The above named parties are in dispute over the manner by which certain vacancies in Tactical Control Units (TCU's) may be filled under Paragraphs VIII and IX of the Memorandum of Understanding dated September 17, 1969.

The Union contends that all positions within the TCU's must be filled strictly on a voluntary basis, and that no firemen may be involuntarily "detailed" into TCU positions or vacancies.

The Department contends that because the fire fighting duties of the TCU are identical with those of other companies, a vacancy therein caused by such circumstances as illness, injuries, vacations or unexpected absences, may be filled by a fireman involuntarily assigned so long as the hours of TCU work coincide with the hours that that fireman would have worked on his regular tour at his regular company.

Paragraphs VIII and IX which are the pertinent parts of the Memorandum of Understanding read, (with the underscoring added):

VIII. All TCU's shall be on a voluntary basis. So that the TCU's shall not jeopardize the 2 platoon system the City agrees that neither the Chief of Department, Fire Commissioner nor any City official will attempt or support any attempt to alter by legislation or otherwise, the present 2 platoon system.
IX. Tactical Control Units will be operational as either Engines or Ladders and respond in adaptive response areas between the hours of 3 pm and 1 am. All personnel will be voluntary in the 10 TCU and consist of 10 Captains, 13 Lieutenants -- 15 Firemen per TCU Engine and 17 Firemen per TCU Ladder. These VOLUNTEERS will work approximately 37 1/2 hours per week and receive night differential as provided by the current wage contracts.

The foregoing language is clear. At several points it mandates and reiterates the voluntary nature of the personnel manning the TCU's. There are no express exceptions to the provision that "all personnel will be voluntary." Obviously if the parties intended to include certain conditions under which firemen could be involuntarily assigned to the TCU's they could and should have included those specific exceptions and limitations within Paragraphs VIII and IX of the Memorandum. That they did not permits of only one conclusion - that no express exceptions or limitations on the voluntary nature of the TCU complement were intended.

However, considering the critical and essential nature of the work performed by the TCU's - fighting fires in the high fire incident areas of the city - I am satisfied that one exception or limitation was and is implicit. And that is the right of the Department to involuntarily assign or detail a fireman to fill a TCU vacancy in an emergency. I think it manifest that a TCU which is undermanned as a result of an emergency situation should not be handicapped in its fire fighting work by the absence of a full complement. Under that circumstance, where the TCU vacancy occurs because of an emergency, and where it cannot be voluntarily filled because of an emergency, the Department may assign a fireman who would
otherwise be working the same tour hours, to fill the vacancy for so long as the emergency lasts.

Emergencies must be determined and judged on a case by case basis. I see no fruitful purpose in attempting herein to define "an emergency," applicable to all situations. Rather, if the parties dispute whether an emergency exists which warrants or causes the involuntary assignment of a fireman to a TCU, I will decide that matter when and if it arises. Also there is no present need to define the terms or scope of an emergency because I am advised that no fireman is at this time involuntarily assigned to any TCU. And I am further informed that the Department has increased the TCU volunteer pool so as to minimize if not eliminate the future possibility of assigning any firemen to TCU's on any but a voluntary basis.

DATED: March 17, 1970
STATE OF New York.
COUNTY OF New York.

On this 17th 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.
In the Matter of the Arbitration
between
Uniformed Firefighters Association
Local 94, AFL-CIO
and
The City of New York (Fire Department)

The stipulated issue is:

Has the Department violated Article XXI Section 5 of the Collective Bargaining Agreement by insisting that all interrogations be stenographically recorded? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on March 5, 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 expressly waived.

Article XXI Section 5 reads:

The interrogation of the employee may be recorded either stenographically or mechanically unless the exigencies of the situation prevent such recording. In the event that an employee is subject to charges by the department, any such record shall be made available to the employee or his representative. The cost of the recording shall be shared equally by the parties.

Clearly, the foregoing provision provides alternative methods for the recording of interrogations - either stenographically or mechanically. As a negotiated part of the Collective Bargaining Agreement, either or both alternatives
are rights enjoyed by both parties. The only limitation is where "the exigencies of the situation prevent such recording." In this case the Department does not rely on that latter limitation.

Therefore, inasmuch as each side enjoys the contractual right to record interrogations either stenographically or mechanically, the Department may not unilaterally foreclose a mechanical recording (by use of a tape recording machine) of the interrogations. For if the Department had such a unilateral right, the alternative methods set forth in Article XXI Section 5 would be meaningless as reciprocal rights. Indeed in that case the Union's right to choose either stenographic or mechanical recording (with the same right accorded the Department) as intended by Section 5, would be reduced to a nullity. And I am persuaded that the parties did not negotiate Article XXI Section 5 either for a meaningless purpose or to empower one side to negate the alternative rights of the other.

Accordingly the Department may not foreclose the use of a tape recorder in the recording of interrogations. If Departmental equipment is used the cost of the tapes shall be shared equally by the parties. The tapes constitute the legal record of the interrogation. Either side, at its own cost may transcribe the tapes into typed or written form so long as the tapes remain within the custody of the Fire Marshall. If either side makes a typed or otherwise written copy from the tapes, it shall provide a copy thereof to the other side.
Of course if the Department wishes, it may stenographically record the interrogations. But in view of the Union's right to record the proceedings mechanically, the Department may not charge the Union any of the costs of the stenographer or reporter so employed by the Department to make the stenographic recording.

Based on the foregoing, an insistence by the Department that all interrogations be stenographically recorded would be violative of Article XXI Section 5 of the Collective Bargaining Agreement.

Dated: March 17, 1970

On this 17th 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 issue before me is not whether a fireman must carry out direct orders subject to his right thereafter, and the right of the Union on his behalf to grieve the propriety of the order. Rather it is limited to whether the cleaning of inside surfaces of a boiler, including flues, tubes and the chimney base is a duty of a fireman under Schedule A of the Collective Bargaining Agreement.

The evidence, which includes the unrefuted testimony of Union officials that they invoked and implemented the agreement with responsible officials of the Fire Department, and the testimony of a former Deputy Fire Commissioner that he remembers such an understanding, supports the Union's claim of the existence of an oral agreement with the Department that the cleaning of inside surfaces of a boiler is not a duty of a fireman. The Department witnesses could only testify that they did not know of such an agreement; not that one did not exist. Indeed the two Department officials with whom the Union claimed it implemented the oral understanding, namely former Deputy Fire Commissioner Nolan and Lt. Collymore (of that commissioner's office) did not testify in response to that claim by the union.
And in my judgement, those officials and the office they represented had apparent if not actual authority to carry out such an arrangement with the Union.

Nor is the evidence on that oral agreement nullified by past or current practice. For the evidence on practice, as presented in this proceeding, is inconclusive. Department witnesses testified that when they were firemen they cleaned the inside surfaces of coal furnaces, and later, as junior officers they issued such orders to firemen who complied. Yet in point of time, this work was performed years ago when a departmental Action Guide, listing such work as part of a fireman's duty, still obtained. But that Action Guide was thereafter abandoned and not replaced. Specific examples of when those witnesses personally gave direct orders to firemen to clean oil burners, narrowed, in the record before me, to a single incident. Beyond that the Department's position on current practice is basically a conclusion - that because the witnesses have not heard of any fireman refusing to perform the work, the firemen therefore must be doing it.

The Department's contentions regarding the ordered performance of the disputed work at certain specific companies, such as Engines 230, 231, 151, 62, 64 and 96 are mere allegations. No personnel from those companies were called by the Department to testify, and none of the Department witnesses knew of their own knowledge that the work had been performed at those locations by firemen.
Contrariwise the Union offered testimony of general refusals to carry out the assignment of the disputed work, together with a flat denial by a Union trustee covering the borough in which at least two of the foregoing specific companies are located, that the cleaning work was done by the firemen. (Except in the single case of Engine 96 where that Union witness stated that a fireman performed the work as a volunteer). And the Union advances the equally plausible conclusion that firemen do not do the work, because company officers have not pursued their orders further and no personnel have been disciplined (except in the instant incident), after the Union informed any inquiring fireman (who had been directed by his superior to perform the work) that it was not part of his job.

In short the record before me on what the practice was and is, is not determinative one way or the other, and therefore cannot preempt the unrefuted evidence of the oral agreement.

Nor is Chapter Nineteen (Company Quarters) sufficient to overturn the oral but express agreement. Reference to "Heating Installations" is general; in connection with the responsibility of the Company Commander for the cleanliness of quarters and the use of fuel and oil. Yet other duties in connection with company quarters are much more specific, such as checking the water level in steam boilers; lubrication of circulator units of the hot water system; the procedure upon discovery of water or sediment in gas or fuel storage tanks; and limitations on the connection of electrical appliances.
That Chapter Nineteen is not similarly specific regarding the cleaning of the inside surfaces of the boilers is not in and of itself fatal to the Department's case. But when viewed together with the abandonment, without replacement, of the Action Guide (which had specified the cleaning of furnaces as a fireman's duty) and the persuasive evidence on the oral agreement as implemented (that it was not part of the fireman's job), the latter must be deemed currently controlling. And as a mutual arrangement, evidenced by its mutual implementation, the oral agreement cannot now be superceded by the Department's unilateral promulgation of PA/ID 5-70.

Accordingly, the Undersigned, as Impartial Chairman under the Collective Bargaining Agreement between the above named parties and having duly heard the allegations and proofs of the parties at hearings on April 9, 13 and 14, 1970, renders the following AWARD

The cleaning of inside surfaces of a boiler, including flues, tubes and chimney base is not a duty of a fireman under Schedule A of the Collective Bargaining Agreement.

Eric J. Schmertz
Impartial Chairman

DATED: April 16 1970
STATE of New York )ss.:
COUNTY of New York )

On this 16th 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

Uniformed Fire Officers Association
Local 854, AFL-CIO

and

City of New York (Fire Department)

Award and Opinion

The issue in dispute is whether the establishment of the 58th Battalion constitutes a Battalion within the meaning of the Memorandum of Understanding of September, 1969?

The pertinent provisions of the Memorandum of Understanding are Sections I and II which read:

1. The City shall appoint in excess of 1,000 firefighters within one year. Of this number, 750 shall be added to and made a part of the firefighters quota; in addition the officer quota is to be increased by 5 Dep. Chfs., 25 Batt. Chfs., 20 Captains and 40 Lieutenants.

II. The City shall establish one division, 5 battalions, 8 companies, 10 Tactical Control Units and 90 Firefighter Tactical Man-Power Pool. The first of these units - one division, 2 battalions, 3 TCU's and 3 full time companies - will be installed on 10/18/69. The remaining units will be phased in equally, as far as possible, on 2 month intervals, with a target date for complete installation of the new units on 3/21/70. The entire program to be in operation by 5/17/70. The entire schedule set forth above is subject to the City being capable of providing adequate living quarters and conditions.

The meaning and intent of Section I is to increase the quota of personnel. The meaning and intent of Section II is to increase the quota of Units. I find that in establishing Battalion #58 the Department complied with Section I but failed to comply with the requirements of Section II.
When the 58th Battalion was established, the Department appointed or promoted the requisite number of officers as mandated by Section I. But simultaneous with the creation of the 58th Battalion, the second section of the 44th Battalion, a Unit which was in existence at the time that the Memorandum of Understanding was entered into, was eliminated. Indeed the second section of the 44th Battalion was used, in part at least, to structure the 58th Battalion.

So, with the simultaneous establishment of the 58th Battalion and the elimination of the second section of the 44th Battalion, no increase in the quota of Units was achieved.

Subsequent to agreement on the Memorandum of Understanding and during meetings regarding its implementation, I stated that the establishment of new or additional Companies under the Memorandum would not be satisfied by the use of existing Squads. I hold that the same proscription is applicable to the elimination and use of a pre-existing second section of a Battalion for and at the same time as the creation of a new Battalion.

This is not to say that the Department does not have the right to change, restructure, redeploy and assign new and different duties to Units in existence at the time that the Memorandum of Understanding was negotiated. Clearly this remains a managerial right and prerogative, subject only to limiting provisions, if any, of the Collective Bargaining Agreements and the Memorandum. Also it is not to say that the 58th Battalion does not represent a more efficient and effective means of handling the increased work load. Quite the contrary. I am persuaded
that the 58th Battalion, with assignments and responsibilities significantly different from and more encompassing than those of the second section of the 44th Battalion, represents a better utilization of manpower and equipment than the latter. But as commendable and practicable as this may be in reducing the work load, it simply does not satisfy the requirements of Section II of the Memorandum of Understanding. That Section contemplates an increase in the quota of total Units by the number of new Divisions, Battalions and Companies set forth therein. And the basis on which the 58th Battalion was established does not meet that test.

Accordingly, the Department shall take whatever steps are necessary to conform the 58th Battalion to the requirements of Section II of the Memorandum of Understanding. I leave it to the Department to decide which method(s) it wishes to employ to accomplish that end, subject to my review of its compliance with Section II of the Memorandum of Understanding. But it seems to me that the most feasible method would be to maintain the present complement of Battalions, including the 58th, and re-establish or re-institute the second section of the 44th Battalion or some other comparable Unit.

The Undersigned as Impartial Chairman under the Memorandum of Understanding of September, 1969, and having duly heard the proofs and allegations of the parties makes the following Award:

In establishing the 58th Battalion the Department complied with Section I of the Memorandum of Understanding, but failed to comply with Section II thereof. The Department shall take whatever steps are necessary to bring the 58th Battalion into compliance with the requirements of Section II of the Memorandum of Understanding.

Eric/J. Schmertz
Impartial Chairman
DATED: August /2/1970
STATE OF New York )ss.:
COUNTY OF New York )

On this /2/ 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.
The stipulated issue is:

Were Firemen DeFeo and Madden entitled to any compensation for October 28, November 7, 18 and 20, 1969 and January 8, 1970 (as to Madden) and November 18, 20, December 3, 11, 1969 and January 8, 1970 (as to DeFeo). If so, how much?

It is stipulated that the Award in this matter will apply also to Fireman Antretta.

A hearing was held on February 24, 1970 at which time Firemen DeFeo and Madden, hereinafter referred to as the "grievants," and representatives of the above named parties appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The grievants are respondents (accused) in Departmental trials. The dates set forth in the issue were days on which their trials were conducted outside their regular working hours. These dates were so scheduled to meet the convenience of the attorneys involved and the Hearing Officer.

Certain points are not in dispute. Most Departmental trial dates and hours are scheduled to coincide with the regular working hours of the respondents involved. Firemen who
are respondents are ordered to appear by "order and notice."
The Department states that the presence of respondent firemen
at Department trials is mandatory. Discipline would be imposed
if they failed to heed the order and notice to do so. When the
trial takes place during a respondent fireman's regular work-
ing hours, he receives his regular pay.

The question in this case is whether the grievants should
be paid for time they spent at trial outside their regular
working hours. And if so, under the authority granted me in
the stipulated issue, how much?

I find no basis, either by practice or contract to deprive
a fireman of pay during the days of his trial merely because
he is the accused. Firemen on trial during regular working
hours are presently paid. Because at those times they are
neither on fire duty nor available to fight fires, it cannot
be argued that they are being paid for their normal firefight-
ing responsibilities. Instead, only one conclusion is possible -
that they receive pay for the trial time, though they are the
accused, as long as the trial coincides with their regularly
scheduled tours. In short, the fact that a fireman is an
accused in a Departmental trial has not been grounds to deprive
him of pay during trial time.

I also find nothing in the contract which reverses or mod-
ifies the traditional presumption of innocence. Indeed the
preamble to Article XXI (Right of Representation) expressly
states in pertinent part:

"It is the policy of the Fire Department of the City
of New York to secure for all its employees their
rights and privileges as citizens in a democratic
society, consistent with their duties and obligations
as employees of the Fire Department of the City of New
York."
Admittedly applicable to interrogations and "suspects," prior to preferring of charges, it serves, in my judgment, as reenforcement of the traditional presumption, neither overturned nor modified by any other contract provision of "innocence until proved guilty." So again, unless there is a presumption of guilt, (and I have found none), or unless suspended from duty, there is no contractual basis upon which a fireman should be deprived of pay because of his accused status.

Therefore the question narrows to whether the time spent as an accused at a Departmental trial scheduled outside of regular working hours should be paid pursuant to Article III Section 3 of the contract. As I see it, the answer to that question turns on whether the time involved is "ordered overtime work" within the meaning of Section 3b of the contract which reads:

Ordered overtime work, when directed by the Commissioner or his designated representative, which is required for purposes other than those indicated in (a) above shall be compensated for by time off at the rate of time and one-half in lieu of cash payments. On and after July 1, 1969, all such overtime shall be compensated for by cash payment at the rate of time and one-half.

or, within my authority under the stipulated issue to determine the amount of compensation, if any, whether it constitutes a period of time to be paid for on some other basis.

Though the grievants were ordered to appear at their trials outside of their regular working hours, I am not persuaded that it was "ordered overtime work" within the meaning of Section 3b. It is well recognized that ordered overtime requires an employee not only to report for work at inconven-
lent hours thereby disrupting his personal life, but also to meet the need or convenience of the employer. In other words, under this contract he is called in during hours burdensome to him, not for his own purpose, but because the Department needs him. For those reasons the payment of a premium (time and a half) as prescribed by this contract, is warranted. But as I see it only one of these two factors may be involved in the scheduling of Departmental trials outside the accused's regular working hours. He is ordered to be present during hours that he would otherwise be off duty, and in that respect the trial dates are an inconvenience or burden to him, within the classic context of "overtime work." But though his attendance is directed by the Commissioner or his designated representative and is for a purpose other than those indicated in Section 3a of the contract, it is not always for the sole need or convenience of the Department. Rather in this case it was to suit the convenience of various participants, the attorneys for the grievants and the Departmental Hearing Officer.

In short, the need and convenience of the grievants' representatives played as much a part in the dates chosen as did the requirements and convenience of the Department. Indeed though the record on this is not clear, the wishes of the former may have been more controlling.

