Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local #376, UAW
and
Colt's Inc.

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

The Company did not violate Article IX Section 15(b) of the labor agreement dated August 5, 1967 when it denied the bid of William Antonelli for the job of "Inspector-Tool & Gage, Parts Measuring Machine" on July 23, 1969.

Eric J. Schmertz
Arbitrator

DATED: February 1, 1971
STATE OF New York ss.
COUNTY OF New York

On this 1st day of February, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 12 30 0110 70
In the Matter of the Arbitration between
Local #376, UAW, and Colt's Inc.

In accordance with Article XV of the Collective Bargaining Agreement dated August 5, 1967 between Colt's, Inc., hereinafter referred to as the "Company," and Local #376, 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 Article IX, Section 15(b) of the labor agreement dated August 5, 1967, when it denied the bid of William Antonelli for the job of "Inspector-Tool & Gage, Parts Measuring Machine" on July 23, 1969? If so what shall the remedy be?

A hearing was held at the Company plant in Hartford, Connecticut on November 9, 1970 at which time Mr. Antonelli, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived. The parties filed post hearing briefs.

I do not find the Company's decision to by-pass the grievant in favor of a less senior bidder for the job in question to be violative of the contract.

The job of "Inspector-Tool & Gage, Parts Measuring Machine"
required the operation of a machine new to the plant - a sophisticated electronic computer. Article IX Section 15(b) of the contract clearly required that the successful bidder possess the ability to perform the job to which he bids at the time he is assigned to it, without any formal training period. The pertinent part of that contract section calls for the filling of such vacancies on the basis of seniority "provided such employees have the ability to meet the requirements of the job classification." It goes on to define "ability" as meaning that the successful bidder must to able to "perform the production requirements of the job at the time the employee fills the vacancy." (Emphasis added). Had the parties intended to afford a senior bidder the opportunity to be trained on the job or a reasonable period of time within which to learn and perform its duties satisfactorily, they could and should have so provided within Article IX Section 15(b) of the contract. That they did not means that the Company may reject a senior bidder in favor of one with less seniority, if, as between the two, the latter is the only one capable of performing the job upon assignment to it.

Under the circumstances involved in the instant case - namely a new machine and a contractual provision requiring the successful bidder to possess the ability to perform the job duties without a formal training or "break-in" period - it is well settled that an employer may use a test to judge the abilities of the respective bidders; provided the test relates to the duties of the job involved, and is uniformly ad-
ministered to all bidders. The test which the Company used in the instant case fully met these standards. There is no dispute that Mr. Wichowski answered the questions and interpreted the job blueprints correctly; and that the grievant and the other bidders did not. As a result, in selecting Mr. Wichowski, the Company made a reasonable choice not of the bidder most qualified, but of the only bidder with the requisite ability. Had the grievant demonstrated an ability to do the job, albeit less qualified then Wichowski, he would have been entitled to the appointment. But that was not the case. By failing to provide the correct answers to a test relevant to the job he sought, the grievant failed to demonstrate the threshold ability required by Article IX Section 15(b) of the contract.

Accordingly I cannot find that the Company's decision to select Mr. Wichowski instead of the grievant was either arbitrary or unreasonable. And therefore I do not find that it violated Article IX Section 15(b) of the contract. The Union's grievance is denied.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Utility Workers Union of America
Local Union No. 1-2, AFL-CIO
and
Consolidated Edison Company of New York, Inc.

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated December 1, 1968 to March 10, 1971 and having duly heard the proofs and allegations of the Parties, Award, as follows:

1. The parties shall calculate what percent of the total Blue Cross premiums paid on and after October 1, 1969, was paid by the employees.

2. That percent of the total amount of refunds and payments received by the Company on and after October 1, 1969 from Blue Cross under the second paragraph of sub-Section (b) Part 4 Exhibit 1 of the contract shall be placed in legal escrow. The disposition of that escrow fund shall be a matter for bargaining between the parties at the expiration of the Collective Bargaining Agreement under which they are presently working.

Eric J. Schmertz
Chairman

Howard F. Lachenauer
Concurring
Dissenting

Harold T. Rigley
Concurring
Dissenting
DATED: December 17, 1971
STATE OF New York )ss.:
COUNTY OF New York)

On this 17th day of December, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: December 1971
STATE OF New York )ss.:
COUNTY OF New York)

On this day of December, 1971, before me personally came and appeared Howard F. Lachenauer 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 1971
STATE OF New York )ss.:
COUNTY OF New York)

On this day of December, 1971, before me personally came and appeared Harold T. Rigley 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
Utility Workers Union of America,
Local Union No. 1-2, AFL-CIO
and
Consolidated Edison Company of New York, Inc.

Opinion of Chairman

In accordance with Article XII of the Collective Bargaining Agreement dated December 1, 1968 to March 10, 1971 between Consolidated Edison Company of New York, Inc., hereinafter referred to as the "Company," and Utility Workers Union of America, Local Union No. 1-2, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Impartial Chairman of a three-man Board of Arbitration to hear and decide, together with the Company and Union designees to said Board, a dispute relating to Blue Cross refunds.

Messrs. Howard F. Lachenauer and Harold T. Rigley served respectively as the Company and Union Arbitrators on the Board of Arbitration.

Hearings were held on November 3, December 7, 1970, August 12, September 14 and September 24, 1971 at which times 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 oath of the Arbitrators was expressly waived. The Board of Arbitration met in executive session on October 8, 1971.
The stipulated issue is:

Under Part 4, sub-Section (b) of Exhibit I of the Collective Bargaining Agreement, and in view of the increased Blue Cross rates effective October 1, 1969, shall any portion of the refunds or payments paid or payable under the second paragraph of sub-Section (b) be shared with all participating employees who are members of Local 1-2? If so to what extent?

The parties stipulated in writing the following agreed to facts:

Local 1-2 - Grievance re: Blue Cross.

It is hereby stipulated and agreed by and between the parties hereto:

I. Prior to 1963, the Collective Bargaining Contract provided that the entire cost of Blue Cross Premium was borne by the employees, and the employees received the entire reimbursement if any granted by Blue Cross.

II. Pursuant to Joint Exhibit II, for the year 1963 the Company paid one-half (1/2) of the premium cost for Blue Cross-Blue Shield and the employee paid one-half, and it was agreed to equally divide any refund or reimbursement.

III. Starting January 1, 1964, the Company paid the entire Blue Cross-Blue Shield premium and obtained the entire refund or reimbursement, as provided by Part 3 of Joint Exhibit II.

