proportion to the amount of time actually taken, they could have easily so provided in Paragraph A6. Indeed they made such provision for a proportionate charge against the total quota in Paragraph A5 of Article XXII. In that section a sabbatical leave of half a year is expressly charged against the Paragraph A4 quota "as one half." So the parties knew how to write contract language calling for a proportionate charge against the quota, and surely would have done the same in the very next section, had they intended it to be so applied. But they did not, and therefore must have intended something different.

If this conclusion produces an inequitable result, or one not intended by the Association, it is only a reflection of the contract language bargained by and between the parties, especially the glaring absence in Paragraph 6, of language mandating a proportional charge against the yearly quota, as is found in the immediately preceding Paragraph 5. And it is to the contract that the Arbitrator is bound even if he may think the contract should be different. He may only enforce the contract as written, not change it. Changes are for negotiation and not for arbitration.

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

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

and 

Cordi Garage 

The Undersigned as Impartial Chairman under the Collective Bargaining Agreement between the above named parties, having duly heard the proofs and allegations of the parties at a hearing on April 17, 1970, renders the following Award:

Cordi Garage owes the Taxicab Industry Pension Fund for the month of January, 1970, the sum of $1,190.61.

Cordi Garage owes the Taxicab Industry Pension Fund for the month of February, 1970, the sum of $1,053.97.

Cordi Garage owes the Taxicab Industry Pension Fund for the month of March, 1970, the sum of $1,213.40.


Cordi Garage owes the Taxicab Industry Health & Welfare Fund for the month of February, 1970, the sum of $2,459.28.

Cordi Garage owes the Taxicab Industry Health & Welfare Fund for the month of March, 1970, the sum of $2,831.25

The foregoing sums are past due. Cordi is therefore directed to pay the aforesaid sums to the respective Funds with interest forthwith.

Eric J. Schmertz 
Impartial Chairman
DATED: May 1970

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

On this day of May, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

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

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

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

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

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

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

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

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

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

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

Eric J. Schmertz
Permanent Arbitrator
DATED: May 1970

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

On this day of May, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 70A-1
In the Matter of the Arbitration between
Motion Picture Laboratory Technicians Local 702, I.A.T.S.E. and
DeLuxe General, Inc.

The stipulated issue is:

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

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

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

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

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

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

Eric J. Schmertz
Permanent Arbitrator

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

On this day of April, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration
between
Motion Picture Laboratory Technicians
Local 702, I.A.T.S.E.
and
DeLuxe General, Inc.

Award

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

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

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

Eric J. Schmertz
Permanent Arbitrator

DATED: April 1970
STATE OF New York )
COUNTY OF New York )

On this day of April, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be
the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 70A-2
In the Matter of the Arbitration between
Motion Picture Laboratory Technicians Local 702, I.A.T.S.E. and DeLuxe General, Inc.

The stipulated issue is:

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

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

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

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

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

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

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

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

1. On November 17, 1970 a dispute arose over the manning of the striping machine and the performance of striping work. As a consequence, and in accordance with the contract, the Developers in the Developing Department interrupted regular production and engaged in a work stoppage within the meaning and proscription of Section 15(h) of the Collective Bargaining Agreement. The Union's defense of "lockout" is rejected. The Company is entitled to receive from the Union, as ordinary damages, the amount of wages paid and welfare and pension benefits credited to the Developers during that period of time. Accordingly the Union shall pay the Company the sum of three hundred dollars and fifty-four cents ($300.54).

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

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

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

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

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

On this fourteenth day of December 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between
DeLuxe General Incorporated and
Local 702, Motion Picture Laboratory Film Technicians, I.A.T.S.E., AFL-CIO

FINDINGS AND AWARD
CASE #70AQ5

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

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

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

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

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

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

On this twenty eighth day of December 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORY INDUSTRY

In the Matter of the Arbitration
between
Local 702, Motion Picture Laboratory Technicians, I.A.T.S.E., AFL-CIO
and
DeLuxe General, Inc.

Award and Opinion

The stipulated issue is:

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

A hearing was held at the Laboratory on March 18, 1971, at which time Mr. Lamendola, hereinafter referred to as the "grievant," and representatives of the above named Union and Company appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived.

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

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

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

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

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

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

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

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

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

Eric J. Schmertz
Permanent Arbitrator

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

On this 12th day of April, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Cas No. 70 A-13
In the Matter of the Arbitration between
Local 702 Motion Picture Laboratory Technicians, IATSE, AFL-CIO and DeLuxe General, Inc.

The stipulated issue is:
Was Anthony Caleca improperly reassigned? Was he improperly reduced in his rate by $16 an hour? If so what shall be the remedy in connection with both questions?

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

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

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

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

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

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

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

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

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

Eric J. Schmertz
Permanent Arbitrator

DATED: October 5, 1970
STATE OF New York )
COUNTY OF New York)

On this 5 day of October, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 70A-8
In the Matter of the Arbitration between
Motion Picture Laboratories Film Technicians, Local 702 I.A.T.S.E.
and
DuArt Film Laboratories, Inc.

Award

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

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

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

Eric J. Schmertz
Permanent Arbitrator

DATED: January 1970
STATE OF New York ss.:  
COUNTY OF New York

On this day of January, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 69A 21
In the Matter of the Arbitration
between
Motion Picture Laboratories Film
Technicians, Local 702, I.A.T.S.E.
and
DuArt Film Laboratories, Inc.

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

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

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

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

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

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

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

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

Eric J. Schmertz
Permanent Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

New Haven Federation of Teachers, Local 933, American Federation of Teachers, AFL-CIO

and

New Haven Board of Education

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 17, 1969 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Board of Education did not violate the contract by scheduling and holding a summer school session of 29 days rather than 30 during the summer of 1969.

Eric J. Schmertz
Arbitrator

DATED: January 6, 1970
STATE OF New York ) ss.: 
COUNTY OF

On this 6th day of January, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 12 30 0168-69
In the Matter of the Arbitration between

New Haven Federation of Teachers, Local 933, American Federation of Teachers, AFL-CIO

and

New Haven Board of Education

In accordance with Article III Section 2 Step 5 of the Collective Bargaining Agreement dated January 17, 1969 between New Haven Board of Education, hereinafter referred to as the "Board," and New Haven Federation of Teachers, Local 933, American Federation of Teachers, AFL-CIO, hereinafter referred to as the "Federation," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Board violate the contract by scheduling and holding a summer school session of 29 days rather than 30 during the summer of 1969? If so, what shall be the remedy, if any?

A hearing was held in the offices of the Board in New Haven, Connecticut on December 9, 1969, at which time representatives of the Federation and Board, 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, and in writing, waived the Arbitrator's oath.

Material to this dispute is Article XVI Section 8, sub-paragraph (e) which in pertinent part reads:
The Board shall determine annually whether a summer school is to be held. If such is held the following conditions will prevail.

...........

(e) A full summer school session shall be thirty (30) working days.

The Federation contends that the summer session of 1969 which encompassed 29 paid days violated the foregoing contract provision. It seeks an additional day's pay for each teacher who worked that summer session.

The Board asserts that as a matter of contract application and interpretation, the foregoing clause only precludes the scheduling of a summer session in excess of 30 working days, but in no way limits the Board's right to unilaterally schedule a summer session of a lesser number of days. Alternatively, the Board contends that the Federation, through its President and other officials, was notified of, agreed to or at the very least acquiesced in the 1969 summer session of 29 days. And that such constituted a contract modification.

The Federation interprets Article XVI Section 8, subparagraph (e) as meaning that the summer school session may not be less than 30 working days. Or in other words, if the Board determines that a summer school session shall be held, its length is contractually mandated at 30 days, no more and no less. The Federation President denies that he consented to or acquiesced in a 29 day summer session for the year 1969, asserting additionally that he lacks the authority to bind the Federation or any of its members to any such arrangement even if he had agreed. Moreover the Federation argues that
any changes in contract provisions, and hence any modification in the foregoing contract clause must be initiated by written request in accordance with Article XVIII Section 2 of the contract, and that no such written request was made of the Federation by the Board in this case.

I accept the Board's contract interpretation of Article XVI Section 8, sub-paragraph (e) and therefore need not decide whether the Federation President or any other Federation official effectively agreed to a modification of the contract or had the authority to do so.