Under that circumstance I am persuaded that it would be inequitable and unfair to penalize the Department by requiring payment to the grievants at the time and a half rate. To pay them overtime would be to grant a benefit in the absence of the full grounds upon which that benefit traditionally rests. And
it would penalize the Department (and reward the grievants) for accommodating the trial dates, in part at least, to the time schedule of the lawyers representing the accused.

It follows therefore that where the trial date and hours have been set outside of the accused regular working hours at the request for the sole convenience of the accused or his representative, the Department should not be required to pay the accused fireman any compensation for that trial time. In that situation he is not inconvenienced in the classic sense, because his presence is ordered at a time he or his representative selects.

On the other hand I consider it similarly inequitable to deprive an accused fireman, and the grievants in this case, of all pay for trial time outside of regular working hours when the scheduling was to meet the convenience of the Department as well as the representatives of the accused; a circumstance which places some responsibility on the Department for an encroachment on what otherwise would have been the grievants' time off; and all within the frame of the previously mentioned "presumption of innocence."

Therefore under the broad authority granted me by the parties in the stipulated issue to decide whether the grievants are entitled to any compensation and to determine how much, if any, I shall render an Award which I consider to be both contractually sound and equitably appropriate.

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

Firemen DeFeo and Madden are entitled to and shall be paid compensation at straight time for the non-duty time that each spent as respondents at Departmental trials on any of the following days:


Ernest J. Schmertz
Impartial Chairman

DATED: June 1970

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

On this day of June, 1970, before me personally came and appeared Ernest J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The issue in dispute between the above named parties involves the application and interpretation of the Temporary Assignment section (Paragraph (c)) and the Night Shift Differential section of Article VI of the Collective Bargaining Agreement. These sections read:

Effective January 1, 1969, whenever a Fireman is assigned to the duties of a higher rank (i.e., officer, marine engineer or pilot) for more than two hours in any tour, he shall be paid in cash for the entire period of such assignment at the rate for the rank in which he serves. The intent is that the Department shall have 2 hours to obtain an officer, marine engineer or pilot qualified in the higher rank. If not, the Fireman assigned shall continue in the assignment of the higher rank and shall receive the pay for that rank for all the time in it. Payment shall be within a reasonable time.

There shall be a five percent differential effective January 1, 1969, for all work actually performed between the hours of 4 P.M. and 8 A.M.; provided that more than one hour is actually worked after 4 P.M. or before 8 A.M.

Hearings were held on March 16 and April 27, 1970 at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties were also afforded an opportunity to file post hearing memoranda.
As of the dates of the hearings, the following facts were undisputed:

1. A number of firemen earned night shift differential for the period January 1, 1969 through November 13, 1969.

2. Some firemen within that group have not yet been paid.

3. Most in that group received the night shift differential pay on April 3, 1970.

4. A group of firemen earned extra pay for performing higher graded temporary assignments during the period January 1, 1969 through March 19, 1969.

5. Most of those within that group (referred to in #4 above) received the temporary assignment pay on March 20, 1970.

6. Some firemen within that group (referred to in #4 above) have not yet been paid the sums they earned performing those higher grade temporary assignments.

The Union claims that the payments already made and those still due failed to comply with the contract provision that:

"Payment shall be made within a reasonable time."

Where payment has been made the Union seeks an Award directing the City to pay interest at the rate of 6% per annum on that money for any period of time beyond 30 days after it became due. As to sums still due the Union seeks an Award requiring payment with interest at the rate of 6% per annum for the period 30 days after it became due to when paid.

The foregoing pertinent contract section relating to payment for work performed in a higher rank expressly states that "payment shall be made within a reasonable time." I am satisfied that a similar provision is implicit within the Night Shift Differential section of the contract.
There can be no real dispute over the conclusion that payments already made and those still due were not and have not been paid within a reasonable time. Those firemen who received the night shift differential pay on April 3, 1970 for their services between January 1 and November 13, 1969 waited from 4-1/2 to 15 months for payment. Those who have not yet been paid have been waiting an additional 24 days, as of the date of the last hearing.

Those firemen paid on May 20, 1970 the sums to which they were entitled for work in higher grade temporary assignments waited a minimum of 1 year and a maximum of 14 months. And those who have not yet received that pay have been waiting an additional 38 days as of the date of the last hearing.

I recognize that some delays in payment result from necessary administrative and auditing procedures of the City. Yet some of the foregoing delays are inordinate. All are beyond normal time limits for payment of debts and hence inconsistent with the contractual obligation. And it is the contract, which the parties themselves negotiated, that this Arbitrator is required to enforce. I have no authority to modify, change it or excuse its enforcement because of slow moving administrative procedures.

Accordingly I find that those payments made and those still due within the foregoing items #1 through #6 were not and have not been paid within a reasonable time as required by the contract. The payments still due are conceded by the City.
However, the Union's claim for 6% interest is denied in this arbitration forum because it is not authorized under the contract. It is undisputed that during the negotiations which led to the current contract, the Union demanded but failed to achieve a contract provision which would impose a 6% per annum interest on money earned by firemen if not paid by the City within 30 days after it became due.

It is well settled that arbitrators may not legislate by arbitration what was not achieved in negotiations. Inasmuch as the Union did not gain its demand for a contract clause imposing interest on payments past due, the present contract between the parties cannot and does not embody that penalty. And because my authority is limited to what is contained in the contract, I am powerless to add 6% interest to the sums due, simply because it would be beyond my authority to do so.

Accordingly, as Impartial Chairman under the Collective Bargaining Agreement between the above named parties, I make the following AWARD:

1. Those firemen who on April 3, 1970 were paid the night shift differential pay they earned for the period January 1, 1969 through November 13, 1969 were not paid by the City within a reasonable time.

2. Those firemen who were not yet paid that night shift differential as of the date of the final hearing (April 27, 1970) have not been paid within a reasonable time. The City concedes it owes this money.

3. Those firemen who on March 20, 1970 were paid the money they earned performing higher graded temporary assignments during the period January 1, 1969 through March 19, 1969 were not paid by the City within a reasonable period of time.
4. Those firemen who have not yet been paid sums earned from higher grade temporary assignments during the period January 1, 1969 through March 19, 1969 have not been paid within a reasonable period of time. The City concedes it owes this money.

5. The Union's claim for 6% interest per annum on the foregoing sums is denied as not within the authority of the arbitration forum.

Eric J. Schmertz
Impartial Chairman

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

On this 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.
In the Matter of the Arbitration
between
Uniformed Firefighters Association
Local 94 I.A.F.F., AFL-CIO
and
The City of New York (Fire Department)

The Undersigned as Impartial Chairman under the
Collective Bargaining Agreement between the above named par-
ties and having duly heard the allegations and proofs of the
parties at a hearing on August 25, 1970, renders the follow-
ing AWARD:

1. I am not persuaded that the job title Fire
   Marshal (Uniformed) became a higher rank for
   the incumbent firefighters so assigned or
   acting, within the meaning of the Temporary
   Assignments section of the contract, until Jan-
   uary 31, 1970 when budget lines were establish-
   ed applicable to positions previously and up
   to that date occupied by firefighters. That
   other Fire Marshal positions received an in-
   crease in pay six months earlier when incorp-
   orated into the uniformed force, I find immater-
   ial, because those positions had been occupied
   previously, not by firefighters, but by civilians.
   Accordingly the Union's grievance as set forth in
   a letter dated May 18, 1970 from its attorney,
   Richard L. O'Hara, Esq., is denied.

2. There is no dispute that the job title Fire
   Marshal (Uniformed) is covered by the Collective
   Bargaining Agreement between the parties. The
   title was added to the unit by decision of the
   Board of Certification. (Decision No. 61-70) of
   August 11, 1970. I find that the work week of
   Fire Marshals is 40 hours including the time
   they take for meals. The practice of the Fire
   Department not to pay for overtime until after
   42-1/2 hours of work including meal time, is
   inconsistent with Article III of the Collective
   Bargaining Agreement. The contract requires
that cash overtime be paid for time worked after the 40th hour in any week. Accordingly the grievance set forth in the Request for Arbitration dated July 2, 1970 is granted. As provided by the contract, Fire Marshals shall be paid in cash for time worked in excess of 40 hours in any week, and the grievants involved shall be made whole.

3. Based on my personal recollection of the negotiations and my notes made during that time, I am satisfied that Article VI, Temporary Assignments, Sub-paragraph (a) of the contract means, and was intended to mean, that unless a fireman assigned to the duties of a higher rank is replaced by the Department within the first two hours of that assignment by an employee qualified in the higher rank, he not only is entitled to pay for all time spent in the higher assignment, including the first two hours, but also, based on the phrase "shall continue in the assignment," is entitled to remain in the higher assignment for the full tour. In other words if replaced within the first two hours the Department need not pay him at the higher rate nor continue him in that title. But if not so replaced within two hours the Department's obligation to him is twofold. First to permit him to continue in the assignment for the entire tour and second to pay him for all time so assigned including the first two hours. Any other interpretation would render the phrase "shall continue in the higher rank" meaningless. Accordingly the grievance set forth in a letter dated June 26, 1970 from the Union's attorney, Richard L. O'Hara, Esq. is granted. The three grievants, Pezzullo, Roman and Loehman shall be paid at the higher rank for the balance of the tour which each worked as referred to therein.

DATED: September 21, 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this 21st day of September, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration
between
Uniformed Firefighters Association
Local 84, AFL-CIO
and
City of New York (Fire Department)

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

1. The Union agrees that the Department has the right to transfer men "for the good of the Department."

2. Was the transfer of Fireman Green an abuse of the exercise of that right?

3. This proceeding is without precedent to any future disputes between the parties.

A preliminary procedural conference was held on December 11, 1969. Thereafter oral hearings were held on December 23, 1969, January 13, January 23, February 19, April 10, May 15 and June 3, 1970 at which time Fireman Green, hereinafter referred to as the "grievant," and representatives of the Union, the Fire Department, hereinafter referred to as the "Department," and the New York City Office of Labor Relations, hereinafter referred to as the "City" appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The surprising part of this case is the emphasis by the parties on the concept of "misconduct" rather than what is explicitly referred to in the issue, namely "for the good of the Department." A significant part of the record before me
suggests that the City believes it acted correctly in transferring Green because of certain alleged misconducts on his part; and that the Union objects to the transfer not only because charges of misconduct against the grievant are unfounded, but even if proved, Departmental disciplinary charges rather than an involuntary transfer was the Department's proper course of action. Scant attention was given by either side to the possibility that bona fide grounds for an involuntary transfer might exist wholly apart from any disciplinary reason. Yet in my judgment this is a major consideration in this case, reinforced by the wording of the stipulated issue.

Frankly I see no reason why the concept of "for the good of the Department" is limited to whether or not the affected employee has committed acts of misconduct for which disciplinary action would be proper. Instead I view that phrase to be of such scope as to include circumstances which have nothing to do with misconduct, but which nonetheless would justify an employee's transfer irrespective of fault, or even where fault is not involved.

As I see it, the stipulated issue means that the Department has the right to transfer a fireman from one company to another "for the good of the Department" when the Department has reasonable grounds to believe the transfer is necessary to either effectuate the fundamental structure, policy or purpose of the Department or to cure conditions markedly inconsistent with that structure, policy or purpose.

If the grievant was transferred as a disciplinary penalty for alleged misconduct, as charged by the Union, I would not
hesitate to reverse the transfer. I would not need to decide whether an involuntary transfer can be used as a disciplinary penalty because in the instant case I would not get to that question. For the City has simply not met the threshold requirement of proving the grievant's culpability of the offenses charged. Though the City denies that this is a disciplinary case, many of the reasons it advanced for the grievant's transfer are obviously disciplinary in nature. I find that none have been proved to the extent alleged or to the standard required in disciplinary matters.

The City charges the grievant with chronic absenteeism and lateness. Yet only a few specific instances could be pointed to. The rest were merely general recollections (without dates or documentation) of Departmental representatives. If the grievant compiled an unsatisfactory record of attendance and lateness the Department failed to verify it both in its own records and in this proceeding.

The City suggests that the grievant had something to do with the charges of insubordination filed against Firemen Butler and Joos. Yet neither in the record of the Departmental trial of those two employees nor in this arbitration, is there any probative evidence implicating the grievant's in the events relating to those charged, let alone any evidence of the grievant's responsibility for those events. Departmental witnesses testified that Ladder 40 had a reputation as a "drinking Company" and was subject to more than a normal amount of complaints by the public of "alleged thefts during the fighting of fires."
But there is no evidence in this record to sustain either charge against the Company in general, and no evidence of the grievant's individual culpability on either count. Nor has the Department proved to my satisfaction that the events of the night of the assassination of Martin Luther King warranted disciplinary action beyond the remedial steps taken shortly thereafter. Apparently under the riotous conditions of that night, when firemen were assaulted by bricks and other debris while fighting scores of fires throughout the night, the grievant questioned whether an officer in charge was doing enough to protect firemen against injury from assault. If this was a challenge to the officer's authority it could and should have been the subject of disciplinary action immediately after or within a short time following the incident. Instead the grievant and the officer involved adjusted their differences in a direct and personal meeting and the grievant apologized. That settled the matter to the satisfaction of those concerned. For the Department to raise it over a year later as one of the reasons why the grievant should be transferred is not only contrary to the well settled rule that there must be a close proximity of time between disciplinary action and the misconduct for which discipline is meted out, but of questionable substantive value because the highly unique problems of that night which had long since been resolved.

For all of the foregoing reasons I do not find that the City has established "just cause" within the traditional meaning and standard of that phrase, to justify the imposition of a disciplinary penalty on the grievant.
But despite this myopia of the parties (the preoccupation with misconduct), I am persuaded that there is more to this case than whether the grievant was or should have been disciplined. Running through the entire record is a highly relevant factor which justifies the grievant's involuntary transfer "for the good of the Department," though it has no connection with the alleged acts of misconduct. Rather it relates to a condition incongruous with the fundamental structure, policy and purpose of the Department.

The fire Department is structured along military or quasi-military lines. Its purpose and policy is to fight fires, effectively, efficiently and as safely as possible. Towards this end the uniformed fire service works under rigidly structured and highly disciplined procedures. The cornerstone of company discipline and adherence to prescribed firefighting techniques is the quasi-military relationship between the officers of the Department and the firemen. That superior-subordinate relationship is unequivocal and uncompromising. The officers must be men of competence, decisiveness and leadership. They give orders which the firemen follow. They must command the respect of the men under them so that orders are carried out unhesitatingly under conditions of danger to life and property unequaled in any other employment relationship. Any significant deterioration of that relationship either in fact or in practice, would be manifestly inconsistent with the way the Fire Department is designed to operate and could jeopardize the ability to fight fires and protect lives and property. If so one could not quarrel with a decision of the
Department to take corrective action to eliminate the inconsistency and to restore the traditional superior-subordinate relationship. Provided the corrective action was reasonably related to the problem, and reasonable grounds existed in favor of taking such action as a corrective move, an Arbitrator should not substitute his judgment for that of the Department as to its actual need or effectiveness.

I find that this latter circumstance - a deterioration in if not total disarray of the requisite officer-firemen relationship was present for some time at Ladder 40. In the Department's own words, and by its own admission, certain officers assigned to that company were "weak and indecisive" and unable to command in a manner expected by the Department. At the same time the grievant, acknowledged as a courageous, aggressive and even flamboyant fireman, was also recognized as an "informal leader." An "informal leader" is one to whom the men look for guidance, training and conduct. His influence on how the men carry out their duties both in the fire house and during runs is considerable. And if the supervising officer is less a leader by comparison, the men will look to the "informal leader" for official direction rather than to the officer in charge. I am persuaded that the grievant, because of the force of his personality and abilities, assumed this role and more. Whether by design or unwittingly, he not only led many of the men but began to usurp the role and authority traditionally and exclusively accorded the officer in charge.

Consequently (and again it is immaterial whether inten-
tional or unintentional) the role of the officer in charge was
deprecated, if not ignored. Instead there developed at Ladder
40 a de facto organizational structure markedly inconsistent
with the orthodox officer-fireman relationship upon which the
balance of the Department so heavily relies.

It does not matter who is to blame. But clearly it warrant-
ed corrective action, no matter where the responsibility lay.
But if blame is to be fixed, it must be shared. I doubt if
the grievant could have achieved his special leadership and
influential position had the Department been able to assign
better officers to that Company. Indeed the grievant and
those influenced by him may not have been interested in estab-
lishing themselves as an independent force had the officer
leadership been stronger. So the inability or failure of the
Department to assign stronger officers to Ladder 40 may have
been as much the cause of the "turn about" officer-firemen re-
lationship as was the aggressiveness, independence and influ-
ence of the grievant.

But blame or responsibility for the condition is immater-
ial because the overriding consideration is "for the good of
the Department." As there can be no serious quarrel with the
Department's judgment that a well defined and unequivocal
superior-subordinate relationship must be maintained between
officers and firemen, there can be no serious dispute over
the right of the Department to take reasonable steps to
correct any contrary condition regardless of who is to blame
for that condition. And it follows that corrective action may
be taken even at the expense of the personal convenience of
any of the individuals involved, whether it be the officer, an affected fireman, or as in this case the grievant.

I do not find the Department's decision to transfer the grievant (along with certain other firemen) as a means of attempting to solve the problem, to be unreasonable or unfair. The Department tried to handle the problem by assigning several different officers to command that Company. I cannot fault its conclusion that that approach failed (though there is some indication that the officer last assigned, at the time of the arbitration hearing, possessed the qualities necessary to achieve the desired results). So, the next logical step was what in fact the Department did - to transfer the grievant elsewhere, where he could fill his role as a dedicated and highly skilled fireman, but where he could not encroach either informally or otherwise, on the authority of the officer in command.

Accordingly, this reason alone is sufficient to find that the Department's transfer of the grievant was consistent with its right to transfer men "for the good of the Department." But because I have found that there was no disciplinary basis for the transfer and that the City failed to prove the alleged misconducts referred to in this proceeding, I direct that any reference in the grievant's personnel record that the transfer was for disciplinary reasons or for misconduct, shall be expunged therefrom.