IV. As of July 1964, Blue Cross increased its rates, which increase was paid by the employees pursuant to subdivision (a) of Part 3 of Joint Exhibit II, which provided that Company was to pay at the rate in force as of the date of the Collective Bargaining Agreement. The increase amounted to $1.28 from $3.56 to $4.84 a month on individual, and on family contract, $2.60 a month increase from $8.72 to $11.32.

V. For the calendar years 1964 and 1965, the Company received the entire refund or reimbursement, pursuant to Part 3 subdivision (a) of Joint Exhibit II.

VI. Under Joint Exhibit III under Part 4, at page 73, paragraph (a) referring to Major Medical Insurance, it was provided: "Recognizing the need for substantial financial assistance when serious injury or sickness
strikes, the Company agrees to establish a Group Insurance Policy providing Major Medical coverage for dependents of Employees on the regular active payroll, to be maintained through the Mutual Aid Society."

VII. Subdivision (b) of Joint Exhibit III at page 74, in regard to Blue Cross and Blue Shield coverage provides "The Company agrees to pay, effective as of January 1, 1966, the premium therefor for the term of this Contract, such payment to be at the premium rate in force as of December 1, 1965," and that "The Company will continue to receive or be credited with any refunds or payments made to the Mutual Aid Society by Blue Cross-Blue Shield on account of any hospital, medical or surgical expense incurred primarily by the Mutual Aid Society."

VIII. Joint Exhibit I, Part 4, subdivision (b) provides that "The Company agrees to continue to pay the premiums for Blue Cross and the newly established (as of Jan. 1, 1969) Group Health Insurance premiums for the term of this contract, such payments to be at the premium rates in force as of December 1, 1968," and that "The Company will continue to receive or be credited with any refunds or payments made to the Mutual Aid Society by Blue Cross and Group Health Insurance on account of any hospital, medical or surgical expense incurred primarily by the Mutual Aid Society."

IX. Mutual Aid Society Funds are supplied by member contributions, which are matched by the Company with the Company having the additional obligation to pay any deficit in the Mutual Aid Society operating funds.

X. On October 1, 1969, Blue Cross increased its rates on individual contracts from $4.84 per month to $7.00 per month, an increase of $2.16; on family contracts, the rate was increased from $11.32 per month to $15.80, an increase of $4.48.

XI. The following refunds or reimbursements have been made by Blue Cross to the Company through the Mutual Aid Society pursuant to Part 4 (b) of Joint Exhibit I:

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<th>Amount</th>
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Part 4 sub-Section (b) Exhibit I of the Collective Bargaining Agreement reads:

(b) Blue Cross and New Group Health Insurance Coverage: The Company agreed to continue to pay the premiums for Blue Cross and the newly established (as of January 1, 1969) Group Health Insurance premiums for the term of the Contract, such payments to be at the premium rates in force as of December 1, 1968.

The Company will continue to receive or be credited with any refunds or payments made to the Mutual Aid Society by Blue Cross and Group Health Insurance on account of any hospital, medical or surgical expense incurred primarily by the Mutual Aid Society.

It is the Union's contention that subsequent to October 1, 1969 that portion of the refunds or payments made to the Company (through the Mutual Aid Society) generated by the increase in Blue Cross premiums paid by the employees should be reimbursed to and shared by those eligible employees. The Union asserts that to permit the Company to retain the increased refunds or payments after the rate increase of October 1, 1969, is to unjustly enrich it with refunds attributable in part to that portion of the Blue Cross premiums paid solely by the employees.

In the alternative the Union asks that the Arbitrators require the Company to pay the full cost of the Blue Cross Premiums (i.e., the premium rate in force from December 1, 1968 to October 1, 1969 plus the increase in the premium rate thereafter) retroactive to October 1, 1969. A majority of the Board of Arbitrators ruled that it would take jurisdiction over and decide this latter alternative remedial claim as well.

The Company also relies on Exhibit I Part 4 sub-Section (b) in justifying its retention of all Blue Cross refunds or pay-
ments. Accordingly, equally in dispute and before this Board of Arbitrators is the question:

Whether the Company has the right to receive and retain all Blue Cross refunds and payments after the rate increase on October 1, 1969, which increase was totally paid by the employees.

It is my conclusion that Part 4 sub-Section (b) of Exhibit I is not supportive of the contentions of either party. In short, I am satisfied that the contract does not cover the issues in dispute.

The alternative remedy which the Union seeks - to require the Company to pay the full cost of the Blue Cross premiums - can be disposed of first, because it has no bearing on the disposition of the stipulated issue. My answer to the Union's alternative claim would be the same no matter in what sequence the issues were decided. The contract makes no provision for payment by the Company of Blue Cross premiums in excess of the premium rate in force as of December 1, 1968. Hence there is no contractual basis to support the Union's request that the Company be ordered to pay the higher Blue Cross premium rates. Nor has there been any practice under which the Company increased its premium payment level during the life of a Collective Bargaining Agreement. Therefore, as has been done in the past, any increase in the Company's Blue Cross premium payment level remains a matter for bargaining after the expiration of the Collective Bargaining Agreement. Consequently the Union's alternative remedial claim is denied.

Similarly, neither under the foregoing contract section, nor elsewhere in the contract, is there provision for the re-
imbursement to or the sharing by the eligible employees of any
of the Blue Cross refunds or payments received by or credited
to the Company. Had the parties intended eligible employees to
share in any of the refunds, especially any portion which was
generated by an increase in premium payments paid by the em-
ployees, that contingency would have been expressly stated un-
der Part 4 of Exhibit 1 of the contract. Indeed it would be a
manifest distortion of the second paragraph of sub-Section (b)
of Part 4, if the sentence:

"The Company will continue to receive or be credited
with any refunds or payments made to the Mutual Aid
Society by Blue Cross ..."

was interpreted to require any proportionate reimbursement to
or sharing with the eligible employees.

Again under the prior Collective Agreement which included
the present wording of sub-Section (b) of Part 4, there was no
past practice of reimbursing or sharing any of the refunds or
payments received by the Company from Blue Cross with employees
who paid the increase in Blue Cross premiums above the level
paid by the Company.

Accordingly neither by contract language nor practice can
I find a contractual basis covering the remedy which the Union
seeks under the stipulated issue, and therefore its claim for
reimbursement to eligible employees of that portion of the
Blue Cross refunds and payments generated by employee premium
payments after October 1, 1969 is denied.