To my mind the phrase "full summer school session" found in sub-paragraph (e) means a summer session of a maximum of 30 working days. The dictionary definition of the word "full" is; complete measure; utmost extent; having within its limits all that it can contain. (Webster's Universal Unabridged Dictionary).

If as the Federation contends, a summer school session is unalterably fixed by contract at 30 working days, I fail to see why the parties would have included the word "full" in sub-paragraph (e), because under such an interpretation, that word would be wholly superfluous. Moreover, if a summer session may not be less than 30 days, or, in other words if 30 days is an irreducible minimum, the inclusion of the word "full," denoting as it does a maximum quantity, would be manifestly erroneous. I am satisfied that the parties did not negotiate the inclusion of the word "full" for either an erroneous or superfluous purpose. Rather, I am convinced
that the word "full" was included for an express purpose and intent - to place a limit on the maximum number of days that the Board could schedule a summer session, so as to protect the teachers from summer sessions of excessive lengths.

In short, by its own language, it places an upper limit on the length of a summer session; but implicit, and unrestricted, is the right of the Board to schedule a summer session, with proper notice, of a lesser number of days.

Of some significance in further support of this conclusion is the fact that teachers working summer sessions are paid on a per diem basis in accordance with individual contracts. To me this clearly suggests some flexibility and potential variation in the total number of scheduled days for a summer session. For if the summer session is mandated rigidly at 30 days, I see no reason why the pay of the teachers would be calculated upon a daily basis. Instead a flat total sum would have been fixed (with appropriate deductions for those scheduled days a teacher may miss).

I conclude that the per diem rate of pay for a summer session is evidence of some recognized leeway in the overall scheduling. And in the face of the maximum limitation of 30 working days as fixed by Article XVI Section 8, sub-paragraph (e), that leeway must be downward from 30.

Accordingly I find no violation of the contract by the scheduling and holding of a summer school session of 29 days rather than 30 during the summer of 1969.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Long Island Division Local 923
R.W.D.S.U., AFL-CIO
and
Dubbings Electronics, Inc.

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

The Company had the right to suspend operations for inventory purposes on November 21 and 22, 1969.

Eric J. Schmertz
Arbitrator

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

On this day of March, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. A70-7
In the Matter of the Arbitration between

Long Island Division Local 923
R.W.D.S.U., AFL-CIO

and

Dubbings Electronics, Inc.

Opinion

In accordance with Section 19 of the Collective Bargaining Agreement dated May 1, 1968 between Dubbings Electronics, Inc., hereinafter referred to as the "Company," and Long Island Division Local 923, R.W.D.S.U., AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company have the right to suspend operations for inventory purposes on November 21 and 22, 1969? If not what shall be the remedy?

A hearing was held at the office of the New York State Board of Mediation on March 19, 1970 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The Union contends that the inventory conducted on Friday, November 21 and Saturday November 22 deprived a substantial number of bargaining unit employees of work on those days because the regular plant operation was shut down. It does not protest, in this proceeding, the manner by which some bargaining unit employees were assigned to work on the inventory those days.
The Union claims that to take inventory on days when normal plant production would otherwise have been scheduled is contrary to past practice; violative of the basic work week provisions of the contract (Section 4); and not a layoff within the meaning of Section 7(c) of the contract.

The Company does not allege that those employees who did not work on November 21 and 22 were laid off. Rather it asserts that the inventory was an essential business activity; that it had to be scheduled over a two day period in lieu of normal production because inventory taken in prior years during non-regular plant operation hours proved totally unsatisfactory to the Company auditors; and that the work week provision of the contract does not constitute a guarantee which may not be curtailed by a bonafide business need such as an inventory.

As neither side claims the curtailment of regular work on November 21 and 22 to be a layoff of those employees not scheduled to work on the inventory, Section 7(c) of the contract is not in dispute and hence not applicable.

I am satisfied that Section 4 of the contract, which provides for a basic work week of 40 hours consisting of five consecutive days of work Monday to Friday inclusive, is not an absolute guarantee. It is well settled that guaranteed periods of employment must be explicitly spelled out by clear and express language. Otherwise, a basic work week is deemed to be the "normal" work week, subject to curtailment by a number of circumstances, such as machine breakdowns, Acts of God, lack of material or bonafide business activities other than normal
production. Indeed, Section 5 of this contract which guarantees four hours pay in the event that an employee is called in or reports in for work, clearly contemplates the possibility that a full day's work on any given day may be diminished, or cancelled in its entirety. Thus by language and intent, Section 5 negates any conclusion that Section 4 represents a guarantee of five days work of eight hours each for each week without exception.

There can be no serious dispute over the fact that an annual inventory is a business necessity. This Company is publicly owned and an audit of its inventory is mandated by the law. The only question is whether the Company was obliged to take the inventory on a day or at a time that would not cause a suspension of normal production or operation. I conclude that the Company was not so obligated. That it did so in prior years is not controlling because the inventories then (which were conducted after working hours or began on Saturday) were sharply criticized by the auditors for inaccuracies and incompleteness, and, as the quantity of the inventory grew, the time required encroached on normal operations anyway - by requiring a completion on the following Monday, a normal working day. The record indicates, without dispute, that the inventory for 1969 grew substantially in quantity over the prior years, warranting at least two days of work. Moreover, the accounting firm which certifies the accuracy of the inventory directed the Company to conduct its inventory over a two day period, and during normal working time. The auditors did so in order to obviate conditions which in prior years produced
marginal if not unsatisfactory inventories.

So for these reasons I must conclude that enough justifiable factors existed to make proper the Company's decision to shift the taking of inventory, an undisputed business need, from non-regular working hours, to a day and time during the regular work week. And as the contract does not provide for a guaranteed work week, those employees not called in to work on the inventory on November 21 and 22, 1969, are not entitled to pay for those days.

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

International Union of Electrical,
Radio and Machine Workers of America,
Local 467, AFL-CIO

and

Thomas A. Edison Industries
McGraw Edison Company

In accordance with Article XIII of the Collective Bargaining Agreement dated January 6, 1970 between Thomas A. Edison Industries, McGraw Edison Company, hereinafter referred to as the "Company" and International Union of Electrical, Radio and Machine Workers of America, Local 467, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Is the position currently held by Angelina A. Sena (hereinafter referred to as the "grievant") under the composite job of Floor Inspector (B-18-16) properly rated under the "Job Rating Plan?" If not how shall it be rated. If the Arbitrator finds for the Union, he will then decide, following an additional hearing or briefs, the matter of retroactivity, if any.

A hearing was held at the Company plant in West Orange, New Jersey, on October 5, 1970 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

I deny the Company's threshold contention that the dispute is not arbitrable. There is no evidence that a prior grievance covering the same complaint and involving the same grievant was
withdrawn by the Union with prejudice. Also there is nothing in the contract fixing a time limit within which the Union must grieve a job evaluation factor(s) after a job has been rated under the Job Rating Plan. The traditional theory of "laches" may be applicable to damages or retroactivity (which may be before me at a later date) but has no bearing on arbitrability. Additionally I do not find the Award of Arbitrator Benjamin C. Roberts of April 19, 1957 to be res adjudica to the instant issue. Mr. Roberts had before him and ruled only on the factor of Experience, which is not a factor presently in dispute.

On the merits the Union challenges the factors of Responsibility for Safety of Others and Working Conditions. Both are presently rated in the 3rd degree under the Job Rating Plan. The Union contends that both should be rated in the 4th degree.

The job of Floor Inspector (B-18-60) is a composite job divided into three separate sets of duties. The grievant has been performing one of those sets of duties and two other inspectors respectively the other two. Based on the record before me, including my observation of the three sets of duties, I am persuaded that the 1/3 segment of the composite job performed by the grievant is significantly different, at least as to one of the factors in dispute, from the balance of the composite job classification. On the other hand if the job of Floor Inspector is considered as a totality (the three sets of duties on a composite basis) the less desirable aspects of the work performed by the grievant is offset
by the less onerous nature of the balance of the total job classification.

The foregoing conclusion, applied to the issue in dispute, means that on a composite basis, considering the Floor Inspector classification as a totality, I find the factors of Responsibility for Safety of Others and Working Conditions to be properly rated in the 3rd degree. And if each of the three Inspectors are rotated amongst the three sets of duties, thereby exposing them equally to the undesirable and then more favorable aspects of the job, the present ratings for both disputed factors would be proper for each incumbent in the composite job classification.