Eric J. Schmertz
Impartial Chairman
In the Matter of the Arbitration between
Uniformed Firefighters Association
Local 84, AFL-CIO
and
City of New York (Fire Department)

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

The transfer of Fireman Green was not an abuse of the exercise of the Department's right to transfer men "for the good of the Department." It was a reasonable attempt by the Department to assert the conventional officer-fireman relationship at Ladder 40.

The City has not proved a disciplinary case against the grievant. Therefore any notation in his personnel file that the transfer was for disciplinary reasons or as a penalty for misconduct shall be expunged therefrom.

Eric J. Schmertz
Impartial Chairman

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

On this 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.
In the Matter of the Arbitration between

Uniformed Firefighters Association Local 94, AFL-CIO

and

City of New York (Fire Department)

Opinion

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

1. The Union agrees that the Department has the right to transfer men "for the good of the Department."

2. Was the transfer of Fireman Green an abuse of the exercise of that right?

3. This proceeding is without precedent to any future disputes between the parties.

A preliminary procedural conference was held on December 11, 1969. Thereafter oral hearings were held on December 23, 1969, January 13, January 23, February 19, April 10, May 15 and June 3, 1970 at which time Fireman Green, hereinafter referred to as the "grievant," and representatives of the Union, the Fire Department, hereinafter referred to as the "Department," and the New York City Office of Labor Relations, hereinafter referred to as the "City" appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

As I see it, the stipulated issue means that the Department has the right to transfer a fireman from one company to another "for the good of the Department" when the Department has reasonable grounds to believe the transfer is necessary to either
effectuate the fundamental structure, policy or purpose of the Department or to cure conditions markedly inconsistent with that structure, policy or purpose.

If the grievant was transferred as a disciplinary penalty for alleged misconduct, as charged by the Union, I would not hesitate to reverse the transfer. I would not need to decide whether an involuntary transfer can be used as a disciplinary penalty because in the instant case I would not get to that question. For the City has simply not met the threshold requirement of proving the grievant's culpability of the offenses charged. Though the City denies that this is a disciplinary case, many of the reasons it advanced for the grievant's transfer are obviously disciplinary in nature. I find that none have been proved to the extent alleged or to the standard required in disciplinary matters.

The City charges the grievant with chronic absenteeism and lateness. Yet only a few specific instances could be pointed to. The rest were merely general recollections (without dates or documentation) of Departmental representatives. If the grievant compiled an unsatisfactory record of attendance and lateness the Department failed to verify it both in its own records and in this proceeding.

The City suggests that the grievant had something to do with the charges of insubordination filed against Firemen Butler and Joos. Yet neither in the record of the Departmental trial of those two employees nor in this arbitration, is there any probative evidence implicating the grievant in the events relating to
those charges, let alone any evidence of the grievant's responsibility for those events. Departmental witnesses testified that Ladder 40 had a reputation as a "drinking Company" and was subject to more than a normal amount of complaints by the public of "alleged thefts during the fighting of fires." But there is no evidence in this record to sustain either charge against the Company in general, and no evidence of the grievant's individual culpability on either count. Nor has the Department proved to my satisfaction that the events of the night of the assassination of Martin Luther King warranted disciplinary action beyond the remedial steps taken shortly thereafter. Apparently under the riotous conditions of that night, when firemen were assaulted by bricks and other debris while fighting scores of fires throughout the night, the grievant questioned whether an officer in charge was doing enough to protect firemen against injury from assault. If this was a challenge to the officer's authority it could and should have been the subject of disciplinary action immediately after or within a short time following the incident. Instead the grievant and the officer involved adjusted their differences in a direct and personal meeting and the grievant apologized. That settled the matter to the satisfaction of those concerned. For the Department to raise it over a year later as one of the reasons why the grievant should be transferred is not only contrary to the well-settled rule that there must be a close proximity of time between disciplinary action and the misconduct for which discipline is meted out, but of questionable substantive value because the highly unique problems of that night had long since been resolved.
For all of the foregoing reasons I do not find that the City has established "just cause" within the traditional meaning and standard of that phrase, to justify the imposition of a disciplinary penalty on the grievant.

However, the grievant's testimony as to two occasions when it was indicated he was to be transferred indicates clearly:

(1) He acknowledged the Department's right to transfer him "for the good of the service".

(2) He was on two other occasions being transferred for this reason.

(3) He was not in fact transferred because he personally appealed to the Chief not to exercise the authority to transfer him that the Chief admittedly had.

Therefore, the grievant was aware of the reason and authority for his transfer and admits being subject to it.

Accordingly, this reason alone is sufficient to find that the Department's transfer of the grievant was consistent with its right to transfer men "for the good of the Department." But because I have found that there was no disciplinary basis for the transfer and that the City failed to prove the alleged misconducts referred to in this proceeding, I direct that any reference in the grievant's personnel record that the transfer was for disciplinary reasons or for misconduct, shall be expunged therefrom.

Eric J. Schmertz
Impartial Chairman
In the Matter of the Arbitration between Telephone Traffic Union Upstate New York and New York Telephone Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated December 19, 1966, as amended June 10, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Mrs. P. A. Mayers was with proper reason and is therefore upheld.

Eric J. Schmertz
Arbitrator

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

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. A 69-5
In the Matter of the Arbitration between
Telephone Traffic Union Upstate
New York

and

New York Telephone Company

In accordance with Article IX of the Collective Bargaining Agreement dated December 19, 1966, as amended June 10, 1968, between New York Telephone Company, hereinafter referred to as the "Company," and Telephone Traffic Union Upstate New York, hereinafter referred to as the "Union, the Undersigned was designated as the Arbitrator to hear and decide the following issue:

Whether or not the discharge of Mrs. P. A. Mayers on August 28, 1968 was with proper reason.

A hearing was held on August 6, 1969 in Buffalo, New York at which time Mrs. Mayers, 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. Post hearing briefs were submitted and the parties agreed to an extension of the due date for the rendition of the Award until on or before January 31, 1970.

The grievant was discharged because of a record of chronic and excessive absenteeism. The magnitude of that record over 22 years of employment between 1946 and 1968 is not in
dispute. Out of a total of 5230 assigned working days during that period the grievant was absent 917 days, which constitutes a 17.4 percent rate of absenteeism.

Similarly, until after July 6, 1968, the reasons for these absences are undisputed. They stemmed from the grievant's medical history of multitudinous afflictions. That she has been plagued by more than her share of ill health is manifest. At 10 years of age, because of an accident, she lost the vision of one eye; she had surgery performed on her spine eighteen months after the beginning of her employment; approximately a year later, in 1949, surgery was performed on her eye; on a number of occasions she was hospitalized because of dehydration requiring intravenous injections; in 1953 was again hospitalized for surgery; and then again hospitalized for removal of a fibroid tumor; in 1959 her appendix was removed; in 1963 she was again hospitalized for a hysterectomy; and in 1967 surgery was again performed because of blood clots in the veins of a leg.

In addition, setting aside those subsequent to July 6, 1968, she was absent many times for a variety of other medical reasons, the explanations for which are not disputed by the Company.

On July 6, 1968 the grievant was in an automobile accident. The Union contends that her absences from then to the date of her discharge were due to injuries or afflictions attributable to that accident. The Company does not accept that explanation, but in any event asserts that the grievant's overall absentee
record has been and continues to be so chronically excessive, despite counselling, warning, and extended efforts by the Company to help her rehabilitate herself, that the Company need no longer continue her in its employ.

The Union's case is based primarily on the theory of condonation. It contends that because the Company tolerated the grievant's record of absenteeism for so long a period of years, and because that record is no worse now than previously, the Company waived its right of discharge. And specifically, because when it gave the grievant a "final warning" it expressly exempted subsequent bonafide absences beyond her control, the Company lost its right to use as the trigger for her discharge, the absences subsequent to July 6 which were due to injuries from the automobile accident.

If there is one rule that is well settled in industrial relations and affirmed by a long line of arbitration decisions, it is that an employee with an excessive absentee record is subject to discharge even if his absences are due to conditions and circumstances beyond his control, such as ill health or injuries. This rule is based on the sound proposition that an employer is entitled to regular and punctual attendance by his employees in order to properly plan and conduct his business. Of course, if an employer has accepted, condoned or acquiesced in a less than satisfactory attendance record, or has permitted or agreed to exceptions to that general rule, it may have waived its right to later rely upon that rule in taking disciplinary action.
So as I see it, the question before me narrows to whether the Company lost its right to discharge the grievant on the basis of her generally excessive absentee record because it had accepted or condoned that record for so many years; and more specifically whether, if it granted her immunity from absences due to an event such as an automobile accident, and if her absences after July 6, 1968 were due to such an accident, it waived any reliance on her post July 6th record.

Based on the evidence before me I am not persuaded that the Company, either expressly, by conduct or by acquiescence lost its right to terminate the grievant when it finally concluded that her unsatisfactory record of attendance would not improve.

There is no doubt that the Company followed its "absence control system," including the imposition of warnings both verbal and written. The Union concedes that the grievant had her fair share of warnings; indeed several final warnings. Nor is there any contention by the Union that the Company's "absence control system" was applied to the grievant in an uneven or discriminatory manner. That she was accorded the benefit of counselling by representatives of the Company, and additional time to rehabilitate her attendance record, do not to my mind, nullify the warning system. Had the Company only extended counselling and forehearance - without warnings, I would readily conclude that it accepted her attendance record and lost the right to discharge her summarily. But coupled with these humane approaches, undertaken by the Company I am
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sure in consideration of her extraordinarily unfortunate medical problems, the Company also made it unmistakably clear, through successive warnings, that it could neither accept nor tolerate the grievant's poor attendance. Obviously the Company hoped to improve the grievant's attendance record or at least give her every opportunity to do so.

But it also protected its right to abandon that effort and to terminate her employment, if it failed. So I do not find that the Company's magnanimity, designed to keep the grievant at work as long as possible in the hope that her attendance record would somehow improve, vitiated its right to discharge her when that hope proved unrealistic.

But though this prior extensive record of absenteeism may have been grounds for discharge prior to July 6, 1968, the Company took no such action. A "final warning" was as far as the Company went. So if the grievant had not been absent thereafter, following July 6, 1968, she would not have been discharged. And hence if those subsequent absences were of the type which the Company had previously assured her would not count against her, her discharge cannot be upheld.

It is clear that the Company stated that the last final warning could be "tempered" if subsequent absences were due to events wholly beyond the grievant's control such as "a brick falling on her head." And that, as a matter of intent an automobile accident with attendant injuries could be included within that scope.

The grievant was involved in an automobile accident on
July 6, 1968. Thereafter she was absent from work on July 8, 9, 10 and 11 and August 23 and 26, 1968. As I see it if those absences were in fact due to the automobile accident, so as to negate their consideration as a basis for the grievant's discharge, it became the grievant's responsibility to establish that fact. She was on final warning. She was told that she would be discharged if her attendance record did not improve. The only exception was "bonafide absences." Under those circumstances, with her continued employment properly in jeopardy, it became her duty and burden to establish the bonafides of any subsequent absences. And while there is no doubt that she was in some kind of automobile accident on July 6, 1968, neither she nor the Union has established to my satisfaction that her subsequent absences were due to that event or that because of it she could not come to work. The ailments complained of were not new. They related to a leg ailment, a sciatica condition and phlebitis, all which she suffered from before the automobile accident. She was not hospitalized following the accident. On at least one day when she was out, she drove her standard shift Volkswagen. The evidence on when and how often she saw her doctor is equivocal and inconclusive. For significant periods of time on at least two of those days she was not at home nor was she seeing her doctor. And she was able to go away on vacation, and apparently engage in swimming.

This is not to say that none of the absences subsequent to July 6, 1968 were directly attributable to the automobile accident; but rather the evidence does not convince me that but for
that accident she would have been at work on those days. And because I find that it was her responsibility to clearly establish a direct causal relationship between the accident and those absences, and because she has failed to do so, I cannot fault the Company’s conclusion that her absences subsequent to July 6, 1968 were nothing more than a continuation, for the same unexcused reasons, of her previous absentee record, despite the final warning.

Accordingly her absences following July 6, 1968 cannot be separated from her prior record, and do not enjoy immunity under the Company’s stated exception. The grievant’s discharge is therefore upheld.

As the parties well remember, the Arbitrator participated in discussions during the course of the hearing in an effort to effectuate a settlement of this dispute, primarily because of the grievant’s many years of service and her nearness to a retirement pension. My Award in this case does not preclude the parties from continuing those discussions if both sides wish to do so. There may still be some equitable basis to accord the grievant either an early retirement or establish some formula under which she could participate in the retirement program. The Company has shown the grievant a good deal of sympathy in the past because of her medical problems, and my Award, though binding unless changed by mutual agreement of the parties, need not bar further compassion.

I am mindful that she received a substantial amount of severance pay and perhaps that could be an ingredient in an
overall retirement arrangement. But all this is for the mutual agreement of the parties. As the Arbitrator my authority is limited to deciding whether there was cause for discharge and I have decided that there was.

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

International Brotherhood of Electrical Workers Local 1992

and

Okonite Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 25, 1966 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

I find the Award of Arbitrator Thomas A. Knowlton of June 28, 1962 to be binding on the parties and despositive of the instant issue. Therefore the Company is not required to pay an incentive employee his average hourly earnings under Paragraph (g) Section C of Schedule B if he is transferred by the Company and not replaced on the incentive job. The grievances of Messrs. Boland, Hall, Sikora and Eckenrode are denied.

Eric J. Schmertz
Arbitrator

DATED: June 3, 1970
STATE OF New York  } ss.:
COUNTY OF New York  )

On this 3 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 1004 69
In accordance with Article XVIII of the Collective Bargaining Agreement dated July 25, 1966 between the Okonite Company, hereinafter referred to as the "Company," and International Brotherhood of Electrical Workers Local 1992, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Is the Company required to pay an incentive employee his average hourly earnings under Paragraph (g) Section C of Schedule B, if he is transferred by the Company and not replaced on the incentive job?

It is stipulated that if the above question is answered in the Union's favor, the Company will pay the claims of grievants Boland, Hall, Sikora and Eckenrode.

A hearing was held in New Brunswick, New Jersey on April 2, 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 provision for a tripartite Board of Arbitration as set forth in Article XVIII Section 3 Step 5 of the contract, as well as the Arbitrator's oath.
I find that by contract and conduct the parties affirmed and are thereby bound by the Award of Arbitrator Thomas A. Knowlton of June 28, 1962.

Certain arbitration Awards between the same parties are despositive not only of the particular grievance submitted, but, especially where a contract interpretation is involved, become binding parts of the collective bargaining relationship. This is particularly so where the contract clause interpreted remains unchanged through subsequent contract negotiations, and where the practice regarding the subsequent application of that contract clause remains consistent with that arbitration Award. In short, it thereby achieves the status of a provision of the contract and its elimination or change is for negotiations, not arbitration.

I am satisfied that the instant case involves the foregoing situation. The contract section in dispute was interpreted and applied by Mr. Knowlton in his Award of June 28, 1962 in a case materially the same as the grievance before me. What Mr. Knowlton said is fully familiar to the parties and need not be recited here, either in whole or in part.

What is significant is that subsequent to Mr. Knowlton's decision, the Union which now objects to it on both procedural and substantive grounds did not seek to upset it in court, and the contract section (the same as presently in dispute) was not changed but remained the same for six years through three contract negotiations (and one additional contract subsequent to this grievance). That each side made certain attempts dur-
ing some or all of those negotiations leading to the contracts of 1962, 1964 and 1966 to change this as well as other incentive sections of the contract is immaterial to the determination of the issue before me because neither achieved any change in the clause at issue. Rather, that clause has remained precisely as it was since last interpreted in 1962 by Mr. Knowlton. And I find nothing, either by subsequent arbitration decision, agreement between the parties, or practice which would vary that clause from the meaning given it by Mr. Knowlton.

In other words, where the very contract provision interpreted by Mr. Knowlton in June of 1962 remained unchanged for such an extended period of time, there is an inescapable presumption that the parties accepted or affirmed that interpretation unless by practice or otherwise they departed from it. But there is no evidence in the record that during the intervening years and through the three subsequent contracts, the Company varied its practice of paying base rate to an incentive worker who is transferred from his incentive job to a base rate job and was not replaced on his incentive job by another employee. The Award and Opinion of Arbitrator Irvine L. H. Kerrison dated May 6, 1968 in no way disturbs what I have concluded. The case before Mr. Kerrison was for compensation during the period of a "mechanical breakdown," when the equipment of the incentive job was shut down pending repairs or replacement. The issue before Mr. Kerrison involved the interpretation of Paragraph (c) of Schedule B and not, as in the instant case, Paragraph (g). In his case he interpreted and applied
the particular contract section which requires the payment of average earnings in the case of a mechanical breakdown. And I am satisfied that his Award is and continues to be the binding interpretation of Paragraph (c) of Schedule B. But it dealt with different facts and a different contract section covering those facts. Limited as it is to Paragraph (c) it cannot serve as an interpretation of a different section of Schedule B, namely that of Paragraph (g) especially when the latter has been the subject of an express interpretation by the Knowlton Award of June 28, 1962 on facts within its purview, and which substantively are virtually identical to those presented herein.

This is not to say that I would or would not have agreed to Mr. Knowlton's decision had the matter been presented to me in the first instance. I make no judgment on that one way or the other. Rather I find that because the parties made no changes whatsoever in the disputed contract over many years and through several subsequent contracts, and engaged in no practice different from Mr. Knowlton's interpretation, they accepted or affirmed his Award as constituting the meaning and application of Paragraph (g) Section C of Schedule B of the contract. Consequently his Award became as much a binding part of the agreement as the provision it interpreted. As such it must be followed not only by the parties, but in my judgment by this subsequent Arbitrator as well.

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

International Chemical Workers Union, Local 692

and

Olin Mathieson Chemical Corporation Energy Systems Division
Indiana Army Ammunition Plant

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated October 26, 1968 through September 14, 1970 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The penalty of discharge imposed on H. Barrett is reduced to a suspension of five working days. He is entitled to reinstatement based on his seniority, with that seniority intact. He shall be paid back pay only for a period of four working weeks subsequent to the five day suspension, at his regular rate of pay.