However, to deny the Union's claim is not to find that the
Company has the right it asserts. I do not read the second par-
agraph of sub-Section (b) the Company's way. Obviously the
second paragraph must be read in conjunction with the first. Clearly they are reciprocal. The first requires the Company to do something - namely to pay all Blue Cross and Group Health Insurance premiums for the term of the contract at the premium rates in force as of December 1, 1968. In other words to fully cover the premiums of those medical and insurance plans up to a specified level, without any contribution from the covered employees. The second paragraph, as I see it, accords the Company a proximate benefit - namely the right to receive and retain any refunds or payments made to it by Blue Cross or Group Health Insurance, resulting from the premiums which the Company paid. Thus, in exchange for paying all premiums up to a specified level, the Company is entitled to receive and retain the refunds generated by its payments up to that level. Indeed that the first paragraph contains no reference to payment of premiums above the December 1, 1968 level, makes illogical a conclusion that the second paragraph applies to refunds generated from payments in excess of that level.

Consequently, the second paragraph of sub-Section (b) was not intended, and hence does not cover the question of what shall be done with any portion of refunds or payments which may have been generated by an increase in the December 1, 1968 premium rate level, and paid by the employees. Just as I have found that the second paragraph does not deal with the Union's claim to a right of participation in the refunds or payments, I similarly find that the second paragraph does not contractually endow the Company with the right to retain that portion
of the refunds or payments attributable to premiums above the December 1, 1968 level paid by the employees.

With this interpretation, what happened under the predecessor contract is immaterial. That the Company retained all of the refunds and payments under that contract, even though the increase beyond the contract premium level was paid by the employees, does not mean that the Company now has the right to do so. If the Union had the right to object, its failure to do so under the predecessor contract could well be construed as a past practice favorable to the Company's interpretation of sub-Section (b). But since it had no such right, it did not waive or relinquish anything, and its failure to grieve cannot be deemed a past practice. Nor can it be construed therefore to give the Company any more rights than it then or presently has.

Put another way, retention of all refunds and payments by the Company during the prior contract without a claim for reimbursement by the Union did not constitute a practice which enlarged the application of sub-Section (b) beyond refunds resulting from Company paid premiums up to the December 1, 1968 level.

Consequently I find that under Exhibit I Part 4 sub-Section (b) the Company does not have the right to retain that portion of the Blue Cross refunds or payments generated by employee premium payments subsequent to October 1, 1969.

In view of my finding that the contract sections relied upon by both parties are not supportive of their respective positions, there remains the question of what should be done.
Threshold to that question is whether the premiums paid by the employees on and after October 1, 1969 when the Blue Cross premium rates were increased above the December 1, 1968 level, in fact generated increased refunds or payments by Blue Cross to the Company. I find that that question is persuasively answered by the prior practice of the parties themselves. Under prior agreements, before the Company agreed to pay the full premiums up to a specified level, the parties recognized a direct mathematical relationship between that portion of the Blue Cross premiums paid by the employees and their percentage of reimbursement.

In other words, the percentage of reimbursement to which employees were entitled from refunds or payments made by Blue Cross equalled the percentage of the premiums paid by the employees. So, as stipulated in paragraph I of the Stipulation of Facts, prior to 1963 the employees received all refunds because they paid all of the Blue Cross premiums. Thereafter, in 1963, when the employees paid one half of the premiums, they received one half of the refunds. It follows then that the amount of money presently in dispute is that portion of the total amount of refunds and payments received by the Company from Blue Cross subsequent to October 1, 1969 equal to that percent of the total premiums which were paid by the employees on and after that date. Paragraph X of the Stipulation of Facts sets forth the dollar increases in the premium. The percentages both for individual and family contracts are thereby readily ascertainable.

Also, based on the procedures for premium payments and refunds, I am satisfied that realistically the increase in premiums
paid by the employees did in fact generate, either directly or indirectly, increased refunds and payments by Blue Cross to the Company. When the medical or hospital bills of an eligible member are paid by the Mutual Aid Society, the regular Blue Cross rates for comparable service or comparable hospital accommodations are refunded to the Mutual Aid Society (and the Company) by Blue Cross. So the Blue Cross refunds are measured by what Blue Cross would have paid the hospital or other facility. When hospital rates and the cost of other Blue Cross services go up, Blue Cross increases its premiums to covered individuals and families, after obtaining permission from the appropriate regulatory agency. Thus, as I see it, when Blue Cross increased its premium rates on October 1, 1969 above the December 1, 1968 level, it did so because hospital rates and rates for other covered medical services had increased or were expected to increase. The increased premiums paid by the employees were designed to cover the increase in Blue Cross costs. And these increased rates or costs are the amounts of the refunds which Blue Cross paid to the Company after October 1, 1969.

It follows then that the Company received higher refunds from Blue Cross because hospital rates and the costs of other medical services had increased; that the premiums paid by the employees after October 1, 1969 covered Blue Cross' increased costs; and that the employee premium contributions subsidized, in part at least, the increased refunds and payments made by Blue Cross to the Company.

What then should be done with that portion of refunds and
payments made by Blue Cross to the Company after October 1, 1969 that is equal to the percentage of the total premiums paid on and after that date by the employees? I have held that the contract does not provide for reimbursement to the eligible employees; nor does the contract entitle the Company to retain it. I can think of no more obvious or classical situation calling for disposition by collective bargaining.

But because bargaining at this time during the term of the present collective agreement, might be disruptive to the present contractual relationship, I direct that the sum of money in question be placed in legal escrow, and that its disposition be the subject of bargaining between the parties when the Collective Bargaining Agreement under which they are presently working expires.

Eric J. Schmertz
Chairman
FEDERAL MEDIATION & CONCILIATION SERVICE, ADMINISTRATOR 

In the Matter of the Arbitration between 
Lodge #184, International Association of Machinists & Aerospace Workers
and
Continental Can Company, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated June 7, 1968 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The Company did not violate the Collective Bargaining Agreement when it deprived Winfield Thompson of an opportunity to work during the period June 8 to September 20, 1970.

Dated: July 29, 1971
STATE of New York )ss.:
COUNTY of New York)

On this 29th day of July, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 71A/7520
In the Matter of the Arbitration
between
Lodge #184, International Association of Machinists & Aerospace Workers
and
Continental Can Company, Inc.

In accordance with Article XII Step 4 of the Collective Bargaining Agreement dated June 7, 1968 between Continental Can Company, Inc., Plant #88, hereinafter referred to as the "Company," and Lodge #184, International Association of Machinists & Aerospace Workers, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the Collective Bargaining Agreement when it deprived Winfield Thompson of an opportunity to work during the period between June 8 and September 20, 1970? If so, what shall be the remedy?