But treated separately - where each Inspector serves continuously in only one of the three sets of duties - the Working Conditions presently applicable to that phase of the job performed by the grievant in the screw machine area are markedly more unpleasant than the Working Conditions of the other two Inspectors. And it is that factor - Working Conditions, which I find significantly different in considering the work required of the grievant as compared with the other two segments of the job classification performed by the other two Inspectors.

As to the factor of Responsibility for Safety of Others, I find no significant difference between what is required of the grievant in the screw machine area and that of the other two Inspectors. And I find that the 3rd degree under the Job Rating Plan for the factor Responsibility for Safety of
Others is correct both on a composite basis and if the job is segmented into three parts.

But the factor of Working Conditions is different. The two other Inspectors not involved in the instant case, perform duties under Working Conditions of less than the 4th degree. But the location of the grievant's set of duties is in an area markedly more unpleasant. I find the requirement that she regularly performed most of her duties in the screw machine area without rotation into the job duties of the other two Inspectors, exposes her "continuously(ly) to several disagreeable elements" within the meaning of the 4th degree of Working Conditions under the applicable Job Rating Plan. As distinguished from the other two Inspectors the grievant is continuously exposed to a high level of noise and to disagreeable dirt, dust, oil, chemicals and heat, indigenous to the screw machine area. So long as she is confined to those duties on a regular and continuing basis, she fails to enjoy the overall or composite Working Conditions of the total Floor Inspector job. Or in short, she is not given the opportunity of periodic relief from those unfavorable working conditions by rotation into the more desirable working areas of the other two sets of duties of the Floor Inspector classification.

Accordingly I consider it improper and unfair that she be accorded the credit of only the 3rd degree when she does not experience that portion of the Working Conditions which are alleviating in nature.

Therefore it is my determination that if the three Floor Inspectors are regularly rotated among the three sets of duties
of the composite job of Floor Inspector, the factors of Working Conditions and Responsibility for Safety of Others would be properly rated, as at present, in the 3rd degree under the Job Rating Plan. But if the grievant is confined to the screw machine area, without equal opportunity to work on the sets of duties performed by the other two Inspectors, the factor of Working Conditions for her segment of the job shall be increased to the 4th degree.

In either event, the factor of Responsibility for Safety of Others is properly rated in the 3rd degree.

Upon the application of either of both parties, I will either schedule a hearing or fix a date for submission of briefs on the matter of retroactive pay, if any.

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

International Union of Electrical, Radio and Machine Workers of America
Local 467, AFL-CIO

and

Thomas A. Edison Industries
McGraw Edison Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated January 6, 1970 and having duly heard the proofs and allegations of the parties, Awards as follows:

The issue is arbitrable. If the three Inspectors are regularly rotated among the three sets of duties of the composite job of Floor Inspector, the factors of Working Conditions and Responsibility for Safety of Others would be properly rated, as at present, in the 3rd degree under the Job Rating Plan. But if the grievant is confined to the screw machine area, without equal opportunity to work on the sets of duties performed by the other two Inspectors, the factor of Working Conditions for her segment of the job shall be increased to the 4th degree.

In either event, the factor of Responsibility for Safety of Others is properly rated in the 3rd degree.

Upon the application of either or both parties I will either schedule a hearing or fix a date for submission of briefs on the matter of retroactive pay, if any.
DATED: October 29, 1970

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

On this 29th day of October, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 - 746 69
In the Matter of the Arbitration
between
United Textile Workers of America
Local 2548
and
Geigy Chemical Corporation

AWARD

The Undersigned Arbitrator, having been designated
in accordance with the arbitration provisions of the Collective
Bargaining Agreement between the above named parties, and having
duly heard the proofs and allegations of the parties makes the
following AWARD:

New jobs and permanent vacancies are being
posted as provided in the collective bargain-
ing agreement.

DATED: December 7th, 1970
STATE OF New York) ss:
COUNTY OF New York)

On this 7th day of December, 1970, before me personally
came and appeared Eric J. Schmertz to me known and known to me
to be the individual described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same.
In accordance with Article XI Section 7 of the Collective Bargaining Agreement dated June 2, 1969 to February 27, 1972 between Geigy Chemical Corporation, Cranston Plant, hereinafter referred to as the "Company," and United Textile Workers of America, Local 2548, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Are new jobs and permanent vacancies being posted as provided in the Collective Bargaining Agreement?

A hearing was held in Providence, Rhode Island on August 31, 1970 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived. The parties filed post hearing briefs.

The dispute is narrower than the stipulated issue. The Union's grievance is that the Company's policy of not posting Class "C" vacancies in the Maintenance Department is violative of Article VII Section 9 of the contract. The Union does not contend that the Company has failed to comply with the contract.
provisions regarding the posting of any other job vacancies.

It is undisputed that for many years, under the predecessor contract, the Company consistently followed the practice of not posting Class "C" job vacancies. Instead it filled those openings by direct assignment from the apprentice ranks, without objection from the Union.

But the Union claims that during the negotiations leading up to the current contract the Company agreed to henceforth post class C job vacancies for bids under Article VII Section 9 of the contract; and that additional wording, negotiated as part of that section in the current contract requires the posting of Class C vacancies in the Maintenance Department.

The question therefore narrows to whether, in the course of the negotiations for the current contract and/or under the additional wording of Article VII Section 9 of the current agreement, the Company agreed or obligated itself to change its prior practice of not posting Class C job vacancies. Or in other words whether by agreement or contract language, the Company is now required to post Class C job vacancies in the same manner as it has posted vacancies in Class B, Class A and Leadman jobs.

The testimony regarding the oral discussions between the parties leading up to the current written contract is in sharp conflict and contradictory, and I cannot find it conclusive one way or the other. Union witnesses testified that they called to the attention of the Company certain inequitable consequences arising from the practice of not posting Class C vacancies -
primarily the "unfair" advantage accorded a less senior Class C employee if he is assigned for an extended period of time to one type of maintenance department work. That experience might give him an edge in any subsequent bid for a Class B craft vacancy, over a more senior bidder who had not gained similar experience. In short, the Union argues that if such an advantage is inherent in a long term Class C job assignment, that Class C vacancy should be posted and filled in accordance with the provisions of Article VII Section 9, rather than assigned on a discretionary basis by the Company from the apprentice ranks.

On the other hand Company witnesses who participated in the contract negotiations flatly denied that the Company agreed to any change in its long standing practice of filling Class C job vacancies by direct assignment from the apprentice ranks.

The best evidence of what the parties agreed to is of course the ultimate contract language itself. Article VII Section 9 of the current agreement reads:

The Company recognizes the right of any employee to apply for a new job or permanent vacancy, and whenever such exists in a department, notice of the same shall be posted for three (3) days in the plant, and all laid-off employees shall be so notified by certified mail. During that time, employees of that department or any other department including laid-off employees, shall have the right to apply for such job or vacancy, and if such job or vacancy is not filled as a result of such application by an employee of that department, the applications from employees of other departments shall be considered. ALL NEW JOBS OR PERMANENT VACANCIES SHALL BE POSTED AS TO DEPARTMENT, AND IN MAINTENANCE AND SHIPPING AND RECEIVING AS TO SHIFT, AND IN MAINTENANCE AS TO CRAFT, DOWN BIDDING OR LATERAL BIDDING FOR NEW JOBS OR VACANCIES IN THE MAINTENANCE AND SHIPPING AND RECEIV-
of a craft. Only if and when they are promoted to a Class B (or above) category are they deemed to occupy a "craft."

The new and additional language of Article VII Section 9 explicitly provides for the posting of new jobs or permanent vacancies in the Maintenance Department as to craft. So long as a Class C vacancy is not a craft I fail to see how this language mandates the job posting of a Class C vacancy. It seems to me that if the Union intended to change Article VII Section 9, so as to include a clear requirement for the posting of Class C vacancies, it could and should have obtained better language towards that end. Especially in view of the long standing past practice of not posting Class C vacancies, any contract language designed to achieve a contrary result must be specific and precise. In this case it should have expressly required the posting of Class C vacancies in a way that would leave no doubt. But the new language of Article VII Section 9 does not do that. Instead it refers to posting "as to craft." And inasmuch as Class C vacancies do not fall within the scope of a craft, the language falls short of including Class C vacancies within the posting requirements, no matter what the Union may have intended. Instead I find that the added language merely delineates a new method by which the craft jobs, namely those of Leadman, Class A and Class B are to be posted. But the new methodology does not expand the scope of the jobs covered, and hence Class C vacancies still remain outside of that coverage.