Eric J. Schmertz
Arbitrator

DATED: June 1970

STATE OF New York
COUNTY OF New York

On this 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. 70A/349
In the Matter of the Arbitration between

International Chemical Workers Union, Local 692

and

Olin Mathieson Chemical Corporation
Energy Systems Division
Indiana Army Ammunition Plant

In accordance with Article VIII Part C of the Collective Bargaining Agreement dated October 26, 1968 through September 14, 1970 between Olin Mathieson Chemical Corporation, Energy Systems Division, Indiana Army Ammunition Plant, hereinafter referred to as the "Company," and International Chemical Workers Union, Local 692, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was the discharge of H. Barrett on a fair and equitable basis and for good and sufficient reason? If not what shall be the remedy?

A hearing was held at the Company plant in Charlestown, Indiana on May 14, 1970 at which time Mr. Barrett, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The grievant was discharged for "loafing or intentional sleeping" in violation of General Plant Rule I-3.

To come right to the point, I find no reason in the record why Assistant Foreman Wesley and Guard C. A. McClure would
bear false witness against the grievant. Accordingly I am satisfied that the grievant was not authorized to work inside of the "sugar shack;" and that shortly after 2 A.M. on February 8 he was found asleep during his regular working hours, in the sugar shack on or amongst a stack of tote boxes. With that conclusion I am per force persuaded that the grievant did not fall asleep inadvertently, but rather went into the shack either for that purpose or, if he entered the shack for warmth and for a sandwich, thereafter fell asleep wilfully.

However, I will not uphold the penalty of discharge for three reasons: 1. I consider it too severe in this case; 2. I find that the Company, on its own initiative, revised and liberalized the penalty for that offense, subsequent to the effective date of the General Plant Rules; 3. The Company through a supervisor with apparent if not actual authority first imposed a five day suspension on the grievant.

The General Plant Rules were effective June 1, 1967 and undisputedly provided for a penalty of "immediate discharge" for "loafing or intentional sleeping." Yet almost one year later, as of May 29, 1968 an "Employee Training Course" prepared and approved by the Company Industrial Relations Department, and which by Company's own admission, was administered to bargaining unit members for instruction purposes, included the following question and answer:

15. An employee discovered by responsible personnel intentionally sleeping (i.e. a prepared resting place) or loafing will be subject to the following disciplinary action.
Answer: (A) Suspension
The employee will be sent home until it has been decided what disciplinary action is to be taken.

Clearly the foregoing question and answer represent a material revision of General Plant Rule I-3. It provides for flexibility of discipline. It contemplates a lesser penalty than discharge - namely that of suspension. Obviously it means that the Company may impose a suspension, or a more severe penalty after the employee has been sent home, depending upon the circumstances. So as of May 29, 1968 the penalty of discharge was not the sole, exclusive or automatically mandated penalty.

It seems to me that whether the grievant was entitled to consideration for the lesser penalty of suspension, depended upon the circumstances of the particular offense when it occurred and his past employment record. As to the latter there is no evidence that his prior employment with this Company, from the standpoint of conduct, was any less satisfactory than other employees similarly situated. He does not have a prior disciplinary record of a "progressive discipline" nature upon which discharge for the sleeping offense on February 8 could be based. So in that regard, and in my judgment, he would be entitled to the lesser penalty for the first offense, rather than an ultimate penalty applicable to the last in a series of violations of Company Rules.

Also there is no dispute that the grievant was on "light duty" as a result of an injury previously sustained to his hand or fingers. His work assignment was of a casual nature and apparently not essential to the work of others. He was
assigned to general clean-up and to the stacking of tote boxes outside the sugar shack area. This does not excuse his sleeping, but merely points up the fact that his light duty work of that night was not critical to the plant's productivity. In addition the weather was cold, the grievant's work was outside and the only ready area of warmth was the sugar shack. And there is some indication that he may have entered the sugar shack for the purpose of taking an allowable "rest break," but thereafter went to sleep. So for these reasons as well I am constrained to hold that the penalty of discharge was entirely too severe.

Within my authority to fashion a remedy, I shall impose a suspension of five working days simply because that was what Supervisor Connors first decided the penalty should be before higher authority increased it to discharge. Connors had authority to discipline, and having so acted I see no reason why that should not be deemed the appropriate measure of penalty, to which the Company is bound.

Accordingly, the discharge is expunged from the grievant's employment record and replaced by a five day disciplinary suspension. The grievant is entitled to reinstatement in accordance with his seniority.

In directing the grievant's reinstatement on the basis of his seniority and with that seniority intact, I shall not award him back pay for the full period of time subsequent to the five day suspension, but rather shall limit his back pay entitlement to a period of four working weeks thereafter. I do so because I see no reason why, following five weeks after
his discharge, he could or should not have mitigated the damages by finding other employment or obtaining Unemployment Insurance Compensation. Within five weeks either or both of these mitigating factors should have been achieved or at least diligently attempted. I am not satisfied that the grievant made a good faith effort to find another job. He admits not looking for one for the first month. That he did not at all file for Unemployment Insurance Compensation is conceded. Moreover I find that at the hearing he was evasive and less than candid about Unemployment Compensation. He first stated that he did not know what it was and was unfamiliar with its benefits. But later he disclosed that he had drawn Unemployment benefits at other times during his working career and indeed knew that there was a longer waiting period in the case of discharges. So I see no excuse for his failure to seek that benefit. And his lack of forthrightness on that matter tends to taint his testimony about his efforts to obtain other employment.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
Local Union 1281 International
Brotherhood of Electrical Workers
AFL-CIO
and
The Outlet Company

In accordance with Article II of the Collective Bargaining Agreement dated May 24, 1966 between The Outlet Company, hereinafter referred to as the "Company," and Local Union 1281, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Chairman of a tri-partite Board of Arbitration to hear and decide the following stipulated issue:

Are the employees entitled to a cost of living increase under the contract as of May 24, 1969? If so, in what amount under the contract?

A hearing was held in Providence, Rhode Island on February 9, 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. Messrs. Sherman Strickhouser and Henry Ferri served respectively as the Company and Union designees on the Board of Arbitration. The parties waived both the oath of the Arbitrators and a meeting of the Board. It was agreed that the Undersigned, as Chairman, would render an Award, with or from which the Union and Company designees would concur or dissent.

The issue in dispute involves the application and inter-
pretation of the following provision of the Collective Bargaining Agreement:

If the U.S. Department of Labor Cost of Living Index for the month of March, 1969 shows a percentage increase over the March, 1966 cost of living figures, and if such increase exceeds the percentage increase in the gross hourly rates of pay of technicians as between March 1, 1966 and March 1, 1969, then the wages set forth above will be increased by such excess rates; such increases if any, shall become effective on May 24, 1969. The above rates shall be recomputed as of March 1, 1970 and a similar adjustment will be made, effective May 24, 1970, if the percentage increase in the cost of living figures as between March 1, 1966 and March 1, 1970 exceeds the percentage increase in the gross hourly rates of pay of technicians as between March 1, 1966 and March 1, 1970.

Without explanation (for reasons indicated below) the Undersigned as Chairman, concludes that neither during the oral contract negotiations nor when the terms of the agreement were ultimately reduced to writing and executed, was there a "meeting of the minds" between the parties on the meaning or conditions for effectiveness of the foregoing contract clause.

Yet it is obvious that the parties intended to include a "cost of living" provision in the contract and it is equally clear that the contract would be materially incomplete without such provision within it. Therefore the classic contract rule of "rescission" where a "meeting of the minds" has not been achieved is manifestly inappropriate.

Also, though I will do so if necessary, I think it at least premature, if not substantively unwise, for an Arbitrator to apply a contract term which suffers from that basic
defect. Instead I think it more advisable and shall direct as an interim Award, that the parties make an effort to negotiate a mutually agreed upon cost of living clause. And I direct that they do so within the 30 day period following receipt of this interim Award.

This Board of Arbitrators shall retain jurisdiction. On the application of either or both parties after the expiration of that 30 day period it shall proceed to render a final Award on how the foregoing present contract language shall be applied if the parties have been unable to negotiate a mutually agreed upon clause themselves.

I choose not to explain my conclusion for two reasons. First, I wish neither to risk prejudicing the position of either side in the negotiations I have directed nor inhibit those negotiations. And second, if the matter is referred back to the Board of Arbitrators the decision that I make on how the present contract language is to be applied, will, of course then include a full explanation. In short, I prefer to withhold an explanation until and only if it is needed in formulating a final Award.

Eric J. Schmertz
Chairman

Sherman Strickhouser

Henry Ferri
DATED: April 1970

STATE OF New York ) ss.:  
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.
This is a proceeding by Albert J. Glass, hereinafter referred to as the "grievant", against Pabst Brewing Company, hereinafter referred to as the "Company" and Local 153 IBT, hereinafter referred to as the "Union" in which he seeks an earlier seniority date for purposes of "allocation" (bidding and layoff).

Completion of the entire record before me awaits receipt of a reply brief from counsel for the Company.

But my decision to render this interim ruling for reasons presently explained, would not be altered by receipt of that reply brief.

I have decided not to render an Award at the present time on the question of the grievant's proper seniority date, but will retain jurisdiction for the purpose of making such an Award at such time as the dispute becomes more adversary, i.e. in the event that the grievant's present disputed seniority date becomes prejudicial to him in connection with any layoff or bidding opportunity.
The grievant's purpose in asserting a claim to an earlier seniority date is primarily to safeguard his job security in case of layoff. Yet, at present, no layoff has taken place, nor is one contemplated. And the grievant's presently accorded seniority whether correct or not, appears adequate to protect him from any future layoff until he becomes eligible for retirement. Also, the record discloses that a change in his seniority date, under his theory of seniority credit, may not afford him the protection he seeks. For it may trigger a similar adjustment in the seniority of several other employees similarly situated, resulting in placing the grievant further down rather than higher up on the seniority list of his classification. In short, an Award favorable to him may prove not only unnecessary, but actually damaging to his job security.

Accordingly, without prejudice to the rights and positions of all parties, there shall be no present change in the grievant's current seniority date. But at such time as he faces a layoff or is deprived of or foreclosed from any right of "allocation" under and because of that seniority, he may ask me for a prompt Award on the question of to which seniority date he is entitled.

Eric J. Schmertz
Arbitrator
DATED: May 7, 1970

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

On this 7th 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.
In the Matter of the Arbitration between

Local 702 Pension Fund; Local 702 Welfare Fund

and

Precision Film Laboratories, Inc.

AWARD

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 Funds at a hearing on October 30, 1970; and Precision Film Laboratories, Inc. having failed to appear after due notice, makes the following AWARD:

For the period March 1, 1970 through September 30, 1970 Precision Film Laboratories, Inc. owes the Local 702 Pension Fund the sum of Nineteen Thousand Three Hundred and Six Dollars and eighty-seven cents. ($19,306.87).

For the periods March 1, 1970 through May 30, 1970 and July 1, 1970 through September 30, 1970 Precision Film Laboratories, Inc. owes the Local 702 Welfare Fund the sum of Four Thousand Four Hundred Seventy Dollars and eighty-six cents. ($4470.86).

The foregoing sums are past due. Therefore Precision Film Laboratories, Inc. is directed to pay said sums to said Funds forthwith, with interest.

In accordance with the contract, Precision Film Laboratories Inc., as the "losing party" in this arbitration shall bear the cost of the Arbitrator's fee and expenses. Therefore Precision Film Laboratories, Inc. shall also pay to the Funds the sum of One Hundred Seventy Dollars ($170.00) representing the Arbitrator's fee and expenses previously paid by the Funds.

Eric A. Schmertz
Permanent Arbitrator
DATED: November 2, 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this 2nd 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 execu-
ted the same.

Case #70A-10
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between
System Council International Brotherhood of Electrical Workers

and
Public Service Gas and Electric Company

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

1. Grievances 985, 864 and 908 are denied.

2. Grievance 971 is granted to the following extent:

The work performed by Mr. A. Steele between 8 P.M. and 2 A.M. on March 23-24 1969 shall be treated as overtime, and not part of his Article III Section F shift. The Company's application of Article III Section F; the grievant's new work schedule and premium pay thereunder, should have commenced at 2 A.M. on March 24th. The Company shall adjust Mr. Steele's pay accordingly.


Eric J. Schmertz
Chairman

Dudley C. Allen
Concurring in Number 1 Above
Dissenting from #2 Above

Alfred Giles
Concurring in # 2 Above
Dissenting from #1 Above
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.

DATED: July 1970

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

On this day of July, 1970 before me personally came and appeared Dudley C. Allen 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: July 1970

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

On this day of July, 1970 before me personally came and appeared Alfred Giles 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 0139 70
In the Matter of the Arbitration between
System Council International Brotherhood of Electrical Workers and
Public Service Gas and Electric Company

In accordance with the arbitration provisions of the Collective Bargaining Agreement effective May 1, 1969 between the above named parties, the Undersigned was selected as the Chairman of a tri-partite Board of Arbitration to hear and decide, with the Union and Company designees to said Board, disputes concerning grievances 985, 864, 908 and 971.

Messrs. Dudley C. Allen and Alfred Giles served respectively as the Company and Union arbitrators on said Board.

Hearings were held at the offices of the American Arbitration Association in New York City on June 9 and 10, 1970. The Board met in executive session on June 16, 1970, and the hearings were declared closed as of that latter date.

GRIEVANCE 985

I find the following provision of the jointly negotiated General Requirements of the Job Specifications for Job Classifications Included in Agreement between Public Service Electric and Gas Company, Electric Operating Department and International Brotherhood of Electrical Workers, to be controlling:

In addition to the duties and qualifications for each job classification as set forth in the job specifications each employee must meet the Company's general requirements which include:

3. The willingness to respond to calls outside of regular hours when the need arises (under-scoring added).
I am satisfied that the foregoing means that an employee is expected to accept a reasonable amount of those overtime opportunities offered him when he is the "low man on the overtime list". And that this is in addition to performing overtime assigned to him when others, further up on the list have also declined that particular overtime opportunity.

This is not to say that an employee must voluntarily accept all overtime opportunities, but rather that he is required to take on his fair share, substantially similar in quantity to the amount accepted by other employees similarly situated. For if an employee could decline all or a large percentage of overtime offers, assuming overtime work only when mandatorily assigned, the foregoing General Requirement, mutually agreed to by the Union and Company, would be both unnecessary and meaningless. And the word "willingness", defined in Webster's Dictionary as cheerfully consenting or ready, would be distorted in meaning.

It is undisputed that the grievant, S. Behot, rejected, on the average, 79% of the overtime requests between January and September, 1969, whereas the other Utility Operators turned down overtime offers an average of 34% of the time. It is also undisputed that prior to the period January to September 1969 the grievant was twice warned, first orally and then in writing because of a similar record.

It seems to me that if the foregoing General Requirement is to have any purpose, it must be enforceable. And when efforts at persuasion fail, I know of no way to enforce it except by discipline. When the grievant, who obviously failed to meet or even approach the rate of overtime accepted by his fellow workers, also failed to heed both informal efforts to persuade him to increase his overtime acceptance rate, and the formal warnings, the Company had no choice but to impose more severe discipline.
Accordingly I cannot fault the Company's decision to impose a disciplinary suspension, nor do I find the suspension of three days to be excessive.

GRIEVANCES 864, 908 and 971

These three grievances relate to the application and interpretation of Article III, Section F of the contract which reads:

The regularly scheduled work hours within the basic 5-day workweek of an employee may be changed to carry on maintenance work for two or more shifts per day on frequency changers, rotary condensers, boilers operating at pressures in excess of 500 psi, turbine-generators, and associated equipment in the generating station the outage of which causes a reduction of not less than 10% in the effective capacity of the related turbine-generator unit. When an employee's scheduled work hours are so changed, he shall be paid the applicable overtime rate for all hours worked outside of his former regularly scheduled work hours on the first two regularly scheduled workdays within the basic 5-day workweek on which he works. This provision shall apply only to the first change of schedule during any one outage. (underscoring supplied).

The grievances involve the question of whether the affected employees were properly assigned certain work or properly paid for that work under the pertinent provisions of Article III Section F of the contract.

As I see it a single interpretation of Article III Section F, specifically as to when maintenance work referred to therein may be performed, is dispositive of all three disputes.

I am satisfied that by intent and practice Article III Section F means that if any or a combination of the equipment underscored above, fails or malfunctions, causing at least a 10% reduction or outage in the effective capacity of the related turbine-generator unit, then, any of those pieces of equipment singly or in combination may be worked on by the maintenance employees, until at least 90% power is restored to the related turbine-generator unit, whether or not the equipment worked on was responsible for outage.
I find that the undisputed circumstances which gave rise to grievances 864 and 908 are consistent with this interpretation, but those which produced grievance 971 are not.

There is no dispute that under grievance 864 the disabled expanders #61 and #62 are "associated equipment" to a turbine-generator unit within the meaning of Article III F. The failure of expander 61 created a 25% outage. The failure thereafter of expander 62 increased the outage to 50%. Though expander 61 broke down first, the turbine-generator could not be restored to at least 90% power until the inboard expander (62) was repaired. So that was done first, followed by repair of the outboard expander (61). The failure of expander 61 caused an outage which met the requirements of Article III Section F of the contract and which permitted work in both expanders, under the foregoing interpretation of that contract clause. Moreover, as a practical matter the turbine-generator would not have been restored to proper power unless expander 62 was repaired before expander 61.