A hearing was held in Wilmington, Delaware on June 29, 1971 at which time Mr. Thompson, 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 hearings were declared closed following receipt of the stenographic record.

I find no violation of the contract by the Company's action. It is undisputed that a part of the grievant's job as an employee in the Machine Shop labor pool was to relieve on a production
line which manufactures inserts for bottle caps. The machines on that production line are referred to in the record as CLM machines. On June 1, 1970 the grievant presented the Company with a statement from his physician which read:

Mr. Winfield Thompson has been advised not to work around CLM Machines for any period of time.

This medical statement related to an allergic condition and adverse physical effect suffered by the grievant from the fumes attendant to the operation of the CLM machines.

Considering the unconditional nature of this medical statement, which by its own terms precluded any work for any period of time on the bottle cap production line, I find no fault with the Company's decision that the grievant was no longer able to perform the full duties of his job. Consequently the Company disqualified him from active work effective June 8, 1970 and placed him on what it terms as a "medical leave of absence."

The Union contends that despite the medical statement, the grievant was willing to relieve on the production line for short intervals of time, but that he objected to assignments that lasted full shifts or for extended hours within a shift; and that it was to the latter situation that the medical statement was directed. The testimony on what work if any the grievant was prepared or able to do on the production line is disputed. However that need not be resolved because the best evidence of the grievant's physical capacity to handle any of the disputed work is the medical statement from his own physician. And under that circumstance I cannot find fault with the Company's treatment of that statement, which advises against any work for any
period of time on the production line, as conclusive.

Additionally the Union contends that the grievant should have been retained in active employment and assigned other duties, in accordance with Article XI Section 11 of the contract, which reads in pertinent part:

The Company will give consideration to aged or partially incapacitated employees for such available lighter work as they are able to perform.

This clause does not place a mandatory obligation on the Company to find other work for an incapacitated employee. It merely provides that the Company will give such an employee "consideration" for other work which may be "available." Under that permissive language I find nothing wrong with the Company's requirement in this case that the grievant present more specific medical information before it considered him for work under that contract section. In view of the fact that no additional medical information concerning the grievant's condition and his ability to perform his regular duties was forthcoming until shortly before his return to work on September 20, and that no evidence was presented on the question of "availability" of other work on June 8, I find no violation of Section 11 during the interim period while the grievant was off the job.

The Union further contends that as a result of meetings between it and the Company, the grievant's return to work on September 20 was under the very same medical conditions and restrictions as existed on June 8. And that if he was eligible to work on the latter date there was no reason for the Company to have disqualified him from active employment in June. The record does not support the premise.
The Company was presented with a second medical statement by the grievant's physician dated September 10, 1970 which read:

Mr. Winfield Thompson is physically able to work but has been advised to avoid fumes of the CLM machines for long periods of time.

Substantively, the medical statements of June 1 and September 10, 1970 are different. Whereas the former advised against any work for any period of time around the CLM Machine (which resulted in the Company's decision that the grievant could not perform part of his regular duties), the latter advises him to avoid the CLM Machine fumes only for long periods of time - meaning that he was physically able to work on or around those machines for the short periods required when he relieves other employees. So the medical information and conditions under which the grievant returned to work on September 20, as supported by his doctor's statement of September 10, were not the same as those on June 8 when he was removed from active employment.

Finally the Union points to the fact that on and after his return to work on September 20, the grievant was not again assigned for any period of time to the bottle cap production line. It points out that other work, as a replacement for that assignment was obviously found, and that the Company should have done the same thing on June 8. Again the testimony is disputed. The grievant asserts that since his return to work, he has not once worked on the production line. A supervisory employee believes otherwise. The weight of the direct evidence supports the grievant's testimony. However I find this immaterial. For though the Company may have found other work for the grievant on June 8, I find no contractual requirement, under
circumstances of this case, that the Company do so. Rather the
Company had the right to withhold "consideration" for other work
until more medical information was available, and there is no
evidence in this record that the other work assigned on and after
September 20 was "available" on June 8.

Accordingly I find no contract violation by the Company's
action of depriving the grievant of an opportunity to work dur-
ing the period June 8 to September 20, 1970.

Eric J. Schmertz
Arbitrator
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration between

Teamsters Local 338
and

Dellwood Dairy Company

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

The discharge of Floyd Toone is reduced to a disciplinary suspension. He shall be reinstated without back pay. The period between his discharge and reinstatement shall constitute the period of disciplinary suspension and shall be so noted in his record.

[Signature]
Eric J. Schmertz
Arbitrator

DATED: September 3, 1971
STATE OF New York ) ss.:
COUNTY OF New York)

On this 3rd day of September, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 71A/10865
In the Matter of the Arbitration between
Teamsters Local 338
and
Dellwood Dairy Company

The issue involves the contractual propriety of the discharge of Floyd Toone.

A hearing was held at the offices of the American Arbitration Association on August 10, 1971 at which time Mr. Toone, hereinafter referred to as the "grievant," and representatives of the above named 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.

It is well settled that failure to regularly invoke, when circumstances warrant, a contract work rule that carries a disciplinary penalty, impairs the import, the effectiveness and the applicability of that rule.

Here the contract provides for summary discharge where an employee is "under the influence of liquor .... while on duty." The weight of the evidence supports the Company's charge that the grievant was under the influence of liquor while working on May 6, 1971.

However the record also discloses that this was a common occurrence. Indeed, the Company conceded that the grievant
worked in an intoxicated condition two or three times a week over an extended period of time prior to May 6. Though from time to time Company representatives spoke to him about it, the contract rule calling for summary dismissal was never invoked prior to May 6.

In part at least I accept the Union's theory of condonation. I do not conclude that the Company totally abandoned its right to discharge the grievant because of prior failures to impose that contract penalty when the circumstances warranted; but I do find the Company lost its right, at least in the instant case, to impose a summary dismissal after it had tolerated the grievant's violations of the work rule so often and over such an extended period of time.

If a summary dismissal work rule is disregarded, overlooked or waived, the effect is to lull the offending employee into thinking that the employer does not view the offense as seriously as does the contract; and that the contract penalty will not be imposed. Here it is understandable if the grievant, after drinking to the point of intoxication during his night shift meal period and returning to work under the influence of liquor several times a week, believed that May 6 would be no different.

In short, I find that by tolerating the grievant's improper course of conduct over such an extended period of time and by not summarily dismissing him earlier as mandated by the contract, the Company waived its right to do so on May 6.