With the foregoing conclusion I find it unnecessary to
ING DEPARTMENTS SHALL BE PERMITTED ONLY ONCE BY EACH QUALIFIED EMPLOYEE DURING THE LIFE OF THIS AGREEMENT.

The language underscored is what was added as a result of the negotiations. The non-underscored language is a repetition of the same provision as found in the predecessor contract. I have considered the underscored language and the Union's contentions regarding it, and I fail to see how it requires the Company to now post Maintenance Department Class C job vacancies.

It is undisputed that a Class C job in the Maintenance Department is a Helper classification. It is also undisputed that there has been no change in the Class C job description; it has remained, as before, a Helper category. Also undisputed is the fact that a Helper classification is not a "craft" and work within it does not achieve the level of a "craft." Rather, in the Maintenance Department, the "craft" classifications are the Class A and B jobs and the Leadman position. An Employee in the latter three classifications works either as a general mechanic, an electrician, in refrigeration, in instruments, in the stockroom or as a painter. An employee classified as Class C may be assigned to any of those areas as a Helper. In practice Class C assignees have been both rotated among those six categories of work, and at times, such as in the stockroom, assigned as a Helper to the craftsmen, on an extended and continuing basis. But there is no claim or contention by the Union that Class C employees, assigned in their Helper capacity, occupy a "craft" position or acquire the skill
decide whether or under what circumstances a Class C vacancy is a "new job or permanent vacancy." Nor do I see any relevance of the added contract language regarding "down-bidding or lateral bidding" to the instant dispute. That latter language refers to jobs which are subject to bids under the posting provisions of Article VII Section 9. And inasmuch as I have found that Class C vacancies are not within the scope of jobs to be posted, the "down-bidding or lateral bidding" contract language has no bearing on the disputed issue.

If the result of this decision is to perpetuate certain inequities - such as an unfair preference towards a Class B promotion for a Class C incumbent assigned for an extended period of time to one category of work as a Helper, it must be cured by negotiations between the parties. Or, assuming the Union attempted to solve it in the last negotiations, the Union's remedy is by a more effective result, in the form of better contract language within Article VII Section 9 --- language which would unequivocally mandate the posting of Class C vacancies. As I have found that that was not achieved in the last negotiations, nor under the additional language of Article VII Section 9, it remains for subsequent negotiations and not arbitration.

[Signature]
Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union of Electrical, Radio and Machine Workers, AFL-CIO
and its affiliated GE-IUE, (AFL-CIO)

Locals: Local 191 IUE
and

General Electric Company

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 discharges of B. King and B. Anderson were for just cause and are upheld.

Eric J. Schmertz
Arbitrator

DATED: November 9/1970
STATE OF New York )ss.: COUNTY OF New York)

On this 9/ day of November, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 32-30-0145-69
In the Matter of the Arbitration between


and

General Electric Company

In accordance with the Arbitration provisions of the National Agreement dated 1966-1969 between General Electric Company and International Union of Electrical, Radio and Machine Workers AFL-CIO and its affiliated GE-IUE, AFL-CIO Locals, the Undersigned was designated as the Arbitrator between the above named parties to hear and decide the following stipulated issue:

Was there just cause for the discharge of B. King and B. Anderson? If not, what shall be the remedy?

A hearing was held in Atlanta, Georgia on August 19, 1970 at which time Messrs. King and Anderson, hereinafter referred to as the "grievants," and representatives of the General Electric Co., hereinafter referred to as the "Company," and Local 191 hereinafter referred to as the Union," 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 Company and the Union, hereinafter referred to collectively as the "parties," filed post hearing briefs; and agreed to an extention of the due date of the Award until on or before November 23, 1970.

The basis for the grievants' discharge is the charge that
they arranged for and permitted someone else to punch their time cards at the conclusion of their shift on Monday, April 14, 1969, in violation of the following work rule incorporated in a Company publication entitled "Work Practices, Procedures, Job Conduct:"

"Punching someone else's clock card or allowing someone else to punch your clock card provides just cause for dismissal."

The grievants and the Union on their behalf deny the charges. Though it is conceded that the grievants were away from their work area and outside the plant at least 15 minutes before clock out time, they and the Union contend that they returned to the plant in time to clock out; that in any event the work rule is unenforceable because of laxity in its application in the past; that as piece workers who had attained at least standard production that night, no damage was caused when they left their work place prior to the conclusion of the shift; and that merely leaving one's work area early without permission of the foreman, albeit a work rule offense, is not grounds for discharge.

I shall deal with the latter three defenses first. The record does disclose two or three incidents prior to 1967 when the Company did not impose the penalty of discharge for the offense of punching out someone else's clock card or permitted someone to do so. But at that time the work rule prohibiting such misconduct was inadequately promulgated and disseminated among the work force. But in 1967 the latter deficiencies were cured. The work rule, together with its prescribed pen-
ality was republished in two places - the document previously mentioned and in the Company News Letter Transformers Topics, and both were well distributed to and amongst the employees. Indeed the grievants conceded that prior to April 14, 1969 they were fully familiar with the work rule and the penalty for its violation. So if the Company was lax in earlier years - in two or three instances - it effectively tightened its procedures and put all employees on notice, on and after 1967. Accordingly the present work rule and its prescribed penalty are enforceable where a violation is found.

That the grievants are incentive or piece workers does not allow them to leave their work areas before the end of the shift without permission. It is well settled that employees must work the full hours of their shift even if earlier they have met standard or incentive production. Therefore, not only may the grievants not be excused from a violation of the clock card work rule (if a violation is found) on those grounds, but also cannot be excused on that ground for breaching the rule against leaving their work area without permission.

Third, there is no dispute over the fact that for these grievants the bare act of leaving the work area without permission is not a dischargeable offense. But it is a disciplinary offense, and if coupled with a violation of the work rule on "clock cards," it is manifest that the penalty of discharge is both contractually mandated and proper.

The question therefore narrows to whether, based on the weight of the evidence, the grievants committed the offense charged.
On that question, aside from the sharply conflicting testimony on whether the grievants admitted or denied their culpability in the course of an investigation by the Company following the event, there is considerable circumstantial evidence in support of the Company's action. The grievants concede that without permission of their foreman they left the plant some time between 11:30 and 11:45 P.M., and that they were seen at or near the main gate of the plant grounds by their foreman at 11:45 P.M. or 15 minutes before the end of the shift. Their time cards show a clock out at exactly midnight.

The grievants claim that they left the plant early to change a flat tire (on King's car, using Anderson's tools), and planned to and in fact did return to the plant in time to clock themselves out at 12 midnight. Though this explanation is technically possible, the circumstances do not support its plausibility. At 11:45 the grievants were located some 500 yards from their work area. They had not yet fixed the flat. Considering the distance and the time remaining to 12 midnight, I am not persuaded that they intended to both fix the tire and return to clock out. It is undisputed that Anderson was anxious to get home that night without delay. I doubt he would have been willing to spend time to assist King in changing a tire that close to the end of the shift, especially in view of the probability that additional time, beyond the 12 midnight clock out, would be needed to get to the location some 500 yards away, change the tire and return to the plant.
to clock out. In short I believe that more than 15 minutes (after 11:45 P.M.) would have been necessary to complete that plan, which would have carried both grievants past the 12 midnight clock out. Indeed, only if the grievants had abandoned their plan to change the tire, and instead returned to the plant immediately upon being seen by the foreman, could they have arrived back in time to punch themselves out at midnight. But as that was not their original plan, I cannot conclude that that was their original intention.

Moreover the testimony regarding their reaction to being observed by their foreman renders their story vulnerable. They stated that when seen, and thereupon realizing that they had been discovered away from their work area without permission, a work rule violation for which one of them had been previously twice warned, they returned to the plant immediately. But if they had intended to return in any event by 12 midnight, why the concern about doing so when observed at 11:45? Frankly it suggests to me, on the basis of their own statements, that but for the fact that they were seen outside the plant before quitting time, they had not intended to return to clock out. That means that they must have arranged for someone else to punch their cards, and I believe they let that arrangement stand.