Under grievance 908 there is not dispute that both the feed water heater and the boiler feed pump are "associated equipment" of a turbine-generator unit. Under the aforementioned interpretation, when the boiler feed pump broke down, causing substantially more than a 10% outage in the related turbine-generator, the Company had the right to assign maintenance work under Article III Section F on both the boiler feed pump and the feed water heater. That the latter broke down first and was worked on on an overtime basis, I find immaterial. For once the boiler feed pump broke down, causing the requisite outage of more than 10%, all the equipment related to the turbine-generator unit, including the earlier disabled feed water heater (which standing alone did not produce a 10% outage) were eligible for maintenance work under Article III Section F of the contract.
However the circumstances under grievance 971 are materially different. There the grievant, A. Steele, was called in under Article III Section F of the agreement for a 12 hour shift beginning at 8 P.M. However from 8 P.M. to 2 A.M. the next morning he was not assigned the work for which he was called in. Indeed over that 6 hour period he performed no work relating to the application of Article III Section F of the contract. Instead he was assigned other work which the Company deemed more compelling because "he was on the premises" and qualified to do it. At 2 A.M. the following morning he began the Article III F assignment for which he was called in 6 hours earlier. My interpretation of Article III Section F allows the Company to perform maintenance work on any of the enumerated equipment or equipment associated with a turbine-generator suffering from a 10% or greater outage of power. But that does not mean that once an employee is called in under Article III Section F because of an outage on a particular turbine-generator he can be required to perform totally different work, on different equipment not related to that turbine-generator unit, as part of an Article III F work schedule. This is not to say that the Company did not have the right to direct Steele to work on the No. 3 gas turbine from 8 P.M. to 2 A.M. But rather that it should not have been done under Article III Section F inasmuch as Steele was called in under Article III F because of an outage in an entirely different generator-turbine, the No. 1 unit.

Until the Article III F work for which he was called in began at 2 A.M. the following day, his assignment on other work for the 6 previous hours should have been on an overtime basis and not part of his Article III F shift. Therefore his work
schedule under Article III F, together with the running of the applicable overtime rate for the first two regularly scheduled work days should have commenced at 2 A.M. on March 24, 1969 and not at 8 P.M. on March 23. The Company is directed to adjust Mr. Steele's pay accordingly.

Eric J. Schmertz
Chairman
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Office and Professional Employees
International Union, Local 153, AFL-CIO
and
Public Service Electric & Gas Company

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

The three day suspensions of Albert Harrison and Angelo Consiglio are reduced to formal warnings. They shall be paid by the Company for the three days lost.

Eric J. Schmertz
Chairman

John J. Carroll
Concurring

Dudley C. Allen
Dissenting

DATED: December # 1970
STATE OF New York )ss:
COUNTY OF New York)

On this # 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. 1330 0363 70
DATED: December 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this day of December, 1970, before me personally came and appeared John J. Carroll 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: December 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this day of December, 1970, before me personally came and appeared Dudley C. Allen 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 Office and Professional Employees International Union, Local 153, AFL-CIO and Public Service Electric & Gas Company

Opinion of Chairman

In accordance with Article IX of the Collective Bargaining Agreement dated May 1, 1969 between Public Service Electric & Gas Company, hereinafter referred to as the "Company," and Office and Professional Employees International Union, Local 153, AFL-CIO, hereinafter referred to as the "Union," the Under-signed was designated as Chairman of a tripartite Board of Arbitration, to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

Whether or not the three day suspensions of Albert Harrison and Angelo Consiglio were in violation of the terms of the Agreement?

The pertinent contract section is Article II Section A which sets forth the Company's right to "suspend (and) discharge for proper cause."

Hearings were held on July 23 and September 25, 1970 at the offices of the American Arbitration Association at which time Messrs. Harrison and Consiglio, hereinafter referred to as the "grievants," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. Messrs. John J. Carroll and Dudley C. Allen served respectively
as the Union and Company members of the Board of Arbitration.

The Board met in executive session on October 30, 1970.

The Company suspended the grievants for three days because it concluded that:

1. During regular working hours the grievants went off their regular work route in a Company car to engage in personal shopping at a highway department store;

2. Either they did not go to any or all of the work assignments on their route prior to driving to the department store; or if they made those work stops at all, did so in such a perfunctory way as to perform no purposeful work at those locations;

3. The work assignments or work locations referred to in No. 2 above were not the regular or proper responsibilities of the grievants, casting doubt on whether they went there at all, or if so, whether any constructive work was performed.

The Company justifies the three day suspensions on the foregoing grounds together with the fact that the grievants, who work regularly in the field, are unsupervised; and that any lesser penalty would be prospectively ineffective.

This is a disciplinary case with the burden on the Company to prove the elements of its contention by clear and convincing evidence. The evidence in the record meets this test with regard to No. 1 above but not Nos. 2 and 3. There is no evidence - only speculative argument - that the grievants did not go to each of the work assignments and locations prior to their drive to the highway department store. Also, though they admit they spent little time at each location, there is not sufficient evidence to support a conclusion that they performed no work.

That the parties are in disagreement over how long it takes to determine the amount of electric power going into a building;
or to read the symbols of a power pole (or determine the size of that pole); or to determine whether a "guy" could be installed, does not conclusively establish as fact that the grievants did not accomplish these purposes, or at least obtain the requisite information regarding these factors at the work locations involved. Nor can I conclude that the grievants had no authority to visit these work locations. The record indicates some unorthodoxy with regard to at least one location (the premises occupied by one of the grievants' father), but the explanation for that visitation advanced by the grievant is plausible, and supported by other earlier examples of a similar nature. And the other locations were within their jurisdiction.

In short though one might feel a measure of skepticism about the total bonafides of one or more of the work locations visited, there is just not sufficient evidence to conclude that these visitations lacked all legitimacy.

In short, though the burden of establishing the grievants' culpability by clear and convincing evidence is unquestionably established in connection with being off their work route in a Company car during working hours (approximately 15 minutes before the regular lunch break) and engaged in personal shopping, the Company's case regarding the work locations, falls short of the required standard. Therefore the issue narrows to whether or not a three day suspension was proper for the former offense alone. I conclude it was not.

First, I believe the Company imposed the three day suspen-
sions on the basis of all three charges, and that a lesser penalty may have been imposed had only charge No. 1 been involved. Though the grievants should not be totally excused for what they did, in my view the circumstances do not endow it with as much severity as does the Company. Specifically, it appears that the grievants combined their personal shopping with their lunch. They were seen (and they acknowledge) that they were off their work route a few miles, at the department store, approximately 15-20 minutes before the commencement of the regular lunch break at 12 noon. Though they should not have been at that location at all, nor that early, there is no evidence that they consumed more than the allowed 1/2 hour for lunch or thereafter took any other lunch period that day. So a portion of their shopping trip at least fell within the period of time they took for lunch, and in that respect no regular working time was lost to the Company.

Moreover the record indicates that employees similarly situated took their lunch breaks at times most convenient to them, and this included examples of stops for lunch prior to 12 noon. Though no doubt this is proper only in special circumstances where the nature of a particular work assignment requires an early lunch (or even a later lunch) I am satisfied that a rigid adherence to commencing the lunch break at precisely 12 noon has been honored in the breach, whether or not the employees had a proper reason. Again this is not to excuse the conduct, but rather to point out that it seems to have been a fairly common practice. And that the Company, by its own admission, has
not promulgated a specific rule or directive prohibiting or tightening up what seems to have been an apparent laxity.

Moreover, the grievants have worked for the Company for 11 and 14 years, and have no prior disciplinary records.

For these reasons I think the penalty of a three day suspension was too harsh. I do not accept the Company's contention that because the grievants and other employees similarly situated are unsupervised in their work, a lesser penalty would be ineffective. It seems to me that in view of what the Company should have known as a loose "lunch break" practice, it has the obligation first to promulgate a directive making what otherwise is obvious -- namely that it will not tolerate employees leaving their work routes in Company vehicles during regular working hours or even during lunch breaks, for personal shopping or other unauthorized reasons. Once that policy is made clear, breaches thereof would be subject to severe disciplinary penalties. In other words I see no reason why the well recognized principle of "progressive discipline" should not apply here -- or at least be tried -- even though the affected employees are unsupervised. That principle is generally applicable to all employees, and so far as I know it does not exempt non-supervised employees from its initial step. And until it proves insufficient, it cannot be bypassed.

In short I think that under the particular circumstances of this case, considering the grievants' long service, the highly skilled jobs they occupy, the absence of any prior disciplinary record, and the practice which the Company had not
unequivocally prohibited by rule or directive, a formal warning should have been sufficient. It would have placed the grievants and all other employees similarly situated on notice that the conduct involved in this case was impermissible and would henceforth be dealt with more severely.

Accordingly I find that there was not just cause for the three day suspensions. However there was just cause for formal warnings. This Award shall constitute the latter penalty. The grievants shall be reimbursed for the three days lost.

I am mindful of the provisions of Article IX Section F of the contract. I am satisfied that this decision is in conformity with the intent and purpose of that section.

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

International Union of District 50
United Mine Workers of America
Local 12999

and

Revere Copper and Brass, Inc.
Baltimore Tube Division

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

The four day suspension of Irvin Simpson is reduced to a one day suspension. He shall be paid for three days at his regular rate.

Dated: December 17, 1970
STATE OF New York ) ss.:
COUNTY OF New York)

On this 17th 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.

File No. 70A/6841
In the Matter of the Arbitration between
International Union of District 50
United Mine Workers of America
Local 12999

and

Revere Copper and Brass, Inc.
Baltimore Tube Division

In accordance with Article VII of the Collective Bargaining Agreement dated March 1, 1968 between Revere Copper and Brass, Inc., Baltimore Tube Division, hereinafter referred to as the "Company," and International Union of District 50, United Mine Workers of America, Local 12999, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the suspension of Irvin Simpson for just cause? If not what shall be the remedy?

A hearing was held in Baltimore, Maryland on November 20, 1970 at which time Mr. Simpson, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The grievant, an employee of only three months was suspended for four days beginning June 10, 1969 for "excessive absenteeism."

It is well settled that chronic absenteeism, no matter what the reason and even if beyond the employee's control or
fault, is grounds for disciplinary action in accordance with the principle of "progressive discipline." The grievant's attendance record since his employment in March 1969 to the suspension on June 10, 1969 shows an excessive number of absences. Moreover, he was warned prior to the suspension. However, one essential factor has not been fully established to my satisfaction - and that is the chronic nature of his record. The circumstances, as disclosed by the evidence in this proceeding, suggest the possibility that the grievant's absences were of a temporary, rather than chronic nature, resulting, in substantial part at least, from a physical condition which he may have incurred in the course of his employment in the Company's aluminum mill. There is no doubt that he suffered from a persistent and troublesome rash, and was treated by the Company doctor. He asserts that it was contracted from the material he used or was exposed to in the aluminum mill. I make no determination as to the validity of that assertion, except to conclude it as a possibility, not refuted in this proceeding by the Company.

I am prepared to give the grievant the benefit of the doubt. I deem it possible that many of his absences were due, as he testified, to the disabling nature of the rash. And because that condition was temporary, together with the possibility that it was employment connected, I think it questionable for the Company to have concluded that the grievant's absences were for other unexcused reasons. And premature to conclude that his record would continue at an unsatisfactory level.
after the physical condition was cured. In other words, I accept the possibility that during the grievant's short tenure of three months, he was absent because of a temporary physical problem, possibly attributable to his work environment; and I hold that without further evidence and additional time, he should not be so severely penalized. (Events subsequent to his suspension may have proved otherwise, but those events are immaterial to the instant case because they could not be known to the Company at the time of the suspension, and therefore played no part in the Company's decision to impose the suspension.)

However, I am not prepared to excuse the grievant entirely. In view of the undisputed quantity of his absences and the fact that he had been warned, he had the duty to exercise special care to guard against absences from work, especially absences for reasons other than his physical problem. He failed to meet this duty on June 9, 1969, the day prior to his suspension. He was absent from work that day because he was "out of town," a reason which he gave to the Company. Considering his precarious attendance record, I am persuaded he should have done more to prevent that last absence or at least should have taken steps to seek prior permission to be out that day. There is no evidence that his absence on June 9 was due to any last minute compelling personal reasons. Instead it appears that he took the day off without adequate prior notice to or permission from the Company, unmindful and in disregard to his obligation to improve his attendance record when and where he could.
In short, though I am prepared to give him the benefit of the doubt with regard to the circumstances surrounding many of his absences, I cannot excuse his absence on June 9. Therefore though the penalty imposed was more than appropriate it should not be vitiated entirely.

Accordingly, under my authority to fashion a remedy, I shall reduce the four day suspension to a one day suspension. The Company shall pay the grievant three days pay at his regular rate.

In view of the foregoing I see no need to decide whether the procedural requirements of the contract, with regard to notice by the Company to the Union in disciplinary cases, was strictly complied with by the Company.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
United Optical Workers Union Local 408, IUE, AFL-CIO
and
Sterling Optical Company, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 29, 1970 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company violated the contract by scheduling an overtime day for Mike Dicembre instead of Herbert Bloom in the weeks of July 13, 1970 and August 10, 1970. The Company shall pay Mr. Bloom for two days at the overtime rate of time and one half.

Award

DATED: December 27, 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this 27 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.1330-0884-70
In the Matter of the Arbitration between

United Optical Workers Union
Local 408, IUE, AFL-CIO

and

Sterling Optical Company, Inc.

In accordance with Article VIII of the Collective Bargaining Agreement dated April 29, 1970 between Sterling Optical Company, Inc., hereinafter referred to as the "Company," and United Optical Workers Union Local 408, IUE, 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 contract by scheduling an overtime day for Mike Dicembre instead of Herbert Bloom in the weeks of July 13, 1970 and August 10, 1970? If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on November 24, 1970 at which time Mr. Bloom, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The pertinent contract sections are Article I which enumerates the Company's departments as follows:

(a) Optometrists;
(b) Receptionists; Office Staff, Clerical personnel, Mail Clerks;
(c) Bench;
(d) Quality Control;
(e) Surface;
(f) RX;
(g) Dispensers (Sales and Deliveries);
(h) Maintenance;
(i) Errand Boys and Porters;
(j) Machinists and Machine Maintenance and Re-building (machine maintenance and repair now being done by other personnel to be continued);
(k) Stock Clerks

and Article VI Section (d) which reads:

It is agreed by and between the Parties that when any overtime shall be performed, it shall be granted on a seniority basis in each Department and such personnel must be able and competent to perform the work required during overtime periods; except that the Shop Steward and Committeemen shall have preference for overtime work, provided they have the ability to perform such work.

There is no dispute that the grievant has nine years more seniority than does Mr. Dicembre. The parties are in dispute over whether those two employees are in the same or different departments. The issue turns on the resolution of that question.

It is the Company's contention that the overtime work was performed in the Bench Department; that at that time Dicembre was the only employee in that Department and therefore its most senior employee within the meaning of Article VI(d) of the contract; and hence the only one entitled to the overtime.

The Union asserts that despite the separate listings of the Bench and Dispenser Departments in Article I, those two areas have been merged into a single functioning Department; and that the grievant, who worked on assignments both in Dispensing and Bench, was the senior employee entitled to the overtime opportunity under Article IV(d).

The weight of the evidence supports the Union's claim.
Physically, the various work areas of the plant have been moved to a single floor with Bench and Dispensing contiguous to each other. The record indicates that employees of Bench and Dispensing have been regularly interchanged between both functions and that the grievant has performed and is qualified to perform both categories of work. Moreover this practice of treating both areas on a merged or interchangeable basis is confirmed by the Company's own Time Schedule on which is printed "DISP-BENCH" next to the word DEPARTMENT. The employees who perform both Dispensing and Bench work are listed on the same schedule for that "DEPARTMENT."

Moreover, Union Steward, Amster, testified that in 1970 Mr. Jackson, the Company store manager, advised him that the then Dispensers, Messrs. Dicembre, Bloom and Bronson were being reclassified as "Dispensers/Benchmen," and that the two job classifications were being combined into one. Amster stated the Company did this because as a matter of practice, the employees had been interchanged between both categories of work. Though Mr. Jackson testified at the hearing he did not refute this portion of Amster's testimony. Additionally the Company concedes that the weekly production reports which are used for payroll purposes also combine the employees of Bench and Dispensing in a single document under a joint or merged heading.

In summary I am satisfied that by the notice to the Union and by practice the Company effectively combined the Bench and Dispenser employees into a single Department; that the
affected employees have been used on an interchangeable basis on
both Bench and Dispensing work; that those employees must be
debemed classified as Dispenser-Benchmen; and that the seniorities
of the entire group must be considered in assigning overtime on
either Bench or Dispensing work. On that basis the grievant
was the senior employee and was entitled to the two days of over-
time involved in the stipulated issue.

Accordingly the Company shall pay the grievant for two
days at the contractual overtime rate.

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

Transport Workers Union of Philadelphia

and

Southeastern Pennsylvania Transportation Authority

Award on Arbitrability

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 15, 1969, and having duly heard the proofs and allegations of the Parties, make the following Findings and Award:

Obviously one cannot be sure what the late Mr. Harry Sutcliffe intended in his conversations with the Union's attorney and Union officials subsequent to the discharge of Mrs. Mary Lewis. If Mr. Sutcliffe was alive, his testimony would be accorded considerable weight because he was a man of honesty and integrity.

But considering the record before us we are persuaded that based on past practice in general (where mutual agreement to extend the time limit for or waive the filing of a grievance in writing has not been infrequent); the practice in the instant case (where the Company twice reinstated Mrs. Lewis following the Union's intervention without requiring the filing of a written grievance and after the time limit to file such a grievance had expired); and the conversations between Mr. Sutcliffe and the Union's attorney and Union officials following Mrs. Lewis' final discharge; the Union had reasonable grounds to believe that the Company agreed to permit Mrs. Lewis' grievance to go to arbitration on the merits after completion of the Workmen's Compensation litigation, without the necessity of the Union filing a written grievance within the time limit prescribed by the contract; and that the time limit requirement was therefore waived.
Accordingly a majority of the Undersigned Board of Arbitration renders the following AWARD:

The grievance of Mrs. Mary Lewis seeking a disability pension under Section 705 of the Collective Bargaining Agreement is arbitrable. The American Arbitration Association shall set a date for a hearing on the merits.

DATED: October 9, 1970

Eric J. Schmertz
Chairman

Earl Kidd
Concurring in the Award

Arthur W. Wilkens
Dissenting from the Award

Case No. 14 30 0153 70M
In the Matter of the Arbitration between

District 157 International Association of Machinists and Aerospace workers, AFL-CIO

and

Special Metals Corporation

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named Parties, and dated August 24, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Grievance 56-70: The Company violated the contract when it laid off James Jones on January 22, 1970. He shall be paid for the one day lost.