Instead, and in order to reestablish both the import and total effectiveness of the work rule prohibiting working while
under the influence of liquor, the Company must put this grievant, and all other employees similarly situated on appropriate notice that henceforth the rule will be invoked. As to the grievant, that notice cannot now take the form of summary dismissal. Rather, because I have found factually that he was intoxicated while on duty, some penalty is warranted. And also that penalty shall serve the purpose of forceful notice to him that further violations of this or any other work rule carrying a penalty of summary discharge, would in my opinion be grounds for his immediate dismissal. The appropriate penalty under the particular circumstances in this case is a disciplinary suspension to run from the date of his discharge to the date of his reinstatement as directed in my Award.

The foregoing is not changed by the Company's contention that the grievant also "refused to obey orders" on May 6, in violation of another work rule of a summary dismissal type. Under ordinary circumstances insubordination warrants immediate discharge. However, here assuming the accuracy of the Company's charge (and the evidence is conflicting) that offense is obviously intertwined with the grievant's intoxicated condition. His refusal to obey orders was when he was under the influence of liquor. A causal relationship between the drinking and the refusal to stack milk as directed by his supervisor cannot be seriously disputed. As I see it, a foreseeable result of intoxication is an argumentative, adversary and resisting attitude over a work order which the employee may dispute or dislike. To tolerate drinking is per force to tolerate such a foreseeable consequence, when that refusal is made while under the
influence of liquor. Having tolerated the drinking, the Company must now assume some responsibility for the causal result. Therefore I cannot accept its argument that May 6 was different from prior instances because the grievant's drinking that night was coupled with a refusal to perform a work order. The two are so bound together under the facts in this case, that a loss of the right to summarily discharge for the former, carries a similar waiver as to the latter.

Accordingly, I need not find whether the grievant was insubordinate that night, simply because as already stated I find that a disciplinary suspension is the appropriate penalty either way.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Was the layoff of Louis D'Agostino in violation of his seniority rights? If so what shall be the remedy?

A hearing was held at the Laboratory on May 28, 1971 at which time Mr. D'Agostino, hereinafter referred to as the "grievant," and representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The Union does not dispute the economic need for layoffs in the Raw Stock Department. It contends however, that before the layoff reached the grievant, the "10% Foreman" Mr. Lorenzano, who had less departmental seniority than the grievant, should have been laid off.

The question is whether the "10% Foreman" is to be included for layoff purposes, with the "rank and file" as part of the same job classification within the meaning of Section 7 (1) of the contract; or rather, whether the "10% Foreman" is a different classification from in this instance, Raw Stock
clerk, and subject to layoff only within the Foreman category.
irrespective of the layoffs and seniority of Raw Stock Clerks.

I find a contractual presumption in favor of treating the
"10% Foreman" as part of the Raw Stock Clerk classification
for purposes of layoffs. Schedule A of the contract is entit-
led "Classifications of Work and Rates." No where in that
schedule is the "10% Foreman" or the Working Foreman or the
Sub-Foreman listed as a classification. The Raw Stock Depart-
ment enumerates only Raw Stock Clerks, Raw Stock Handlers and
Head Raw Stock Receiver (the latter two not involved in the
instant dispute.) In short, Schedule A which contractually
enumerates two job classifications, does not include the Foreman
job assignment. Accordingly Section 16 of the contract, parti-
cularly Section 16 (e) cannot be construed as establishing the
Foreman assignment as a job classification. Instead, I am sat-
isfied that its purpose and intent is limited to fixing a pay
premium of 10% above the existing classification, for perform-
ance of certain supervisory duties. I interpret it to mean
that the supervisory job assignment carries a 10% premium above
the highest base rate of the classification of the affected
employee. In other words, narrowed to the instant dispute, the
"10% Foreman" is paid the highest base rate of his classification
plus 10% for performing certain supervisory work; but he re-
mains classified pursuant to that base rate, namely as a Raw
Stock Clerk.

The intent and spirit of the relationship between the
"10% Foreman" and the "rank and file" in sharing the available
work is found, I believe, in Section 9, though it relates spec-
ifically to sharing overtime. In substance that Section pre-
cludes either a preference or disadvantage to the Foreman in
the allocation of overtime work; permitting him to participate
in regular departmental overtime on precisely the same basis
as the rank and file. To my mind that means not only that
contractually there may be neither a preference for a restraint
on the Foreman's entitlement to the extra available work to-
gether with the "rank and file" in his department, but that
implicitly and reciprocally no preference should be accorded
the Foreman if the available work falls below a full regular
quantity. But contrary to this intent, a Foreman would enjoy
such a proscribed preference, if though junior in seniority,
he is retained in a layoff situation and thereby continues at
work while others within the rank and file who enjoy greater
departmental seniority, are laid off.

Finally I consider it significant that the "10% Foreman"
is within the bargaining unit and covered by this Collective
Bargaining Agreement. Though undisputedly he performs certain
supervisory functions (like a group leader or leadman) he can-
not be considered a managerial supervisor because he is not en-
compassed within the managerial ranks. The Company's argument
in this case, that the Foreman must be retained or dealt with
separately in layoff situations because of the essentiality of
his supervisory assignment, and because his layoff might paralyze
the work of the department, endows these bargaining unit Fore-
men with the kind of supervisory authority ordinarily attached
to managerial supervisors who are excluded from the bargaining
unit for that very reason. Absent proof in this area, I am not
persuaded that the "10% Foreman" who is covered by this Collective Bargaining Agreement as part of the bargaining unit enjoys that level of importance or authority. Also I think the Company exaggerates the impact of a ruling favorable to the Union in this case. It suggests that a determination which combines the "10% Foreman" with the rank and file for purposes of layoff would cripple its ability to operate the various departments involved. The fact however, is that the circumstances in the instant dispute are unique. Both sides recognize that in the overwhelming number of situations the "10% Foreman" is an employee with the highest seniority in the department, and therefore under any theory, not reachable in a layoff unless the less senior rank and file employees of the department have been laid off first. So as a practical matter, the concern expressed by the Company is most unlikely to develop.

The evidence on Industry practice and the practices of this Company do not change the foregoing. Uncontroverted is the Union's testimony that elsewhere in the Industry, involving Employers covered by this same master Agreement, departmental layoffs include the working Foreman and the rank and file as a group within the same classification. So apparently, absent evidence to the contrary, other employers faced with the same adverse economic conditions, have managed to maintain the remaining production even where a "10% Foreman" junior to employees in the "rank and file" is laid off.