Whether in the absence of direct evidence on who punched the grievants' cards, the foregoing constitutes a sufficient quantum of proof to meet the Company's burden of establishing just cause for discharge is a close question. But I resolve it in favor of the Company simply because the grievants and the Union, though alleging a defense, which if transformed into
evidence would be highly persuasive, failed to offer that evidence in support of that allegation, though the knowledge thereof and ability to do so was well within the Union's control.

Considering this latter circumstance, I conclude that the evidence offered by the Company was sufficient to meet its burden on a prima facie basis; that the burden then shifted to the grievants and to the Union to come forward with evidence in support of the alleged defense. Specifically the grievants and the Union assert that certain named employees were at the time clock at 12 midnight and saw the grievants clock themselves out.

Yet though still employed, and readily available, these named employees were not called by the Union to testify in the grievants' defense in this arbitration; nor although also referred to, were they produced at an earlier unemployment insurance hearing. The named employees are members of the Union and within the bargaining unit. For the Union to call them in defense of its position in this arbitration is both logical and wholly consistent with their status as bargaining unit employees. In consequence of the substantial evidence advanced by the Company, which can only be interpreted as prejudicial to the grievants, I conclude it was the Union's responsibility to bring forward evidence in support of its bare assertion that other employees saw the grievants clock themselves out. Not to do so suggests to me that no such defense exists.

I am not impressed with the Union's explanation that those named "witnesses" were not called to testify or declined to
testify "out of fear of reprisal by management". There is no evidence whatsoever that the Company has punished or engaged in reprisals against bargaining unit employees who testify at an arbitration in support of the Union's position. Indeed I am sure that this Union would know how to cope with any such action by the Company. Also the record discloses that during the investigation of the case and the processing of the grievance, the Company sought information and evidence from the Union which might lend credence to the grievants' claim that they clocked themselves out that night. That the Company urged the Union to come forward with any such evidence, nullifies the unsupported charge that the Company would punish an employee who so testified.

An arbitration, albeit adversary, is a search for truth. All material information, when raised as an allegation by one or both of the parties, should be put forward in the form of evidence. Accordingly the Union and the grievants, having raised such an important assertion as a defense, failed to meet the burden of coming forward with evidence in support of that defense, and have therefore failed to rebut the Company's prima facie case when they should have done so.

For the foregoing reasons the discharges of B. King and B. Anderson were for just cause and are upheld.

Eric J. Schmertz
Arbitrator
WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by Congressman Henry Helstoski and Mr. Henry L. Hoebel, candidates for Congress in the Ninth Congressional District of New Jersey, and the Fair Campaign Practices Committee having determined and certified to the American Arbitration Association that the dispute between the candidates can be decided by arbitration, and having been duly sworn and having held a hearing on October 29, 1970, FIND, as follows:


2. Both parties were duly notified of the time and place of the hearing. In accordance with Section 13 of the Rules, the Board directed that the hearing proceed although neither Mr. Hoebel nor his representative appeared.

3. The evidence before us is therefore confined to that presented by Congressman Helstoski, who testified under oath.

4. Based on the evidence before us we find that certain campaign material and statements of Mr. Hoebel misrepresent and distort the Congressional voting record, activities and intentions of Congressman Helstoski in violation of the fourth pledge as to conduct contained in the Code of Fair Campaign Practices.
In the Matter of the Arbitration between

International Union, District 50
United Mine Workers of America
Local 13226

and

Hercules Incorporated

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated May 21, 1967 and having duly heard the proofs and allegations of the Parties, Award, as follows:

A "substantial change" in the job of welding turret line plugs to lead wires occurred in April, 1967. The provisions of Section IX of the contract did not bar the Company from making a prospective revision in the piece work rate in April, 1969. The parties shall attempt to negotiate a mutually acceptable piece work rate. If unable to do so within 60 days of the date of this Award, they may, on the request of either or both, refer that question to this Board of Arbitration for a final and binding determination.

Eric J. Schmertz
Chairman

Joseph Barbash, Esq.
Concurring

Duane Groves
Concurring
Dissenting
DATED: May 1970
STATE OF New York )
COUNTY OF New York )

On this day of May, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 1970
STATE OF New York )
COUNTY OF )

On this day of May, 1970, before me personally came and appeared Joseph Barbash 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.

DATED: May 1970
STATE OF New York )
COUNTY OF )

On this day of May, 1970, before me personally came and appeared Duane Groves 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 0938 69
In the Matter of the Arbitration between

International Union, District 50
United Mine Workers of America
Local 13226

and

Hercules Incorporated

In accordance with Section V of the Collective Bargaining Agreement dated May 21, 1967 between Hercules Incorporated, hereinafter referred to as the "Company," and International Union, District 50, United Mine Workers of America, Local 13226, hereinafter referred to as the "Union," the Undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide, together with Mr. Duane Groves and Joseph Barbash, Esq., the Union and Company designated Arbitrators respectively, a dispute involving the Company's right to revise the rate on the job of welding turret line plugs to lead wires in the Bridging and Filling Department.

A hearing was held in Kingston, New York on February 27, 1970 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrators' oath.

The Board of Arbitration met in executive session in New York City on May 6, 1970 following which the hearings were declared closed.

The threshold issue in dispute is:
Whether the provisions of Section IX of the contract prohibit the Company from tightening the piece work rates in April 1969, almost two years after a "substantial change" in the job (upon which the revision is based) took place?

The parties stipulated that if that question is answered in the negative, the piece work rates which obtained prior to the revision would be re-established; but that if the question is answered in the affirmative, they would attempt to negotiate a mutually acceptable piece work rate with this Board of Arbitration retaining jurisdiction over that question if an agreement could not be reached.

The first question, as indicated in the foregoing issue, is whether the "substantial change" took place as early as two years prior to the rate revision. I am persuaded that it did. Though it is conceded that a change in the job operation occurred in June of 1968 in connection with lowering the conveyor and work table, neither the Company nor the Union assert that this change alone constituted a substantial change within the meaning of Section IX of the contract. Indeed the Company concedes that either or both of the changes which occurred in April 1967, namely the installation of a wire slitter and the increase in the plug pin size met the requirements of a substantial change. And the Company further admits that irrespective of the lowering of the conveyor and work table in June 1968, the two earlier changes in April 1967 stand on their own as substantial changes for the purpose of rate revision. In other words, as I see it, the Company would have made a revision in the rates and bases its substantive right to do so on the April 1967 changes alone.
The Union argues that the language of Section IX of the contract precludes the Company from waiting two years after a substantial change in job content to tighten the piece work rate. The pertinent provisions of Section IX with the language relied upon by the Union underscored read:

(a) Wage rates for purposes of the Agreement shall be those set forth in Schedule "B" annexed hereto. Piecework rates will be adjusted in accordance with past procedures.

(e) Piecework rates shall be established so that average earnings for groups of trained proficient pieceworkers will be $2.88 plus or minus 5% per hour. All rates shall be set by the Company in accordance with established Industrial Engineering principles.

(g) When the piecework job content is substantially changed, either by simplified methods or by added requirements, the job will be considered a new job for the purpose of rate setting.

The Union contends that the word "When" in Paragraph (g) above means, if not forthwith after the substantial change, at least within a reasonable time thereafter. And that almost two years is too long.

It also claims that the phrase "piece work rates will be adjusted in accordance with past procedures" in Paragraph (a) and "all rates shall be set .... in accordance with established Industrial Engineering principles" both mandate rate revisions soon after any substantial change has occurred in the job, as has been the practice with regard to other rate revisions in this plant.

Obviously, in the absence of any explicit contractual time limit on when a piece work rate revision may be made, the Union's case is one of implicit limitation based on its inter-
interpretation of the underscored language. I am not persuaded that the Company is so restricted by any such implicit limitation. It seems to me that if the parties intended to place a time limit on when a piece work rate could be tightened they should and could have done so in a more express manner - by placing a specific period of time in Section IX of the contract. I am not satisfied that the underscored language relied on by the Union represents a substitute for what could have been negotiated as a precise time limitation. Rather I believe that the relied upon language was intended and in fact relates to the methodology of establishing and changing piece work rates rather than the timing.

As I see it the word "when" means "not until," or in other words is designed as a protection to employees on piece work jobs, by prohibiting the Company from making any changes in the piece work rates before a "substantial change" has occurred. In other words it immunizes the employee from a piece work rate change upon the occurrence of small or minor job changes and does not open up the job to a rate revision until those minor changes, cumulatively, become substantial, or a substantial change in and of itself takes place.