Grievance 57-70: The three day suspension from January 27 through January 29, 1970 imposed on George Wilson was for just cause and is upheld.

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

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

between

District 157 International Association of Machinists and Aerospace Workers, AFL-CIO

and

Special Metals Corporation

In accordance with Article VII of the Collective Bargaining Agreement dated August 24, 1968 between Special Metals Corporation, hereinafter referred to as the "Company," and District 157 International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issues:

Grievance 56-70: Did the Company violate the contract when it laid off James Jones on January 22, 1970.

Grievance 57-70: Was the three day suspension from January 27 through January 29, 1970 imposed on George Wilson for just cause? If not, what shall be the remedy?

A hearing was held at the Company plant in New Hartford, New York on August 20, 1970 at which time Messrs. Jones and Wilson, hereinafter referred to singly as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. Full opportunity was afforded all concerned to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.
Grievance 56-70

Due to a cut back in the amount of gas to be supplied by a gas utility to the Company, a furnace was shut down on January 22, 1970. The employees who worked on that furnace were laid off. That layoff is not challenged by the Union and therefore its propriety is not before me.

As a consequence of the furnace shut down, the grievant, James Jones, a Refractory Man, whose work serviced that furnace, was also laid off. The grievant's layoff is challenged by the Union because he was not the junior man in the Refractory Department.

The Union contends that the Company effectuated the grievant's layoff under Section 6 paragraphs a through d (covering Temporary Layoffs) of a Supplemental Agreement dated August 24, 1968; that it improperly applied that contract provision beyond its intended scope; that the only right the Company has to make temporary layoffs due to equipment breakdowns is as prescribed therein; and that that right is limited to "employees on the equipment where the breakdown occurs" (in this case the employees on the furnace) and not any other, albeit allied, departments (such as in the instant case, the Refractory Department).

The Company does not claim it relied on Section 6, a through d of the August 24, 1968 Supplemental Agreement in effectuating the grievant's layoff. Instead it relies on the Award of Arbitrator Milton Rubin, dated June 21, 1967. The Company contends that the Rubin decision, which affirmed its
unrestricted right to make temporary layoffs out of seniority or on any other basis, remains in full force and effect except as limited by Section 6 of the Supplemental Agreement of August 24, 1968. And that because Section 6 applies to employees or groups working on the equipment where the break down occurs, the provisions and restrictions thereof are so limited, and do not extend to or impinge on the Company's unrestricted right, as stated in the Rubin Award, to make temporary layoffs in other departments. In other words the Company denies that Section 6, negotiated subsequent to the Rubin Award, superceded that Award; but rather that Section 6 is confined to the department and equipment where the breakdown occurs, representing therefore only a limited restriction on the Company's general right to effectuate temporary layoffs on an unrestricted basis.

Or, in short, with the exception of a department or equipment covered by Section 6, the Company's unchallengeable right to make temporary layoffs remains intact. Hence in the instant case, the Company argues that though Section 6 may be applicable to the layoff of the employees on the furnace, neither it nor any other contract clause controlled or restricted the Company's right to temporarily lay off the grievant from the Refractory Department even though he was not the junior man.

To the surprise and perhaps disappointment of the parties I find I need not determine whether Section 6 was applied; or whether it was applicable or not applicable to the Refractory Department layoff; or whether the Rubin Award was totally superceded or only partially limited by the subsequent negotiation of Section 6 of the August 24, 1968 Supplemental Agreement.
I need not because, in my judgment, the January 22nd layoff in dispute did not meet what I consider to be the essential requisites of a temporary layoff. As I see it, a temporary layoff is one which when made is known to be of short duration. That means that the employer must have sufficient knowledge or control of the situation to be able to reasonably conclude, at the time of the layoff, that it will be temporary in nature.

In the instant situation the Company possessed neither that control nor that knowledge when the grievant was laid off. The cause for the shut down of the furnace was not within the Company's control. It came about because of a cut back in gas supplied to the Company by an outside gas utility. Resumption of a full gas supply was in control of the utility, not the Company, and until the utility resumed full gas service, the furnace could not be reactivated. Also the Company had no knowledge of how long the gas would be cut back. Indeed the Company's Supervisor of Labor Relations stated on cross examination that the cut back in gas service by the utility was "due to the cold weather and was expected to last until the weather improved or until gas was obtained elsewhere." And that "the Company did not know how long it would last". So at the time of the layoff the Company could neither control the length of the layoff nor had it knowledge of how long the condition causing the layoff would last. In short it did not nor could it determine whether the layoff would be of short duration - temporary or extended.

That the grievant was recalled to work the very next day, January 23, and that the furnace resumed operation on January 27
are immaterial. For the test of whether a layoff is to be temporary or extended, turns on the conditions and circumstances at the time the layoff is implemented, not subsequent events, especially when the Company neither knew of nor had any control over the conditions which led to those subsequent events.

Therefore I am not persuaded that the Company had the right to deem the circumstances of January 21-22 with regard to the Refractory Department as a temporary layoff. Accordingly I find Section 6 of the Supplemental Agreement which applies to temporary layoffs and Arbitrator Rubin's prior Award concerning the Company's right to effectuate temporary layoffs, inapplicable to the instant grievance. Instead, because the Company did not know how long the layoff would last at the time it was announced, nor had control over the circumstances which necessitated that layoff, the regular layoff provisions of the contract, namely Article X Section 7 should have been followed. In my view, unless the Company can show the specific elements of a temporary layoff, the presumption should be that the layoff is or must be for a longer or extended period of time, requiring, under this contract, the application of Article X Section 7.

Accordingly, because the grievant was not laid off in accordance with the provisions of Article X Section 7, his layoff was improper and he shall be made whole for the one day lost.
The grievant was suspended for three days because he failed to report for work on the 11:30 P.M. to 7:40 A.M. shift on January 19-20, 1970. The Company contends that the grievant's conduct with regard to that absence violated Article VIII Section 2 of the contract, and that the degree of penalty was proper because of the grievant's prior unsatisfactory attendance record for which he had previously received a written warning.

Article VIII Section 2 is clear. It provides that an employee may be discharged if he receives three warning notices within any 12 month period "for any absence without notifying the Company, unless a justifiable excuse is presented for such failure to notify the Company." (Underscoring supplied). And that the second such warning shall be accompanied by a three day suspension.

There is no dispute that the grievant received a written warning for absenteeism and tardiness on January 15, 1970. Neither the accuracy nor the propriety of that warning was challenged by the Union when issued. Rather in this case, the Union attempts to explain away that record on the ground that it was largely confined to the winter months when the weather in this region is extremely severe, during which the grievant had difficulty getting to work because he lives some distance from the plant in a trailer camp inaccessible to the main highways. But the evidence does not support that explanation. The grievant's absentee and tardiness record during the Spring, Summer and Fall months for the 12 month period January 17, 1969
to January 20, 1970 is just as bad as during the winter months. And I am satisfied that the absences and lateness that make up that record, and for which the warning was given, included the grievant's failure to notify the Company that he would be absent or late and/or his failure to present justifiable excuses for failing to so notify the Company.

So I am persuaded that the written warning of January 15, 1970 met the test of a first warning within any 12 month period referred to in Article VIII Section 2 of the contract. And I conclude that on the night of January 19-20 the grievant again failed to notify the Company that he would be absent and had no justifiable excuse for that failure.

This conclusion is reached on the basis of the grievant's own version of the events that night. He stated that he first called the Company and reported that he would be late to work. Thereafter he did not again call the Company nor did he report for work that night. He testified that he was unable to come to work because the snow and ice on his driveway made it impossible for him to get his car out (and that he blew out a tire trying). But even accepting the accuracy of that explanation, the grievant offered no justifiable excuse for his failure to notify the Company that he would not be in to work at all that night. Clearly his first call that he would be late or would be in when he got his car out did not constitute notice that he would be totally absent. The weather may have been too severe for the grievant to drive or even get out of his driveway, but in no way did the weather or the blow out impede him from promptly calling the plant a second time to
let them know that he would be absent. Obviously to plan its work that night the Company was entitled to notice that the grievant would be absent, not just late.

Therefore I find that on the night of January 19-20, the grievant was absent; did not notify the Company that he would be absent; and had no justifiable excuse for his failure to so notify the Company. I also find that this was a second such offense within a 12 month period and that the penalty of a three day suspension was proper as mandated by the express provisions of Article VIII Section 2 of the contract.

Eric J. Schmertz
Arbitrator
ORDER AND AWARD OF IMPARTIAL CHAIRMAN
NEW YORK CITY TAXICAB INDUSTRY SEPTEMBER 28, 1970

As sympathetic as one may be with the reason for a twenty-four hour work stoppage on September 29 to protest the tragic murder of cab driver, Benjanin Rivera, and to mourn his death; and as understanding as one may be of the intense emotional feelings of frustration, anger and fear which gave rise to considering a work stoppage, any such concerted action by the Union and taxidivers would be in violation of the collective bargaining agreement which absolutely prohibits work stoppages of any type and for any reason during the life of the contract.

Accordingly, as impartial chairman with the duty to enforce the contract I hereby enjoin and prohibit the Union and the drivers from calling for or engaging in a twenty-four hour cessation of work and direct the Union, its officials and all employees to cease and desist from any plan to engage in any such cessation of work, picketing or interference with the dispatching of cabs, if any such action is planned.

I direct each employee to report for and assume work at his regular time.

However, I find that an expression of respect for Mr. Rivera and a peaceful, reasonable demonstration of protest over the crime that took his life are appropriate and proper. Accordingly, in his memory and in this particular unique situation, and after employees have commenced their regular duties I would allow the employees to cease work during the Mass at St. Patrick's Cathedral and/or to attend the Mass for the one-hour period of the funeral Mass from 11:00 A.M. to Noon, plus a reasonable amount of time before the Mass for those Union officials and drivers participating in the funeral services. At the conclusion of the Mass the employees shall immediately return to and resume work.

The employers shall post this order in each garage. The Union shall notify its chairman, committeemen, and members of this Order and take the necessary steps to insure compliance.

ERIC J. SCHMEIZ
Impartial Chairman
In the Matter of the Arbitration
between
Motion Picture Laboratory Technicians, Local 702, or the I.A.T.S.E.
and
Technicolor, Inc. and Precision Film Laboratories, Inc.

The stipulated issue is:
Which Collective Bargaining Agreement shall survive, the Collective Bargaining Agreement between Local 702 and Technicolor, Inc., or the Collective Bargaining Agreement between Local 702 and Precision Film Laboratories, Inc?

A hearing was held at the American Arbitration Association on November 5, 1970 at which time representatives of Local 702, Precision Film Laboratories, Inc. and Technicolor, Inc., appeared and were afforded full opportunity to present their respective cases. All parties expressly waived the Arbitrator's oath.

As Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties and having duly heard the proofs and allegations of the parties, I make the following AWARD:

The Collective Bargaining Agreement between Local 702 I.A.T.S.E. and Precision Film Laboratories, Inc. shall survive.

Eric J. Schmertz
Permanent Arbitrator
DATED: November 1970

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

On this 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.
In the Matter of the Arbitration between
Motion Picture Laboratory Technicians, 
Local 702, or the I.A.T.S.E.

and

Technicolor, Inc. and Precision Film Laboratories, Inc.

The stipulated issue is:

Which Collective Bargaining Agreement shall survive, the Collective Bargaining Agreement between Local 702 and Technicolor, Inc., or the Collective Bargaining Agreement between Local 702 and Precision Film Laboratories, Inc?

A hearing was held at the American Arbitration Association on November 5, 1970 at which time representatives of Local 702, Precision Film Laboratories, Inc. and Technicolor, Inc., appeared and were afforded full opportunity to present their respective cases. All parties expressly waived the Arbitrator's oath.

As Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties and having duly heard the proofs and allegations of the parties ably presented by counsel for the Union and the two Employers, I make the following AWARD:

I find that Technicolor, Inc. is permanently discontinuing its plant operation. Accordingly, following payments of moneys due under Sections 6, 7, 11 and 34, comprising pro rata vacation, two weeks wages in lieu of notice, severance pay, and pro rata sick leave to all employees eligible for such payments, the Collective Bargaining Agreement between Local 702 I.A.T.S.E. and Technicolor, Inc. shall be terminated. The Collective Bargaining Agreement between Local 702 I.A.T.S.E. and Precision Film Laboratories, Inc. shall survive.

Eric J. Schmertz
Permanent Arbitrator
DATED: November /0 1970
STATE OF New York )ss.:
COUNTY OF New York)

On this /0 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.
NEW JERSEY STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration

between

EMPLOYEES ASSOCIATION OF HEYDEN-NEWPORT CHEMICAL CORPORATION

and

TENNECO CHEMICALS, INCORPORATED

AWARD

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

Grievance 59-69

With the exception of Fred Weber and Joseph Gregus there was just cause for the three day suspensions of the mechanics in the Maintenance Department. The suspensions of Weber and Gregus are reversed and they shall be paid for the time lost.

Grievance 60-69

The five day suspensions of Walter Scott and Patrick Monaghan are reduced to three day suspensions for each. They shall be paid for two days lost.

DATED: May 6, 1970

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

On this 6th 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. 69-210
In the Matter of the Arbitration

between

EMPLOYEES ASSOCIATION OF HEYDEN-
NEWPORT CHEMICAL CORPORATION

and

TENNECO CHEMICALS, INCORPORATED

In accordance with Article XVI of the Collective Bargaining Agreement dated January 1, 1968 between Tenneco Chemicals, Inc. (The Heyden Division), hereinafter referred to as the "Company", and Employees Association of Heyden-Newport Chemical Corporation, hereinafter referred to as the Union, the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issues:

Grievance 59-69: Were the men classified as mechanics in the Maintenance Department suspended for just cause? If not what shall be the remedy?

Grievance 60-69: Were the suspensions of Walter Scott and Patrick Monaghan for just cause? If not what shall be the remedy?

A hearing was held in New Brunswick, New Jersey on March 24, 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 submitted post hearing briefs.

Grievance 59-69 involves 51 mechanics who were suspended for three days for a "concerted failure and refusal to report for work on Friday, September 19, 1969". Messrs. Scott and Monaghan, referred to in Grievance 60-69 were suspended for five days as the "ringleaders" of the September 19th incident.
On September 19, 1969 the Company's work force of mechanics numbered sixty six regular employees and two probationary workers. The normal rate of absenteeism is about one or two a week. Under normal conditions the Company excuses an absence if the employee calls in that he is ill or will be out on personal business. Generally verification has not been required. But on September 19th the unusual occurred. All but the two probationary mechanics failed to report for work. Many called in "sick" or reported out on "personal business".

In view of the evidence in the record that the mechanics, in a group discussion the evening before, expressed displeasure with certain disciplinary action previously imposed on two members of their group, I consider it reasonable for the Company to have concluded that the mass absenteeism of mechanics on September 19th was, in most cases at least, not due to illness or for any other excusable reason.

Under that unusual circumstance I do not think the Company was obliged to follow its usual or customary practice of accepting as truthful the excuse of illness or personal business offered by any of the employees without supporting verification. Rather, confronted with an unprecedented degree of absenteeism, involving all the regular mechanics, the Company had the clear right to inquire more deeply into the bona fides of those absences. For to bind the Company to its normal practice of accepting an employee's bare excuse (applicable to normal absenteeism), no matter how wide spread the absenteeism may be, would afford an impermissible method of circumventing
the "no strike" provision of the contract. Instead I am persuaded that under the unusual circumstances present on September 19th, the Company had the right to make a special and reasonable inquiry into the reasons for each employee's absence and to seek verification of those reasons from the employees. Indeed when all the regular mechanics absented themselves on a day following a "group discussion" at which they expressed displeasure with the Company, and in light of a normal absence rate of only one or two a week, a logical presumption of a planned refusal to report to work arises. In my judgement the burden shifts to the absent employee to rebut that presumption by responding fully to the Company's inquiry and by providing an acceptable excuse for his absence. Three mechanics did so to the Company's satisfaction, and are not among those disciplined.

I do not find that the Company's method of making inquiry was unfair or unreasonable. Supervisors gave the affected employees an opportunity to specify the reasons for their absences; the nature of the illness if that was a reason; the names of doctors consulted, if any were, and any other information which would support the bona fides of the absence.

Based on the entire record before me I conclude that of all of the grievants involved in both issues, none of them met their burden of rebutting the presumption of the impropriety of their absences except grievants Fred Weber and Joseph Gregus. As to these two I find they probably were ill and either had or could have produced medical verification which the Company should have accepted. Consequently the three day suspensions imposed on them are reversed and they are to be made whole for the time lost.

As indicated I find that grievants Walter Scott and Patrick Monaghan were absent without a bona fide excuse on September 19th. But the evidence in the record falls short of
establishing their status as "ringleaders". The remarks attributed to them in connection with the "meeting" or "discussion" on September 18th were not, even assuming the validity of the attributions, more than a reflection of how the entire group of mechanics felt and what, as a group, they apparently planned to do. This is not to say definitively that Scott and Monaghan were not leaders, but rather that the evidence in this proceeding does not establish their leadership so conclusively as to justify the more severe disciplinary penalty imposed on them. Accordingly their five day suspensions are reduced to three days each.

Eric Jv Schmertz
Arbitrator
NEW JERSEY STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration between
Local 8-566, Oil, Chemical & Atomic Workers Union, AFL-CIO

and
Tenneco Chemicals, Inc.

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

There was just cause for the discharge of Alexander Obsuth.

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.

Case No. 69-548
In accordance with Article IV of the Collective Bargaining Agreement dated August 1, 1968 between Tenneco Chemicals, Inc., hereinafter referred to as the "Company," and Local 8-566, Oil, Chemical & Atomic Workers Union, AFL-CIO, 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 discharge of Alexander Obsuth? If not, what shall be the remedy?

A hearing was held in Garfield, New Jersey on July 2, 1970 at which time Mr. Obsuth, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The grounds for the grievant's discharge is a record of poor attendance and lateness for which he had previously been warned and suspended.