The evidence advanced by the Company in connection with its practice is neither sufficiently extensive nor sufficiently comparable to the instant dispute to be controlling. I cannot
consider only two prior layoffs (in the Developing Department and in the Printing Department) to be of the quantity or consistency required to establish a "past practice." Also it appears that in the layoffs in these two departments, though affecting the rank and file first, and the foremen later (i.e. as separate groups) the foremen involved possessed higher seniority than any of the others first laid off. Hence under the Union's theory in the instant case, those layoffs were and would not be objectionable to the Union. And therefore the Union's failure to grieve in those instances cannot be deemed prejudicial to the Union's position here. Instead, as I previously indicated, the facts in the instant case are unique; indeed the first time that the problem has arisen. Here, as distinguished from any other prior departmental layoff, the "10% Foremen" just happened to be junior in the seniority to the rank and file Raw Stock Clerks; hence for the first time, in an unusual circumstance, the problem arose and the grievance was filed.

For all the foregoing reasons I am persuaded of a contractual presumption in favor of treating the "10% Foreman" in the Raw Stock Department as part of the Raw Stock Clerk classification. Consequently he should have been included amongst the other Raw Stock Clerks for purposes of the layoffs which took place on or about Friday, May 21, 1971 in accordance with Section 7 (1) of the contract. As such, because his departmental seniority was less than that of the grievant's, his layoff should have preceded the latter's, and because the layoff went no further, the grievant would and therefore should not have
been laid off at all. Accordingly he shall be reinstated and made whole for the time lost.

As the Permanent Arbitrator in the Industry I wish to make it clear that the presumption which I have fashioned in deciding this case, is just that - a presumption. It should not be deemed irrebuttable. For example, though in this case I have not been persuaded that the supervisory work of the "10% Foreman" in the Raw Stock Department (where only one Stock Clerk and one Foreman remain) mandates the retention of Mr. Lorenzano, there may be other situations where, based on evidence presented, the retention of a foreman, albeit junior in seniority, is a compelling business necessity. In other words, the presumption may be rebutted if the Foreman's supervisory function is essential and I am persuaded that there is no other bargaining unit employee realistically and contractually able and willing to assume the supervisor assignment, and/or no managerial supervisor similarly available. Then the implicit right of the Company and its manifest need to continue the department at work to meet remaining business needs, would negate the presumption and allow the retention of the less senior foreman. But this exception to the presumption was not shown in the instant case. I do not know for example that the remaining senior Raw Stock Clerk, Mr. Contino, lacks the ability or willingness to assume Mr. Lorenzano's supervisory assignments; or that other senior employees elsewhere in the Laboratory are unqualified or unwilling to accept a transfer to that work; or that the managerial supervisory force would be unable to cope with or absorb
the supervisory work in the event of Mr. Lorenzano's layoff or
his replacement by some other employee. (This is not to criticize
the Company's case herein. Obviously it could not know or antici-
pile the presumption on which I rely until the rendition of
this decision.)

Therefore I want the parties to clearly understand that the
contractual presumption involved in deciding the instant case
is not irrebuttable and therefore not absolutely controlling in
all departmental layoffs. Instead it is a presumption favorable
to the Union's argument that the Foreman and the rank and file
are to be deemed within the same classification; but rebuttable
on a case by case basis as indicated. For this reason I think
it fair and appropriate that the Arbitrator's fee in the instant
case be shared equally by the parties.

Accordingly the Undersigned, as Permanent Arbitrator under
the Collective Bargaining Agreement between the above named part-
ies and having heard the proofs and allegations of the parties,
makes the following Award:

The layoff of Louis D'Agostino violated his seniority
rights. He shall be reinstated and made whole for the
time lost.

For reasons stated in the Opinion the Arbitrator's fee
shall be shared equally by the parties.

Eric J. Schmertz
Permanent Arbitrator

DATED: June 7, 1971
STATE OF New York )ss.: COUNTY OF New York)

On this 7th day of June, 1971, before me personally came
and appeared Eric J. Schmertz to me known and known to me to be
the individual described in and who executed the foregoing in-
strument and he acknowledged to me that he executed the same
In the Matter of the Arbitration between
Local 702, Motion Picture Laboratory Technicians, I.A.T.S.E., AFL-CIO
and
DeLuxe General, Inc.

The stipulated issue is:

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

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

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

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

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

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

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

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

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

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

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

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

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

Cas No. 70 A-13
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between
East Side Airlines Terminal Corp.

and

Airline Aerospace Employees Local
732 International Brotherhood of
Teamsters

AWARD

The Undersigned Arbitrator, having been designated in accordance with the Collective Bargaining Agreement between the above named parties, and having been duly sworn and having duly heard the proofs and allegations of the above named Employer; the above named Union having failed to appear at a hearing after due notice, makes the following AWARD:

The Union violated the "No Strike" provisions of the contract, when on July 23, 1971 it initiated and directed a one hour work stoppage by 12 employees.

The work stoppage was not only proscribed by the contract, but unnecessary. The dispute between the Union and Employer, relating to "death in the family benefits," was a classical disagreement over the application and interpretation of a specific contract clause, and as such was properly and exclusively a matter for discussion, resolution or adjudication under the grievance and arbitration clauses of the contract.

The grievance and arbitration provisions of the contract are fully capable of redressing all grievances over the application and/or interpretation of the contract. The Union and aggrieved employees can be made whole through the use of those procedures if the Employer has acted improperly or in violation of the contract.

Resort to "self help" in the form of a work stoppage is therefore as much an unjustified alternative remedy as it is prohibited by the contract.
Accordingly the Union and its members shall cease and desist from any such further or future work stoppages during the term of the Collective Bargaining Agreement.

Eric J. Schmertz
Arbitrator

DATED: December 29, 1971

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

On this 29th day of December, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0924 71
The stipulated issue is:
Whether Esli Gonzalez is entitled to notice pay and vacation pay for 1969?

The claim for notice pay is denied, but the claim for vacation pay is granted on a pro rata basis.

Under the contract a principal condition for "notice pay" is a discharge with finality. Though the grievant was initially discharged, that was not his final status. Rather, his discharge was changed to a suspension by Arbitrator Daniel G. Collins. Had the discharge been upheld, notice pay would have attached. But it was not, and any right to notice pay was thereby vitiated.

I am satisfied that Arbitrator Collins' Award should be interpreted in a traditional manner. The grievant's reinstatement "without back pay" means a deprivation only of back wages. The customary and traditional interpretation of the phrase "without back pay" neither disposes of nor denies other contractual benefits during the period of time the affected employee is suspended. Accordingly Arbitrator Collins' Award was not intended to nor did it deprive the grievant of
his accrued vacation entitlement for the period of time he actively worked during 1969.