But I am not persuaded that the word "when" either means or was intended to mandatorily and contractually require the Company to make rate revisions immediately or within any period of time.

Similarly, I cannot read a specific time limit into either of the other two underscored phrases. I believe they were in-
will evaluate the methods, output and earnings. During the seventy (70) working day period, adjustments will be made if necessary to keep the rate in proper relationship with the rate in paragraph (e). The Union will have a maximum of twenty (20) working days after the said seventy (70) day period to request that the rate of pay for such new or changed piecework job be subject to negotiations between the parties hereto without affecting the remainder of this Agreement.

Clearly the employee is again not prejudiced. The new piece work rate is only temporary over a maximum of 70 working days. And thereafter if the Union protests the accuracy of the rate it becomes a matter for negotiations between the parties and presumably arbitration under the Agreement. So again the Company's unilateral act in revising a piece work rate, even after an extended period of time following the substantial change upon which that revision is based, is not final. It is subject to review, negotiation between the parties and an adjudication as to its accuracy by the Board of Arbitration.

So, in light of that protective provision, I am all the more satisfied that the other provisions of Section IX of the contract should not be read to imply a time limitation on the Company for the revision of piece work rates following a substantial change in a given job.

For the foregoing reasons the Union's claim that the Company is barred by the provisions of Section IX of the contract from tightening the piece work rates on the disputed job is denied. In accordance with the agreed to stipulation the parties shall attempt to negotiate a mutually agreed upon rate, failing which within 60 days of the date of this Award,
that question may be referred back to this Board of Arbitration by either or both parties.

Eric J. Schmertz
Chairman
In the Matter of the Arbitration between
Local 22026, Federal Labor Union
AFL-CIO

and

Hess Oil and Chemical Division,
Amerada Hess Corporation

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

The Company violated the Agreement by transferring certain maintenance and operating work with respect to tanks 1214, 1215, 1216, and 1220 from Local 22026 members to Operating Engineer members and in transferring maintenance work on tanks 1217, 1218, 1219, 1221, 1222 and 1223 in the same fashion. The Company is directed to restore this work to Local 22026 and its members. The Union's request for a monetary remedy is denied.

Eric J. Schmertz
Arbitrator

DATED: October 2, 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this 2nd day of October, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 69-358
In the Matter of the Arbitration
between
Local 22026, Federal Labor Union
AFL-CIO

and

Hess Oil and Chemical Division,
Amerada Hess Corporation

In accordance with Article 20 of the Collective Bargaining Agreement dated August 1, 1969 between Hess Oil and Chemical Division, Amerada Hess Corporation, hereinafter referred to as the "Company," and Local 22026, Federal Labor Union, AFL-CIO, hereinafter referred to as the "Union," the Under-signed was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the Agreement by transferring certain maintenance and operating work with respect to tanks 1214, 1215, 1216 and 1220 from Local 22026 members to Operating Engineer members and in transferring maintenance work on tanks 1217, 1218, 1219, 1221, 1222 and 1223 in the same fashion. If so what shall be the remedy?

A hearing was held at the Company offices on August 14, 1970 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The Company filed a post hearing brief.

The evidence convincingly establishes that when the work referred to in the stipulated issue was originally assigned
to Local 22026 members it was not by unilateral action of the Company; but rather was a jurisdictional arrangement negotiated and agreed to by the Union and Company in 1963, confirmed by letter dated April 15, 1964, from a then Company Vice President to the Union's attorney and thereafter affirmed by more than five years of unvaried practice. As such I find that the Union's specified work jurisdiction in connection with the tanks referred to in the stipulated issue achieved the status of a contractual condition of employment, jointly negotiated and thereafter followed by both parties to the contract.

The rule in such situations is well settled. Mutually agreed upon conditions of employment may not be unilaterally changed by either party except in the most compelling and extraordinary circumstances. I do not find the Company's reasons for eliminating the Union from its work jurisdiction on the tanks involved (in Tank Field #3) and the assignment of that work to the Operating Engineers (which previously shared jurisdiction in Tank Field #3 with the Union) to so qualify.

The fact is that the Company has not established a causal relationship between the Union's work on the stipulated tanks and the rupture on October 30, 1969 of tank 1214. The Company speculates that had not the work in Tank Field #3 been shared by the Union and the Operating Engineers, closer attention might have been given to the tanks, and the signs of a rupture on tank 1214 might have been discerned and corrected before the rupture took place.

But the Company concedes that it has no conclusive evidence in support of this reasoning. It does not flatly con-
tend that but for the shared jurisdiction in Tank Field #3 the rupture and attendant oil spillage would have been prevented. But rather only that it might not have happened. On this basis, presumably to protect against any further such accident the Company unilaterally withdrew work jurisdiction from the Union in Tank Field #3 and assigned all of the maintenance and operating work there to the Operating Engineers.

Not only does the evidence presented in this case not establish a causal relationship between the Union or the shared jurisdiction and the rupture of tank 1214, but the specific facts indicate, to me at least, that the probability of detecting the early stages of such a rupture was remote, even if the Operating Engineers or a single union had complete jurisdiction over Tank Field #3. The rupture occurred because the ground underneath the tank either shifted or sank, producing unusual stress on the tank's bottom plate, which ultimately cracked.

Based on the record I am not persuaded that full performance of all required maintenance and operating work in Tank Field #3, either by one or both unions, would have detected the problem. The Company suggests that the members of the Union did not check the capacities and status of the tanks each time required, but merely repeated the figures taken from previous tests. While this may be true, there is no probative evidence to support it as a matter of fact. Also the Company's complaint that Union members may not have given full and adequate attention to their duties - and that this may have had something to do with the rupture of tank 1214, - would be more properly, in my judgment, the subject of disciplinary warnings
and other disciplinary penalties as a protection for the future than unilateral and total deprivation of the Union's work jurisdiction in Tank Field #3. Especially when that jurisdiction was mutually agreed to as part of the 1963 contract negotiations, and carried out as an unvaried practice for several years thereafter. That no Union members were laid off, or lost their jobs or received less pay or overtime subsequent to the Company's unilateral elimination of the Union from Tank Field #3 does not mean that the Union or its members are not prejudiced. For though they have not yet suffered job losses or diminution in income, the effect may be damaging in the future. For example, in the event of a large layoff in the other tank fields, the Union, if deprived of work jurisdiction in Tank Field #3, would be unable to exercise bumping rights into that Field (because the jobs had been taken over by the Operating Engineers.) In short, with a reduction in the area over which the Union enjoys job jurisdiction, the total availability of jobs to absorb large numbers of laid off employees is either actually diminished or potentially reduced.

Accordingly I grant the Union's request for an order directing the Company to return to the Union its jurisdiction over the stipulated tanks in Tank Field #3. But I deny the Union's request for a monetary remedy. As indicated, none of the affected employees lost their jobs. They were assigned similar work elsewhere without loss in regular pay. Also there is not sufficient evidence to support the Union's claim that the employees would have enjoyed more overtime had they not been taken off their work in Tank Field #3.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

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:

Christmas Day 1969 shall be deemed as time worked (8 hours) for grievant Allen, and New Years Day 1970 shall be deemed as time worked (8 hours) for grievant Bulauskas in computing overtime for the work-weeks in which those holidays fell under Article VI Section 13 of the contract.

Eric J. Schmertz
Arbitrator

DATED: July 1970

STATE OF New York ss.: COUNTY OF New York

On this day of July 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
United Papermakers and Paperworkers'
Local 800, AFL-CIO
and
Johns-Manville Products Corporation.

In accordance with the Arbitration provisions of the Collective Bargaining Agreement dated August 16, 1968 between the above-named Parties the Undersigned was selected as the Arbitrator to hear and decide a dispute involving grievance 5B.

A hearing was held in Manville, New Jersey on June 30, 1970 at which time representatives of the Parties appeared and were afforded full opportunity to offer evidence and argument and to examine and to cross-examine witnesses. The Parties expressly waived the Arbitrator's oath.

The dispute relates to the application and interpretation of Article VI, Section 13 of the contract which reads:

When any of the above holidays falls within the first forty (40) hours of an employee's scheduled workweek, it shall be counted as time worked (8 hours) for each such holiday in computing overtime for the employee for the particular workweek, whether or not the employee worked such time on such holiday or holidays.