There is no dispute over the well settled principle that a chronic record of poor attendance and lateness, no matter what the reason, is grounds for disciplinary action including
the ultimate penalty of discharge if uncorrected, after a disciplinary warning and suspension. Indeed in this proceeding the Union concedes that the grievant's record up to the disciplinary suspension was unsatisfactory, and the Union does not challenge the propriety of the prior disciplinary warnings or the two day suspension.

Hence the question narrows to whether during the period between the suspension and discharge the grievant's attendance record continued unimproved, thereby warranting the latter penalty.

In making such a judgment, it is my view that any affected employee should be entitled to a reasonable, albeit relatively short period of time, and not dealt with precipitously. I think it unfair that a single absence or lateness following a disciplinary suspension be the basis for discharge. Rather over a fair and representative span of time his attendance record should be evaluated and compared with what it had been prior to the disciplinary suspension.

But, an employee who has been both warned and suspended because of an undisputed poor attendance record has an obligation to make an extra effort to improve that record. Part of his obligation is to avoid circumstances which may result in his absence from or lateness to work. For, in view of a prior chronic record of absenteeism and lateness, any continuation of that record, even for reasons beyond the employee's control, or due to circumstances originating outside the employment relationship, would still be a basis for his discharge simply because an employer need not retain an employee who cannot give
regular and predictable service.

As I see it, the grievant's record subsequent to his two
day suspension falls into this latter category. His two days
of suspension were February 9 and 10. A little more than a
week later, on February 19, he was late to work nine minutes.
The next day, February 20, he was requested to report to work
two hours earlier than his regular shift, but reported in sig-
nificantly later. On February 22, he came to work two hours
late. And on March 13, though he called in that morning to re-
port he would be two hours late because of a dental appointment,
failed to come to work at all. Finally on March 17, to answer
a traffic summons in court, he took the entire day off. His
discharge then followed.

I do not find the period of time from February 10 to
March 17 to be unreasonably short for a valid determination,
especially in view of the grievant's absences and tardiness
over that period. The prior disciplinary warnings and suspen-
sion were clear notice to the grievant that he was under a
special obligation to improve his record of attendance, and
that if he did not his job was in jeopardy. Implicit and prop-
er was the admonition that a continuation of that type of re-
cord, even if he tried and was unable to improve it, would not
excuse him from the penalty of discharge.

I do not know whether the grievant wanted to heed the
warnings. But his record subsequent to the disciplinary sus-
pension indicates a failure or inability to do so. His late-
ness of nine minutes on February 19 is not so serious as an
isolated case, but the next day he failed to respond to a request to report in two hours earlier than his regular shift. And I find nothing in the record to explain that failure. Nor do I find any valid reason for his lateness of two hours on February 22; nor can that lateness be excused because he worked two hours beyond the end of his shift that day to make up the time lost. The events of March 13 show a manifest disregard of the duty to improve his attendance record. He decided to take time off for a dental appointment. Yet not until the morning of that day did he call in and report that he would be two hours late. The urgency of that appointment is not established in the record. Most serious however, is the fact that though he reported he would come to work two hours late that day, he failed to show up at all and without any further notice to the Company. That he had to wait beyond his appointment hour for the dentist to treat him falls far short of any acceptable excuse in view of the tenuous nature of his employment status at that time.

His record subsequent to the disciplinary suspension, must be viewed not as separate incidents, but collectively in the context of the overall record for which warnings and the prior disciplinary suspension were imposed. As I see it, the latter record is continued indication of the grievant's failure or inability to improve what previously had been unacceptable. It seems to me that all if not most of his absences and lateness between February 19 and March 13 could and should have been avoided.

Therefore, by his own conduct the grievant placed himself
in a precarious position, in terms of job security, even prior to the events of March 17. The incident of March 17 was nothing more than the last in a series, which convinced the Company that the grievant either would not or could not improve his attendance record.

There is no question that the grievant had to absent himself from work on March 17. He was under court order to respond to a traffic summons. If he failed to do so a warrant for his arrest would have issued. He asked the Company to be excused from work that day but was denied permission, an understandable response by the Company in view of the grievant's past record. That he took the day off anyway is equally understandable, because, on balance, he preferred the risk of further disciplinary action by the Company to jail. But his choice in doing so and the fact that his choice represented the lesser danger, does not mean that the resultant absence from work can be excused. Due to circumstances outside of the employment relationship, he had placed himself in a situation which had a direct effect on his ability to report to work. If his prior attendance record had been satisfactory, his request for time off that day might, and even should have been granted. But with an unsatisfactory attendance record, which continued without satisfactory explanation following the disciplinary suspension, it is difficult to find fault with the Company's conclusion that the grievant's absence on March 17 was conclusive evidence of his inability to maintain regular and satisfactory attendance.

The March 17th event confronted the grievant with a diffi-
cult choice. If he stayed at work and failed to heed the traffic summons he would have been arrested and jailed. By going to court, though denied the time off by the Company, he risked further disciplinary action, including loss of his job. But the dilemma in which he found himself was of his own making; and the harsh alternatives of jail or loss of employment, were products of his own failure or inability to both maintain a satisfactory attendance record on the job and to avoid outside circumstances which would interfere with his ability to achieve and maintain that record.

In other words I find that the grievant's absence on March 17 was not the single cause of his discharge; but rather that because of several incidents of absences and tardiness following his disciplinary suspension, the March 17th absence was just too much. And that the grievant, as the architect of his own overall and unsatisfactory attendance record, both before and after the warnings and suspension, was not entitled to have the events of March 17, for which he was also solely responsible, treated as unique and separate from the rest of that unsatisfactory record.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Local 8-566, Oil, Chemical and Atomic Workers Union, AFL-CIO
and
Tenneco Chemicals, Inc.
Heyden Division

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

The Company's action in transferring the Research and Development Laboratory from the Garfield Plant to a location in Piscataway did not violate the contract. Grievance 5-70 is denied.

Award

DATED: September 1, 1970
STATE OF New York )ss:
COUNTY OF New York)

On this 1st day of September, 1970, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case #69-567
In the Matter of the Arbitration
between
Local 8-566, Oil, Chemical and
Atomic Workers Union, AFL-CIO

and

Tenneco Chemicals, Inc.
Heyden Division

Opinion

In accordance with Article IV of the Collective Bargaining Agreement dated August 1, 1968 between Tenneco Chemicals, Inc. Heyden Division, hereinafter referred to as the "Company," and Local 8-566, Oil, Chemical and Atomic Workers Union, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute involving Grievance #5-7.

A hearing was held in Garfield, New Jersey on July 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 waived the Arbitrator's oath and subsequently extended the due date for the rendition of the Award until on or before September 12, 1970.

The parties could not agree on a precisely worded issue, but their respective positions regarding the issue in dispute are not substantively different. Clearly the dispute involves the Union's claim that the Company violated the contract by transferring the Research and Development Department or Laboratory from the Garfield location to the Company's installation.
Based on the positions of the parties it is clear to me that my authority as the Arbitrator is limited to a determination of whether the Company's action violated the contract. It is not within my jurisdiction to concern myself one way or the other with whether the Company's decision violated or was consistent with the National Labor Relations Act or any other statute. The latter question, if in dispute, must be determined in some other forum.

I answer the question before me in the negative. I find no provision of the contract which was breached when the Company, under the particular circumstances involved, discontinued the Research and Development Laboratory at Garfield and transferred it to and consolidated it with the Research and Development facility at Piscataway without extending Union coverage to the latter location.

It seems to me that the possibility of an employer removing certain work or jobs from one unionized location to another of its installations where employees performing that type of work are not organized, is just as foreseeable as a potential encroachment on the bargaining unit, as for example, sub-contracting, or supervisory personnel performing bargaining unit work. As such, like the two examples cited, the contract could and should explicitly deal with that problem, especially if it is to be absolutely prohibited. In my view, considering the conditions under which the Company acted, if this type of transfer...
is to be contractually proscribed unless the Union's jurisdiction is extended to the new location, the contract should say so in more express terms than the present Recognition Clause upon which the Union principally relies.

I find the word "now" as set forth in Section 1 of Article 1 (Coverage and Recognition) to be no help in determining the contract question, because I find it ambiguous. The sentence which grants the Union exclusive recognition as the collective bargaining representative "of all production, laboratory, maintenance and clerical employees now in its Garfield Plant ...." (underscoring supplied) is as much subject to an interpretation prejudicial to the Union's position in this case as it is to one supportive of that position. It could mean as the Union argues, that Union representation attaches to and continues for all those covered employees employed at the Garfield location when the contract was signed, no matter where thereafter those employees or the work they perform is transferred or re-located.

But with equal logic it could mean that the Union represents those covered employees and their duties at the Garfield location only so long as they continue work at that location, but not if they or their duties are transferred elsewhere subsequently.

In short, a phrase this ambiguous is just not enough to sustain a charge of contract violation under circumstances in the instant case.

This is not to say that the Company has the indiscriminate right to transfer bargaining unit work from a location within the Union's jurisdiction to one that is not. Rather, absent an
explicit contract prohibition or limitation, there remains nonetheless, in my judgment, a presumption in favor of preserving the bargaining unit and the Union's right to representation over the work for which it was certified. Therefore transfers or consolidations of the type involved herein should be allowed only if the Company establishes the bona fides of its business need and decisions to do so; provided the affected employees are given an opportunity to transfer with the work under conditions of employment no less favorable than they enjoyed; and provided the transfer or consolidation was not for the purpose of avoiding unionization or divesting the Union of jurisdiction.

I am persuaded that the reasons for the Company's action in the instant case met the foregoing tests. The Heyden Division of the Company, under which the laboratory at Garfield operated, was combined with the Nuodex Division. With the merger of these two former divisions, a new division, the Intermediate Division, was created. And the research and development work of the two former and separate divisions were similarly merged into a single laboratory. The only adequate space to accommodate the research and development work of the new Intermediate Division, which combined the previously separate laboratory work of the Heyden and Nuodex Division, was at Piscataway. I am persuaded that this represented a bona fide business decision based on a realistic business need, and that it was not fictitiously engineered as a subterfuge to divest this Union of its representation rights.
Also the Company did not hide the move from the Union. Shortly after the decision was made the Union was notified and extended discussions took place. Though it did not do so initially, the Company, ultimately but within time, asked the affected Garfield employees if they would be interested in transferring with the work under similar conditions of employment, including coverage under the Union contract. Whether or not the parties could have negotiated an agreement to extend the Union contract to the affected employees at the Piscataway location became moot, in my view, when none of the affected employees evinced interest in the transfer, and the Union asked the Company not to inquire of the affected employees if they would take a transfer if the Union contract applied.

I find the Company's effort in this regard to be consistent with the requirement that the affected employees be offered an opportunity to "follow the work" under no less favorable conditions. And in view of the lack of interest in transferring to Piscataway among the affected bargaining unit employees at Garfield, together with the Union's injunction against the Company's effort to ascertain the interest of the affected employees if the Union contract covered them in the new location, any equitable claim the Union may have had to the Piscataway jobs was either abandoned or lost.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Chemicals and Craft Union, Inc. Ind. and
Union Carbide Corporation
Chemicals and Plastics Operations Division

Award of Arbitrators

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated May 9, 1970 and having duly heard the proofs and allegations of the Parties, Award, as follows:

The Company did not violate the contract by hiring outside contractors to work on the line 4-3 shutdown in Building 91 during the two week period beginning October 27, 1969 and ending November 11, 1969, and overtime on October 27, 1969.

Eric J. Schmertz
Chairman

Bryan Murray
Concurring

John Dacey
Dissenting

DATED: December 7, 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.

Case No. 70A-9495
DATED: December 1970  
STATE OF New Jersey ss.:  
COUNTY OF  

On this day of December, 1970, before me personally came and appeared Bryan Murray 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: December 1970  
STATE OF New Jersey ss.:  
COUNTY OF  

On this day of December, 1970, before me personally came and appeared John Dacey 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
Chemicals and Craft Union, Inc. Ind.

and

Union Carbide Corporation
Chemicals and Plastics Operations Division

Opinion of
Chairman

In accordance with Article IX of the Collective Bargaining Agreement dated May 9, 1970 between Union Carbide Corporation, Chemicals and Plastics Operations Division, hereinafter referred to as the "Company," and Chemicals and Crafts Union, Inc., Ind., hereinafter referred to as the "Union," the Under-signed was selected as Chairman of a tripartite Board of Arbitration to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

Did the Company violate the contract by hiring outside contractors to work on the line 4-3 shutdown in Building 91 during the two week period beginning October 27, 1969 and ending November 11, 1969, and overtime on October 27, 1969? If so, what shall be the remedy?

A hearing was held at the Company plant in Bound Brook, New Jersey on November 25, 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. Messrs. John Dacey and Bryan Murray served respectively as the Union and Company members of the Board of Arbitration. The parties expressly waived the Arbitrator's oath. The Board met in executive session following the hearing.
The pertinent contract clause is Article XIV Section 10 entitled Sub-Contracting, which reads:

The Company retains the right to purchase goods and services from any source. Before exercising this right the Company agrees to give reasonable consideration to the job security of people in the bargaining unit as one of the factors in reaching a decision.

There is no dispute that the use of an outside contractor was the "purchase of services from any source" within the meaning of the foregoing contract section. Rather the question is only whether in exercising its right to use an outside service the Company gave "reasonable consideration to the job security of people in the bargaining unit."

I am persuaded that the Company did. As I see it an impairment of the job security of the bargaining unit would occur if the sub-contracting caused a layoff, or took place when qualified employees were on layoff, or significantly diminished the normal quantity of regular work available to the bargaining unit even if a layoff did not result and no qualified employees were on layoff. But in the instant situation none of these circumstances were present or occurred as a consequence of the use of outside contractors. No layoff took place nor is there any reason to believe that a subsequent layoff might occur as a result of the work performed by the contractors. No employee qualified to perform that work was on layoff. Rather the entire bargaining unit force, albeit undisputedly qualified to do the work in question, was fully occupied on other assignments within their classifications during the entire two week period that
the outside contractors were used. Nor was there a diminution in the normal overall quantity of work available to the bargaining unit. The employees within the unit not only worked their full regular shifts during that period of time, but also worked at least as much overtime as has been customarily assigned to them in the absence of outside contractors.

In short, the use of the outside contractors in no way encroached on the quantity of both regular and overtime work normally performed by the bargaining unit employees.

Therefore none of the work performed by the outside contractors during regular working hours between October 27, 1969 and November 11, 1969 or during overtime hours on October 27, 1969 can be construed as an impairment of the job security of the bargaining unit.

Eric J. Schmertz
Chairman
In the matter of the arbitration between Local 153, Office and Professional Employees International Union, AFL/CIO, and the United Federation of Teachers Welfare Fund, the undersigned Arbitrator makes the following award:

I find that Mrs. Regina Singletary, hereinafter referred to as the grievant, improperly challenged the managerial authority of Mrs. Gloria Williams and Mr. Charles House, on June 10, 1970. The grievant's misconduct warrants some disciplinary penalty, but less than discharge. I conclude that the proper penalty is a disciplinary suspension for the period from June 10, 1970 to Monday, July 20, 1970. The grievant shall be reinstated as of July 20, 1970 without back pay but with her seniority intact. The disciplinary suspension shall be made part of her personnel file. Any further misconduct by the grievant would be grounds for her discharge.

The grievant has received pro rata vacation pay for this year, and shall not again be paid that portion of the vacation pay which she has received, if she takes vacation time off.

The one-week severance pay which the grievant received shall be charged against her sick pay entitlement for the period January 20, 1971 to January 20, 1972. However, if the grievant is properly discharged before then, the employer need not pay her any further severance pay.

(Signed) ERIC J. SCHMERTZ, ARBITRATOR

DATED: July 17, 1970

EUGENE M. KAUFMAN
Notary Public, State of New York
No. 03-7160956
Qualified to Serve 5 Years
Commission Expires March 19, 2013
In the Matter of the Arbitration
between
Local 8-718, Oil, Chemical and
Atomic Workers International Union
AFL-CIO

and
United Nuclear Corporation

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated March 5, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Gerald Stode was discharged for proper cause.

Eric J. Schmertz
Arbitrator

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

On this 5th 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.
In accordance with Section 22.0 of the Collective Bargaining Agreement dated March 5, 1968 between United Nuclear Corporation, hereinafter referred to as the "Company," and Local 8-718, Oil, Chemical and Atomic Workers International Union, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was Gerald Strode discharged for proper cause under the contract on February 13, 1969? If not, what shall be the remedy?

A hearing was held at the Company plant in New Haven on December 5, 1969 at which time Mr. Strode, 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.

I see no useful purpose in reciting or analyzing in detail the facts involved in this case. Suffice it to say that based on the record before me I am persuaded that on February 12, 1969, in the course of a supervised snow removal operation in the Company parking lots, and during regular working
hours, the grievant operated his car in a grossly unsafe manner and contrary to the direct instructions of the foreman in charge. In doing so he violated Rules 3 and 5 of the Company's Personal Conduct Rules.

There is no evidence in the record, nor indeed does the Union claim, that those Rules are unreasonable or improperly promulgated or effectuated. Hence the Company's Personal Conduct Rules meet the well established test for applicability to its employees.

The preface to the enumerated Rules provides for the classic disciplinary penalties for violations, i.e. reprimand or suspension or immediate discharge, depending upon the seriousness of the offense and the past record of the employee. As I see it, in view of my finding that the grievant violated Rules 3 and 5, the sole remaining question is whether the penalty of discharge was too severe. I conclude that it was not.