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

The claim for notice pay is denied. The claim for vacation pay for the year 1969 for Esli Gonzalez is granted on a pro rata basis for the period of time he was actively at work during that year (excluding the period of his suspension under the Award of Arbitrator Daniel C. Collins.)

DATED: February 22, 1971
STATE OF New York ) ss.
COUNTY OF New York)

On this 22nd day of February, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

1330 0888 70
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration
between
Licensed Practical Nurses of New York, Inc. and
Elizabeth Horton Memorial Hospital

Award

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

Contract Term

The duration of the new contract shall be 18 months and 1 day, from June 30, 1970 through December 31, 1971. The Association's demand for a wage re-opener during the life of the contract is denied.

Wages

The present salaries of all LPNs, including the starting salary, shall be increased across the board by the following amounts, effective as indicated:

An increase of 14¢ an hour effective June 30, 1970
An additional increase of 10¢ an hour effective January 1, 1971.
An additional increase of 8¢ an hour effective July 1, 1971.

Association Security

The Association's demand for a "Union Shop" is granted, but prospectively, covering LPNs hired on or after the date of this AWARD. Other LPNs shall continue to be covered by the same Association Security clause as under the expired contract. The "Union Shop" provision shall require Association membership after 90 days of employment.
Vacations

In addition to the present benefits of two weeks vacation with pay to full time LPNs with one or more years of service, and 3 weeks vacation with pay for LPNs with 3 years of service or more, the new contract shall provide for 4 weeks of vacation with pay for full time LPNs with 10 or more years of service.

Leaves of Absence

The Hospital's present practice shall continue. The Association's demand for 9 contractual paid leave days for educational seminars, is denied.

Uniform Allowance

The Association's demand for a uniform allowance is denied.

Sick Leave

The Association's demand for an increase in the number of paid sick leave days from the present 10 to 12 per year, and its demand for retention of the provision of paying for unused sick leave, are granted.

Holidays

The Association's demand for an increase in the number of holidays or personal days is denied.

Benefits Fund

As under the predecessor contract the Hospital shall continue to pay for Blue Cross, Blue Shield, Malpractice and Disability Insurance. The Hospital shall also contribute the sum of $6.11 per month for each LPN to the Beneficiary Fund of Licensed Practical Nurses to cover the cost of Major Medical, Dental and other benefits of that Fund as agreed to by the Trustees, not now provided by the Hospital.

Overtime

The Association's demand for a change in the conditions for payment of overtime is denied.

Annual Increments

The annual increment shall be increased to $3.60 per week or $187.20 a year, effective June 30, 1970.
Shift Differential

The present shift differential of $2.40 per day shall be increased to $3.00 per day effective June 30, 1970.

Premium Pay

The present extra pay of $2.00 for each "in-charge" shift shall be increased to $3.25 per shift for the LPN in charge, effective June 30, 1970.

DATED: April 26, 1971
STATE OF New York )
COUNTY OF New York):

on this 26th day of April, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

American Federation of State, County & Municipal Employees District Council 37

and

Queens Borough Public Library

During the hearing in the above matter the above named parties reached a settlement of the dispute. At the request of the parties I make the Settlement Stipulation my AWARD, as follows:

Without prejudice to the positions of the parties, the parties have settled and withdrawn this arbitration on the following basis:

1. The period of time from August 7, 1970 to September 28, 1970 shall be deemed a disciplinary suspension and so noted in Mrs. Decker's personnel record.

2. Without prejudice to the period of time in #1 above being deemed a disciplinary suspension, the Library shall make Mrs. Decker whole for the pay she lost during that period. Also there shall be no break in her seniority due to the suspension.

DATED: April 8, 1971
STATE OF New York ) ss.:
COUNTY OF New York)

On this 8th day of April, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0725 70
In the Matter of the Arbitration between
Local 89 United Papermakers and Paperworkers, AFL-CIO
and
Federal Paper Board Co., Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 16, 1969 to July 15, 1971 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

Mr. Radis Fears is entitled to five weeks vacation pay for the vacation year 1970 under Article X of the Collective Bargaining Agreement dated July 16, 1969.

dated: July 1971
STATE OF New York )ss.: 
COUNTY OF New York)

On this 7th day of July, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 1239 70
In the Matter of the Arbitration between
Local 89 United Papermakers and Paperworkers, AFL-CIO
and
Federal Paper Board Co., Inc.

In accordance with the Arbitration provisions of the Collective Bargaining Agreement dated July 16, 1969 to July 15, 1971, between Local 89 United Papermakers and Paperworkers, AFL-CIO, hereinafter referred to as the "Union," and Federal Paper Board Co., Inc., hereinafter referred to as the "Company," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:


A hearing was held at the offices of the American Arbitration Association in New York City on May 24, 1971 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 Company filed a post hearing brief.

The Company denied Mr. Fears, hereinafter referred to as the "grievant," vacation pay for the year 1970 because he worked no time during that year. He was on a non-occupational sick leave of absence throughout 1970. It is agreed and stipulated that if he is entitled to vacation pay for the vacation year 1970 under the contract, his entitlement would be for five weeks.
A determination of this dispute turns on the interpretation of the fifth paragraph of Article X Section 1 of the contract which reads:

Employees who have been continuously in the employ of the Company for twenty-five (25) years or more shall be eligible for five (5) weeks' vacation with pay during that calendar year.

Generally, absent a contract provision to the contrary, it is well settled that an employee on leave because of sickness is still "employed," albeit without direct salary or wages. In other words his period of employment or continuous employment is not suspended or interrupted by a non-occupational medical leave of absence unless the contract expressly so provides.

I conclude that this interpretation is applicable in the instant case:

The contract does not use the phrase active employment, which is traditionally used when periods of extended illness or non-occupational medical leaves of absence are to be excluded from calculating uninterrupted employment. Nor does this contract use any other language excluding periods of illness or non-occupational medical leaves of absence from the phrase "continuously in the employ of the Company."

The third paragraph of Section 5 of Article X, which sets forth the method of paying vacation pay to employees returning from military service or Workmen's Compensation leaves of absence would have been the appropriate place to include a restriction on vacation pay eligibility for employees on non-occupational medical leaves of absence during the vacation year. That it does not, when such a circumstance was clearly fore-
seeable means that an exclusion was not intended, leaving the only variation to Workmen's Compensation and military leaves.