The grievants received holiday pay for the two holidays in question. There is no dispute that under their respective work schedules, Christmas Day was a scheduled day off for Allen and New Years Day a scheduled day off for Bulauskas.
The Union contends that whether as scheduled work days or not, holidays must be counted as time worked in computing overtime for the particular workweek in which the holiday falls, and that this has been the Company's practice. The Union concludes therefore that either Christmas Day and New Years Day, though not worked by grievants must be credited to them as time worked, thereby entitling them to some overtime pay for the weeks in question, (they each worked five or more days excluding the holiday in the respective week that the holiday fell).

It is the Company's position that a holiday is to be counted as time worked only if it is a day on which an employee would have worked as part of his regular workweek had it not been a holiday. And that because these two holidays fell on one of the two days in each of those weeks that each grievant was scheduled off, they do not qualify as time worked for the payment of weekly overtime in excess of 40 hours.

Both sides rely in part at least, on the language of Article VI Section 13, which they both assert is clear and supportive of their divergent interpretations. The Company reads that section to mean that the holiday must fall not only within but as part of the first 40 hours of an employees regularly scheduled workweek for it to count as time worked for overtime. The Union interprets it to mean that if the holiday falls somewhere between the beginning and end of an employee's 40 hours of scheduled work, or in other words sometime before the 40 hours of work are expended (even if the holiday falls on a day off), it must be counted as time worked for computation of overtime beyond 40 hours of that week.

That the parties interpret the clause differently, while arguing its clarity, points up its obvious ambiguity. Indeed
I find that the disputed clause is subject to either interpretation with equal logic. If it was meant to require that the holiday fall within what would have been part of the employee's scheduled work week, the clause could easily have provided the words "and as part of" after the word "within" in the second sentence thereof. Though this may have been the intent, a different interpretation is also possible. The phrase "within the first 40 hours" can also mean the intervention of a holiday sometime after the beginning of a 40 hour work period, but before its end. And in the case of the grievants, where a portion of their 40 hours is worked before a day off and the balance thereafter, a holiday which falls on an intervening day off can be construed as a holiday that falls within the first 40 hours of that employee's scheduled workweek. Indeed that the latter interpretation is as logical as the former is evidenced by the fact that the Company has in the past paid overtime on the very basis advanced by the Union in this case.

I shall rely on the traditional approach in situations where the contract language is ambiguous - namely to apply past practice. Though the Company asserted at the hearing that its investigation showed past practice to be "all over the lot", the Company's answer to the Union's grievance indicates otherwise. It states in part:

"We agree we have erred in the past, thus causing the employee to be overpaid."

Had the contract section been clear and unequivocal in support of the Company's interpretation, past errors in payment would not have been so damaging. But where the clause is ambiguous as I have found it to be, the "error" of the Company in making payments in the past is prejudicial. It is an example not only of how the Company applied the disputed contract language but stands as evidence of what the clause meant. Under the
circumstances a clarification of the clause in support of the Company's position or a change in the language to conform to the interpretation advanced by the Company in this case, must remain a matter for negotiations.

Accordingly Christmas Day 1969 shall be deemed as time worked (8 hours) for grievant Allen, and New Years Day 1970 shall be deemed as time worked (8 hours) for grievant Bulauskas in computing overtime for the work-weeks in which those holidays fell under Article VI Section 13 of the contract.

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:


DATED: July 2, 1970

STATE OF New York
COUNTY OF New York

On this 2-2 day of July, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0395 70
In the Matter of the Arbitration between
United Papermakers and Paperworkers Local 800 AFL-CIO and
Johns-Manville Products Corporation

In accordance with the Arbitration provisions of the Collective Bargaining Agreement between the above-named Parties and dated August 16, 1968, the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Did the Company, on February 2, 1970, violate Article XXII, Paragraph 75, of the collective bargaining agreement dated August 16, 1968, when it failed to assign overtime in accordance with Paragraph 14 of a document entitled "Proposed Overtime Procedure - Department 160" dated January 1, 1966?

If so, what shall be the remedy?

A hearing was held at the Company plant in Manville, New Jersey on July 9, 1970 at which time the representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and to cross-examine witnesses. The parties expressly waived the Arbitrator's oath.

Paragraph 14 of the "Proposed Overtime Procedure-Department 160" reads:

Overtime required for inventory, employees shall be selected as follows:

1st Qualifications
2nd low men on overtime

The inventory in question was performed on the first shift on February 2, 1970, and not on an overtime basis. Therefore Paragraph 14 of the overtime procedure is not applicable. On that basis alone the Union's grievance fails.
However lest this not be a full and satisfactory answer, I am persuaded that the Company's action in taking inventory on February 2 was in no way materially different from its prior practice. Previously as in the instant case this type of inventory was taken on the day shift. Similarly the Banbury machine was shut down and its day shift crew was assigned to the inventory work. Undisputed is the fact that this type of ticketed inventory has always required that machine to be shut down. So in those respects the inventory taken on February 2nd was no different from monthly inventories taken over the previous five years.

Nor do I find that the Company's action on February 2 improperly deprived employees of overtime. I find no significant difference between the operation of the Banbury machine on February 2nd on the second shift, with its crew working overtime after the inventory was completed, and the prior practice of the Banbury crew working overtime on a day or days subsequent to the inventory in order to make up the time lost. Either way the overtime went to the Banbury crew and not to other employees. And in both situations it was to recover production lost as a result of the inventory.

In short the events of February 2, 1970 no more impinged on the rights of other employees than did any other monthly inventory over the previous five years. And I find nothing contractually wrong with that practice.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Association of Machinists and Aerospace Workers, District 47, 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 29, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company has the right under Article 12 Section 12.3 "Hours of Work and Overtime" to change an employee's shift during the normal work week.

phasis

Eric J. Schmertz
Arbitrator

DATED: October 16, 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this 16th day of October, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0345 70

MAURICE L. SCHOFENWALD
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-839765
Qualified in Nassau County
Expires March 30, 1971
In the Matter of the Arbitration
between
International Association of Machinists
and Aerospace Workers, District 47, AFL-CIO
and
Johns-Manville Products Corporation

In accordance with Article 20 of the Collective Bargaining Agreement dated August 29, 1968 between Johns-Manville Products Corporation, hereinafter referred to as the "Company" and International Association of Machinists and Aerospace Workers, District 47, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Does the Company have the right under Article 12 Section 12.3 "Hours of Work and Overtime" to change an employee's shift during the normal work week? If not what shall be the remedy?

A hearing was held at the Company's plant in North Brunswick, New Jersey on September 30, 1970 at which time representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath and contract provision for a tripartite Board of Arbitration.

Article 12 Section 12.3 reads:

The work-week and payroll week shall begin on the first (night) shift on Monday morning and shall continue for seven (7) days throughout the last (evening) shift Sunday. The work-day on Monday shall begin on the first (night)
shift on Monday morning and shall continue for twenty-four (24) consecutive hours. Each successive day of the work-week will begin and end at the same time as the work-day on Monday. Prior to the beginning of any work-week, the COMPANY may schedule within the work-week those days on which an employee is to work, and those days on which he is to rest, and for any subsequent work-week may change such schedule when deemed advisable; however, the COMPANY shall not require an employee to forego on his regularly scheduled work days solely to avoid payment of overtime for the particular work-week.

Both the Union and the Company rely on the express language of the foregoing clause and the past practice of its application in support of their respective but divergent interpretations of that contract provision.

I find the language of the contract clause to be clear; to be supportive of the Company's interpretation; and the evidence of "past practice" if material at all to the issue in dispute, too scant to alter that interpretation.

The language of Article 12 Section 12.3 clearly prohibits the Company from changing the beginning and ending hours of the 24 hour work day within the period of the scheduled work week; and within a prescribed work week prohibits the Company from changing the days on which an employee is to work and rest. Only after the expiration of a scheduled work week and prior to the beginning of a new work week may the consecutive hours of the 24 hour work day, or the days on which the employee is to work, be changed.

But there is nothing in that contract clause which either addresses itself to or prohibits the Company from changing the hours of an employee's 8 hour shift within the fixed 24 hour work day or on the fixed days he is scheduled to work.
It seems to me that if the parties intended to restrict the Company from changing an employee's shift hours they would have included that prohibition together with the restrictions on the Company's right to change the starting and finishing time of the 24 hour work day and the days of the week on which the employee is to work and rest.