It is impossible to determine absolutely whether the grievant, in angrily driving his car out of the parking lot at an excessive speed in a reckless manner, intended, even momentarily, to run down Foreman Savo, Supervisor Bozzi and Guard Teodosio or any one of them. To do so would require a probing of the grievant's mental processes at the time of the incident, which is beyond competence of this proceeding. But I find nothing fanciful, unreasonable, or illogical about the Company's conclusion in this regard. The weight of the credible evidence, particularly the testimony of Messrs. Savo, Bozzi and Teodosio, that they were forced to jump aside in order to avoid being hit, together with evidence of statements by the
grievant soon thereafter when he returned to the plant after parking his car on the street, supports the bona fides of the Company's conclusion regarding what it believed to be the grievant's intent. And in my view, absent the possibility of ascertaining the absolute truth regarding the mental intent of the grievant at the time of the incident, the Company's reasonable conclusion, based as it is on persuasive evidence, is sufficient to cast the grievant's breach of Rules 3 and 5 in a most serious light.

Also in my judgment, separate from the foregoing but of equal relevance to the penalty of discharge is the fact that the particular circumstances surrounding the grievant's violations of Rules 3 and 5 indicate a temperament incompatible with the manufacture and handling of the Company's unique product. The Company makes and deals with nuclear and atomic devices and processes which, undisputedly, are of potential danger to the employees and to the surrounding community unless handled properly. An employee who possesses an excessive or irrational temper is manifestly unsuited for this work.

I recognize that to be required to move one's automobile several times from one parking lot to another in order to facilitate snow removal, and to be directed to place one's car in close proximity to another so as to possibly impede its ready availability later, is exasperating and can lead to some irritability. But the grievant's reaction went well beyond the bounds of what normally can be expected or tolerated under the circumstances. As such, it provides probative support to the
Company's conclusion that his emotional temperament, and short temper make him unsuited for the special and sensitive work handled at this plant. I cannot fault this conclusion. That the grievant may have been suffering from a headache on the day in question as a result of an injury sustained the day before, is not enough, standing alone, to negate either of the conclusions reached by the Company. Nor, as a short term employee, has he been on the job long enough to show, by a record of continuity and stability, that these conclusions are baseless or unreasonable.

Accordingly I find that the Company was justified in terminating Gerald Strode on February 13, 1969.

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

Oil, Chemical and Atomic Workers, Local 8-718, AFL-CIO

and

United Nuclear Corporation

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated March 5, 1968 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

Grievance #AF 70-6 dated February 18, 1970 is granted. The Company violated Article 23.3 of the contract when it assigned Labor Grade 7 and Labor Grade 9 employees to perform work previously performed by the grievants prior to their layoff, and failed to recall the grievants to that work. The Company shall pay each of the grievants, Messrs. Rossetti, Birkemyer, Best, Sullivan and Libby five days pay at their regular rates.

Eric J. Schmertz
Arbitrator

DATED: December 17/1970

STATE OF New York )
COUNTY OF New York)

On this 17 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 the Matter of the Arbitration between

Oil, Chemical and Atomic Workers,
Local 8-718, AFL-CIO

and

United Nuclear Corporation

In accordance with Article 22.0 of the Collective Bargaining Agreement dated March 5, 1968 between United Nuclear Corporation, hereinafter referred to as the "Company," and Oil, Chemical and Atomic Workers, Local 8-718, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

What shall be the disposition of Grievance #AF-70-6 dated February 18, 1970?

A hearing was held at the Company plant, in New Haven, Connecticut, on December 3, 1970 at which time representatives of the Union and Company, hereinafter referred to collectively as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. The grievance reads:

The Company has violated Art. 23 in the Q.C., area, 24-D, Dept. 8784 by laying off senior employees while continuing the job from which they were laid off. The Union asks that senior employees be recalled to these jobs with all lost monies and L.G.

Specifically, the Union claims that the Company violated Article 23 by assigning to certain Labor Grade 7 and 9 employees "contamination" inspectorial work previously performed by
the Labor Grade 12 grievants, while the grievants were on lay-
off.

I find the Union's complaint to be meritorious. For more
than a year the inspection work in connection with a "contam-
ination problem" was handled by the Labor Grade 12 Quality Con-
trol Inspectors including the grievants. That particular work
was not and has not yet been the subject of a job description.
However, by practice for more than a year it has been perform-
ed first by Labor Grade 11 and Labor Grade 12 Inspectors, and
then only by the latter group (the Labor Grade 11 employees
were promoted to the next higher level). Therefore I am con-
strained to conclude that this special work, which both sides
readily admit is of a critical nature, was properly on the
level of, and within the job duties and jurisdiction of the
Labor Grade 12 Inspectors, including the grievants.

Consequently when subsequent to the grievants' proper
layoff (resulting from downward or lateral bumps by higher
rated or senior Inspectors from another Department), the Com-
pany assigned six to nine Grade 7 and Labor Grade 9 Inspect-
ors to perform the very same work which the grievants handled
before their layoff, it violated the grievants' rights to re-
call under Article 23.3 of the contract. That section clearly
affords an employee on layoff the right of recall to the class-
ification or job from which he was laid off before the vacancy
is filled in some other manner.

In short, when additional "contamination" inspection work
was needed or scheduled, the grievants should have been re-
called to perform it simply because it was within their job classification as a matter of practice, and it was the very work from which they were laid off. For the Company to assign that work instead to lower rated and less senior Inspectors was contractually improper.

Based on the only probative evidence on the point in the record, I find that the period of time during which the Labor Grade 7 and 9 Inspectors performed the work for which the grievants should have been recalled, is a total of 5 days. Accordingly the five grievants, namely, Messrs. Rossetti, Birkemyer, Best, Sullivan and Libby shall each be paid by the Company five days pay.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal.

In the Matter of the Arbitration between

Local Union 1251, UAW

and

Waterbury Companies, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated March 5, 1970 and having duly heard the proofs and allegations of the parties, Awards as follows:

The Company did not violate the Collective Bargaining Agreement dated March 5, 1970 when it forced employees entitled to a third or fourth week of vacation to take such weeks of vacation contrary to the individual's desire.

Eric J. Schmertz
Arbitrator

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. 1230 0082 70
In accordance with Article 5 of the Collective Bargaining Agreement dated March 5, 1970 between Waterbury Companies, Inc. hereinafter referred to as the "Company," and Local Union 1251, UAW, 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 dated March 5, 1970 when it forced employees entitled to a third and fourth week of vacation to take such weeks of vacation contrary to the individual desires? If so what shall be the remedy, if any?

A hearing was held at the Company plant in Waterbury, Connecticut on October 12, 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's action in requiring certain employees to take their third or fourth week of vacation entitlement in May of 1970 or at other times contrary to their individual preference may not have been in the interest of sound labor relations, but I cannot find that it violated the contract.

There is no dispute that a portion of an employee's vacation must be taken during the plant shut-down, a period to be
negotiated between the Company and the Union in accordance with Article 7 Section 7.4 of the contract. But under the contract that is the only portion of an employee's vacation the dates of which are subject to negotiation. Under the clear language of Section 7.4 of the contract that negotiated period of time need not exceed one week, and apparently, in practice, has not exceeded two weeks.

Again based on the contract language, the balance of an employee's vacation period, including a third or fourth week, if he is entitled to that amount, may be scheduled on an entirely different basis.

Section 7.6 provides in pertinent part that:

"All employees in the bargaining unit shall take their vacations between January 1 and December 15 of any year."

The foregoing means, obviously, that any time within that stipulated period (almost the entire calendar year) is proper for the scheduling of a vacation.

In addition to the provision in Section 7.4 requiring the parties to negotiate the plant shut-down period which "shall be considered as part of the vacation period," that section goes on to read:

"The second, third and fourth weeks of vacation shall be taken at the convenience of the department concerned."

I am satisfied that the immediate foregoing phrase is synonymous with the "convenience of the Company," i.e. the production requirements and other bona fide business needs of the particular department of the Company in which the employee(s) entitled to the additional weeks of vacation is located.
I cannot accept the Union's argument that the foregoing phrase should be interpreted to mean "at the convenience of the individuals in the department." If that was the intent, the parties could and should have clearly so stated. Rather the word "department" must be given its traditional meaning - namely a segment or constituent part of the Company as an entity.

Based on the foregoing contract provisions, I am satisfied that vacations may be scheduled any time between January 1 and December 15 of a calendar year; only a portion of the vacation of employees entitled to three or four weeks is subject to negotiation (in the form of the plant shut-down period); and that the balance of an employee's vacation entitlement, namely, in the instant case, third or fourth week, is to be scheduled subject to the convenience of the Company.

In short, so far as the stipulated issue is concerned, the Company had the right, based on its convenience, to schedule the third and fourth weeks of vacation any time between January 1 and December 15, 1970; and May of 1970 fell within that period.

Finally I am satisfied that the phrase "the convenience of the department concerned" encompasses any legitimate and bona fide business need or condition which would affect either the presence or absence of employees on their job in that department. I see no basis to construe it so narrowly as to make it applicable only to those periods of time when the department is busy and in need of its full complement.
The word "convenience" is broader in scope. With equal logic and meaning, it includes the circumstance where the business of the department concerned is slack, and fewer employees than a full complement are needed. Though the Company could have laid off the affected employees under the latter circumstance, I find nothing contractually wrong with its decision to require the affected employees to use their vacation entitlement instead.

Accordingly the Union's grievance #3035 is denied.

Eric V. Schmertz
Arbitrator
In the Matter of the Arbitration between
International Union of Electrical,
Radio and Machine Workers, Local 746
AFL-CIO

and

Western Electric Corporation

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated February 28, 1970 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The discharge of Josephine Funk was for just cause under the Columbus, Ohio Plant disciplinary procedure.

Eric J. Schmertz
Arbitrator

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

On this / 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. 5230 0136 70
In the Matter of the Arbitration
between
International Union of Electrical,
Radio and Machine Workers, Local 746
AFL-CIO
and
Western Electric Corporation

Opinion

In accordance with Section XIV-A (Arbitration) of the Collective Bargaining Agreement dated February 28, 1970 between Western Electric Corporation, Columbus Plant, hereinafter referred to as the "Company," and International Union of Electrical, Radio and Machine Workers, Local 746, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was Josephine Funk discharged for just cause under the Columbus, Ohio Plant disciplinary procedure? If not, what shall be the remedy?

A hearing was held in Columbus, Ohio on September 10, 1970 at which time Mrs. Funk, 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 waived the Arbitrator's oath and filed post hearing briefs.

In my Award of May 13, 1968 I agreed with the Company's substantive case, but reduced the grievant's discharge to a three day suspension for procedural reasons.

I found that the grievant's attendance record over an ex-
tended period of time had been chronically unsatisfactory. I reiterated the well settled rule that excessive absenteeism no matter what the reason, and even if beyond the employee's control, is grounds for discharge if that record fails to improve after imposition of the lesser disciplinary penalties of warning and suspension. But I found that the grievant's unsatisfactory attendance record at that time constituted the "second violation" within the meaning of Company Plant Rule 9 Group C (Excessive Absences), and that by the express provision of that Rule a three day suspension (for the second violation) was all that could be imposed.

I stated however, that if the grievant's attendance record remained unsatisfactory she would be subject to discharge - the final penalty prescribed by the Rule for a "third violation."

In the instant case the question before me is whether the grievant's record, subsequent to my prior Award, constitutes a "third violation."

Substantively there can be no serious dispute that the grievant's attendance record has continued at an unsatisfactory level. Also there is no evidence that her inability to come to work on a regular and consistent basis is anything but chronic. With that conclusion I see no useful purpose in reciting the quantity and percentages of her absences due to illness and disabilities during the period between her reinstatement under my prior Award and her discharge in the instant case. Indeed if that was all there was to this dispute, there would be no question in my mind about the Company's right to finally terminate her.
But there is another procedural matter which was not before me in 1968. It is an apparent agreement between the parties and the practice of the Company to impose the penalty of a third Group C violation only within a period of two years after the second violation. In other words a "statute of limitations" is set up between the second and third violations; and if more than two years have elapsed the progressive discipline sequence is vitiated, and must be commenced again from the beginning. In the instant case the Union contends that my Award of May 13, 1968 imposed a three day suspension for the three days immediately following the date of the grievant's prior discharge (July, 1966;) that from the completion of that suspension to the grievant's discharge in the instant case (on December 30, 1969) more than two calendar years have elapsed. And that consequently the Company may not impose a "third violation" penalty.

I agree with the Union that the effect of my prior Award was to retroactively impose a three day suspension over the three working days immediately following the date of her discharge in July, 1966. But while it is true that more than two calendar years have elapsed from the end of that suspension to the instant discharge, the Union's contention that the work rule "statute of limitations" bars a third violation penalty founders when subjected to the well established legal grounds on which statutes of limitations are enforced.

There are specific times when the running of a statute of limitation is suspended, though the calendar continues.
For example if an individual is subject to a civil law suit; or is to be served with a summons and complaint; or is subject to apprehension by the authorities; the time within which these things are to be done runs so long as the individual involved is "legally available" to be sued, served, or apprehended. Specifically if these procedures can be achieved only while the affected individual is "within the jurisdiction," any time that he spends beyond the jurisdiction of the court or authorities does not count in the running of the statute of limitations. So, though more than several calendar years may elapse, the amount of time for the running of the statute of limitations may be considerably less. The rationale should be obvious. If, again by example, one person has the right to sue another, his failure to do so within a specified period of time, and during which time the potential defendant is within the jurisdiction of the court is construed to mean that he has decided not to maintain such an action and a potential defendant should not be subject to later harassment. But if during a portion of that time the potential defendant is outside the jurisdiction of the court, and therefore immune from suit, that period of time during which the aggrieved party could not commence a suit even if he wished to do so, cannot be calculated within the statute of limitations to the prejudice of the aggrieved.

To my mind the instant case is analagous. The period of no more than two years between a second and third violation clearly presupposes that the affected employee will be actively in the Company's employ during those two years. It assumes
that during the two year statute of limitations the Company will be able to observe and evaluate an employee's record or conduct in light of the prior second violation. If the Company fails to act within a two year period, it can be deemed as an irrebuttable presumption that the Company either finds an employee's work or conduct satisfactory, or by acquiescence waives its right to take final disciplinary action against him.

Manifestly however, if an employee, like the grievant, is not actively employed during the two year period, or in other words is "outside the jurisdiction," no such observation or evaluation can be made; the two year period does not serve the purpose for which it is intended; and therefore cannot be counted as part of the "statute of limitations" to the Company's detriment. In short because the two years could not establish either a change in or a perpetuation of the grievant's record, its inclusion within the statute of limitations would be meaningless.

Accordingly, though I find a practice of following a two year "statute of limitations" between the second and third offense, the proper application of that limitation to the instant facts and dispute brings the grievant and her attendance record well within the two year period. Though my prior Award reinstating her after a three day suspension, was rendered in May of 1968, its effect was to suspend the grievant three days during the month of July, 1966. But between that latter date and the date of the grievant's actual reinstatement under my Award, she was not at work. So that period of time cannot
count towards the running of the two years. Rather, the two
year period began to run when the conditions for its proper
application once again obtained - namely on the date she re-
turned to active employment pursuant to my Award of May 13,
1968. Clearly from then to her instant discharge on December
30, 1969, less than two years passed. Moreover, I find that
that latter period constituted a reasonable span within which
she was to improve her attendance record if she could do so.
That she did not (the year 1969 was particularly excessive)
justified the Company's conclusion that her record would not
improve no matter how long she was retained.

Accordingly I find that the grievant's unsatisfactory
attendance record during the period of time subsequent to my
Award of May 13, 1968 constituted a third violation of Plant
Rule 9 Group C, and that the penalty of discharge is both man-
dated and proper.

Eric J. Schmertz
Arbitrator
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

In the Matter of the Arbitration between

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

and

Willow Maintenance Corp.

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:

Willow Maintenance Corp. owes the Taxicab Industry Pension Fund for the month of February, 1970 the sum of $1,781.37.

Willow Maintenance Corp. owes the Taxicab Industry Pension Fund for the month of March, 1970 the sum of $1,914.12.

Willow Maintenance Corp. owes the Taxicab Industry Health & Welfare Fund for the month of February, 1970 the sum of $4,156.53.

Willow Maintenance Corp. owes the Taxicab Industry Health & Welfare Fund for the month of March, 1970 the sum of $4,466.28.

Willow Maintenance Corp. is directed to pay the aforesaid sums to the respective Funds with interest forthwith.

Dated: April 1970

STATE OF New York ) ss.
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.

Eric J. Schmertz
Impartial Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Textile Workers Union of America AFL-CIO
and
Zamax Manufacturing Company, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 25, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

There was just cause for the discharge of James E. Black

DATED: December / 1970
STATE OF New York )ss:
COUNTY OF New York)

On this /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. 1330-0802-70
In the Matter of the Arbitration
between
Textile Workers Union of America
AFL-CIO
and
Zamax Manufacturing Company, Inc.

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated April 25, 1969 between Zamax Manufacturing Company, Inc., hereinafter referred to as the "Company," and Textile Workers Union of America, AFL-CIO, 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 discharge of James E. Black? If not, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on November 17, 1970 at which time Mr. Black, hereinafter referred to as the "grievant," and representatives of the Union and Company, appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

On July 27, 1970 the grievant was on layoff status. The Company gave him permission to come into the plant that day for the single limited purpose of picking up his pay check. I find that the grievant wilfully and defiantly exceeded the bounds of that permission.

Instead of merely picking up his pay check, he went to the work area of the plant; loudly objected to the work that
was being performed; without permission took a series of flash photographs of the work in progress; erroneously and menacingly accused a fellow employee, who was welding a tool, of performing production work; though ordered to do so, refused to leave the plant, necessitating a call by the Company to the police; and persisted in his refusal to leave the plant until the police arrived.

I find that his actions and conduct distracted other employees, interrupted the Company's work that day, and constituted both a breach of the basis upon which he was permitted to enter the plant, and an insubordinate defiance of the Company's authority.

I do not accept the argument that he had no alternative. If he thought his layoff was improper (though the evidence indicates he was laid off properly for lack of production welding) he should have filed a grievance in an orderly manner with the Union for processing under the grievance and arbitration provisions of the contract. And the same is true if he felt that any of the work being performed that day was within his classification.

Accordingly I find no basis upon which to excuse the grievant's actions and conduct on July 27, 1970. I have no choice but to hold that his cumulative conduct that day constituted just cause for his discharge.

Eric J. Schmertz
Arbitrator