But a restriction on changes in shift hours was not negotiated as part of Section 12.3 and I find no basis upon which it can be justifiably inserted or implied.

In short, based on the language of the foregoing contract clause, so long as there is no change in the consecutive 24 hour work day, and no change in the actual days of the week an employee is scheduled to work and rest, the Company is not proscribed from changing the hours of his shift.

The evidence of "past practice" advanced by the Union is not persuasive, simply because the situation which gave rise to this grievance never previously occurred, at least so far as the record before me is concerned. It is undisputed that shift changes have been made within a prescribed 24 hour work day and fixed work week at least once or twice a month over the last few years. It also appears that in each instance the affected employee(s) assented to the change so that the question of the Company's right to require an employee to change his shift never arose. In my judgment the fact that employees in the past have been willing to accept changes in their shift hours during a prescribed work week, does not mean that the Company does not have the right to require them to do so if the voluntary arrangement fails or
proves insufficient. Much more relevant would be the evidence of "past practice" demonstrating that the Company permitted employees to decline shift changes; or that the Company bypassed employees unwilling to voluntarily accept shift changes; or that the Company took no action to obtain a full quota of employees when an insufficient number volunteered or assented.

But though the Union alleges, only in general terms, that in the past some employees were permitted to refuse a change in shift hours, there is no evidence of a single specific case. Hence in the absence of any such relevant past practice, the bare language of Section 12.3 must stand.

In short, the burden is on the Union to show a practice which supports its contention that a restriction on changes of shift hours should be included as part of the interpretation of Section 12.3; and based on the record presented in this case the Union has not met that burden. My authority is confined to the contract. Whether the Company's action in exercising its contractual right to require shift changes is consistent with good labor relations is not within my jurisdiction to judge.

[Signature]
Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
District 47 I.A.M. & A.W.
and
Lily Tulip Cup Corporation

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

The three day suspension of Terence Sweeney is reduced to a one day suspension. The Company shall pay him for the two days lost.

Eric J. Schmertz
Arbitrator

DATED: June 5, 1970
STATE OF New York ) ss.:  
COUNTY OF New York )

On this 5th day of June, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0238 70
In the Matter of the Arbitration "

between

District 47 I.A.M. & A.W.

and

Lily Tulip Cup Corporation


In accordance with the Arbitration Provisions of the Collective Bargaining Agreement between Lily Tulip Cup Corporation, hereinafter referred to as the "Company," and District 47 I.A.M. & A.W., hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was there just cause for the three day suspension of Terence Sweeney? If not what shall be the remedy?

A hearing was held in Woodbridge, New Jersey on May 12, 1970 at which time Mr. Sweeney, 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.

A review of my decisions will disclose that I have not hesitated to uphold disciplinary penalties, including the penalty of discharge, where an employee, whether a Union representative or not, directed profane and abusive language to a supervisor in a manner or with an intent that was personal, insubordinate, contemptuous or disrespectful. It is well settled that personal vilification of a supervisory employee...
by a member or representative of the bargaining unit is im-
proper unless justifiably provoked, no matter what the setting
within the employment relationship between the two may be.

However, in the instant case, though there is no question
that the grievant used profane and obscene words and phrases
to Foreman Elsman, I conclude under the circumstances involved,
that the use of that language, unnecessary and unwarranted as
it was, did not reach the level of personal vilification or
abuse.

The incident took place in the course of what I consider
to be an adversary setting - a meeting called by Mr. Elsman,
to "instruct and caution" employee Rivera on the dangers and
impropriety of "horse play" in the plant. The grievant in his
capacity as a Union Shop Steward accompanied Rivera. The griev-
ant's conduct thereafter was in that capacity. As such he had
the right to object to both the calling of the meeting and to
what took place in the course of it, whether or not his grounds
for objection were meritoseous. On the same basis, and again
in his capacity as Shop Steward he had the right to express the
view that the meeting was disciplinary in nature. (The Company's
characterization as "instructional" notwithstanding.) And
that it was improper unless the Company had evidence that
Rivera was guilty of horse play, again irrespective of the
merits of that point of view.

I agree with the Union's assertion that as a shop steward,
the grievant was entitled to deal with the foreman as an equal,
and to vigorously protest both the procedural and substantive
aspects of the meeting. Clearly the grievant's attitude and
demeanor were harsh, abrasive, highly partisan and profane.
Yet I conclude that the unsocial language used was both common to this plant, and the kind of colloquial language which the grievant would use as an instrument of protest, if as shop steward he wished to express himself in the strongest terms possible against the Company's action.

In short though I can appreciate why Foreman Elsman took offense and why he interpreted the language as a personal attack on him, I believe the grievant meant it as an attack on the nature of the proceedings, i.e., the meeting itself, and as a defense of his Union member whom he represented, rather than as a personal or insubordinate attack on Foreman Elsman.

This is not to say that in discussions or even inevitable arguments between Union and Management representatives, the use of profanities, which may be interpreted as personal invectives, may be used. Indeed representatives of both sides should be placed on notice that vigorous representation, including the right of protest and the use of the grievance and arbitration provisions of the contract are fully available to protect the rights of employees without resort to unsocial words and expressions which could well, in other circumstances be interpreted either by this or subsequent arbitrators, as abusive and insubordinate, warranting discipline. All that I mean is that in this particular case, limited to the particular circumstances herein, the grievant's intention was to act aggressively as a shop steward rather than to disrespectfully abuse the foreman. Therefore I cannot find that his language
exceeded the bounds of propriety within the context of an adversary proceeding between a Union steward and a foreman, though it was dangerously close to the brink. And it should be avoided in the future, as both unnecessary and unwarranted, and with this notice, subject to an interpretation adverse to the one using it.

However, I do find that the grievant acted improperly in another respect. He disrupted and prematurely ended the meeting which Foreman Elsman had called. In doing so the grievant stepped beyond the bounds of his role as shop steward. No matter how irregular or improper he considered that meeting, he had no right to abruptly withdraw from participation and take employee Rivera with him before Foreman Elsman had concluded. If he objected to the meeting he could have stated so. He could have filed a grievance against any or all aspects of the meeting, and the rights of Rivera as well as those of the Union could have been both adjudicated and protected by use of the grievance and arbitration provisions of the contract, if the objection was well founded. I find no justification for his refusal to permit Foreman Elsman to "instruct" Rivera about horse play, even in the face of Elsman's remark that a written notice of the meeting would be placed in Rivera's employment file. If the grievant or the Union considered that procedure wrong, the use of the grievance procedure, subsequent to that meeting, was fully available to redress that wrong. But when the grievant removed himself and also instructed Rivera to leave the meeting before its completion, he improperly impeded the foreman from carrying out a supervisory function. Foreman Elsman had ordered
the meeting, and the grievant, by taking Rivera from it before its completion in effect countermanded that order. For that action I am satisfied that some discipline is warranted.

The record indicates that the Company, in suspending the grievant for three days, relied on the grievant's total conduct at the meeting with Foreman Elsman - the use of profanity and the refusal to permit the foreman to carry the meeting to its end. Because I uphold the Company on the latter charge but not the former, I shall reduce the penalty to what I consider appropriate within my authority to fashion a remedy. It appears that the Company relied more on the profanities than the premature termination of the meeting. Also there is no evidence that the grievant, as an employee, has a prior disciplinary record or as a steward has engaged in prior irresponsible conduct. Therefore I shall reduce the three day suspension to a one day suspension. The Company is directed to pay the grievant for two days lost.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between Research Development and Technical Employees Union and Massachusetts Institute of Technology

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named Parties and dated October 19, 1968 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

I find that by his express, unconditional and undisputed statements to Company representatives, and by confirming conduct, John Neuzil voluntarily quit his employment at the Draper Laboratory. Though there is no doubt he was dissatisfied with his job assignment, I am not persuaded that he was under the kind of pressure, tension, or other emotional strain as would cloud his comprehension of the import of what he said and did and the consequences thereof. Nor is there evidence to support the claim that his decision to quit was forced, coerced, or brought about by the undue influence of the Company or its representatives. If he retained mental reservations, or if he intended his statements and action to be conditional, no such indication was manifested. And therefore none can be imputed as either understood by or known to the Company.

Accordingly the Union's grievance that he was discharged is denied.

Eric J. Schmertz
Arbitrator
DATED: December 29, 1970

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

On this 29th day of December, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1130 0251 70