Also, the phrase "continuous service," which I deem synonymous with "continuously in the employ" is used and defined in the Pension Plan Booklet prepared by the Company and incorporated by reference into the Collective Bargaining Agreement under Article XIX of the contract. "Continuous service" under the provisions of that Plan is broken, among other reasons, by a non-occupational disability or leave of absence of more than two years duration. Though admittedly for pension purposes only, it seems to me that had the parties intended a different or more restricted interpretation of the phrase "continuously in the employ of the Company," for vacation pay, under Article X, the contract would have explicitly so stated. That it does not constrains me to conclude that synonymous phrases should be interpreted with equal liberality. Or in short, the phrase as it applies to vacations should be no less liberal than it applies to pensions.

However, most significant, in my judgment is the first paragraph of Section 5 Article X of the contract, which sets forth the method of computing the amount of vacation pay. It fixes that amount not based on the earnings of the employee during the calendar year of the vacation, but rather on a percentage of his gross earnings of the previous calendar year. I deem this as evidence of the parties intent. It seems to me that they intended to determine an employee's vacation eligibility not on his service during the year he takes or claims a vacation, but instead on the amount of hours worked during and
his gross earnings of the prior year.

In other words if he worked the requisite hours during the prior year two factors are determined. First those hours, together with the gross earnings produced therefrom determine the amount of money he is to receive in vacation pay during the subsequent year. And second, by doing so he has met the test of eligibility for vacation pay in the subsequent year, whether he works during that subsequent year or not. In the instant case the grievant worked the requisite number of hours during the prior year (from January to the latter part of July, 1969) and thereby established not only the basis for the amount of his vacation pay, but also his eligibility of a vacation for the following year 1970.

None of the foregoing is overturned by the Company's case on past practice. The examples advanced by the Company, where employees were not granted vacations during a vacation year in which they performed no work, are not determinative because all involved employees who retired or quit. I accept the Union's explanation that because those employees retired or quit and made no claim for vacation pay, their particular situations did not come to the Union's attention.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union of Electrical, Radio & Machine Workers, Local 119 and

General Electric Company

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated 1970-1973 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The discharge of Arliss Thomas was for just cause.

Eric J. Schmertz
Arbitrator

DATED: October 15, 1971
STATE OF New York ) ss.
COUNTY OF New York)

On this 15th day of October, 1971 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1430 1081 71 M-H
In the Matter of the Arbitration between

International Union of Electrical, Radio and Machine Workers, Local 119

and

General Electric Company

The stipulated issue is:

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

A hearing was held in the Philadelphia offices of the American Arbitration Association on July 27, 1971 at which time Mr. Thomas, hereinafter referred to as the "grievant," and representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. Post hearing briefs were filed.

The Company charges the grievant with a second violation of a major work rule - namely "sleeping during working hours or hiding with the intent to sleep" on the night of October 8, 1970. A few months earlier, in June of 1970, the grievant was suspended for "sleeping, insubordination and striking a supervisor," also a "major" offense.

The Company delineates disciplinary offenses as "major" and "minor." A second major disciplinary offense or a second breach of a major work rule carries the penalty of discharge. The existence of the work rules involved in this case together with the Company's two step disciplinary procedure are estab-
lished in the record to my satisfaction.

The Union contends that the grievant was not sleeping on the night of October 8, 1970; that if he committed any offense it was simply a late return to his work station following a lunch break (a "minor" offense); and that in any event it was not his second breach of a major work rule.

It is undisputed that two guards found the grievant in the dark in an unused ladies wash room, seated on a chair with his feet propped up, after the resumption of his work shift following the lunch break. Based on the record before me I am persuaded that he was asleep. The testimony of the guards, describing the grievant's appearance and demeanor, when considered with the remoteness and condition of the location, strongly support the conclusion that he was asleep. More important, and determinative to my mind is the grievant's own testimony. He stated that on other occasions he had gone to that wash room to "rest" during the lunch break. Presumably on those occasions he was able to resume his work on time after the lunch break ended. Yet this time he was not able to do so. He admitted that on this occasion he went to the wash room without a watch or any other means of determining when, as a matter of time, the lunch break would be over. He stated that he expected to be able to return to work on time because, as in the past, he would hear the machines and see the start-up of work. That he did not see or hear the "start-up" this time suggests only one logical conclusion - that he was unable to do so because this time he was asleep.
The question narrows to whether he committed a major offense of "sleeping during working hours or hiding with the intent to sleep." Based on his past record I must hold in the affirmative. It is undisputed that he, like other employees doze off during their lunch break. This is not and was not objected to by the Company. But the grievant, unlike other employees, was unable, on at least two prior occasions, to rouse himself at the end of the lunch break. At least twice his supervisor had to wake him and instruct him to return to work. Contrary to the Union's contention, this conduct was neither accepted nor acquiesced in by the Company. The grievant was warned by his superior that the Company could not tolerate sleeping past the end of the lunch break. In short, as I see it the Company put the grievant on notice that if he slept during his lunch break he did so at his peril, and would be subject to disciplinary action if he was unable to awaken in time to resume work.

Obviously, any attempt to determine whether the grievant went to the unused ladies wash room during his lunch break on October 8, 1970 for the express purpose of sleeping beyond that break would be speculative. I do conclude that he went to that location on a floor different from his work station to either rest or sleep during the lunch break. In doing so he placed himself in a prejudicial position for which he alone must be responsible. He knowingly ran the risk of falling asleep, and again sleeping into the regular working hours of his shift, at a location where no one could awaken him. Im-
prudently, when he had a duty to be careful, he failed to heed his supervisor's prior admonition regarding sleeping past the lunch break; and disregarded both the seriousness and consequences of another sleeping offense following his disciplinary suspension of three months earlier. Consequently, as an offense it went well beyond a mere isolated failure to report back to work on time; but rather reached the level of an unjustifiable disregard of a major Company rule.

There remains only the question of whether this constituted the grievant's second offense. The Union correctly argues that at the time the grievant was discharged, his prior disciplinary suspension of June, 1970 was still pending in the grievance procedure and had not been adjudicated on the merits. And that therefore on October 8, 1970 the Company could not authoritatively determine that the offense that night was a second major offense. However, by the time the instant case came to arbitration on July 27, 1971, any procedural defect had been cured, and the Union's argument was moot. By that date the Union had failed to process the grievance protesting the initial disciplinary suspension to arbitration within the contracturally prescribed time limit. Hence by the time the instant arbitration case began, the prior disciplinary penalty was no longer subject to challenge by the Union and therefore stood as imposed - a first major offense within the meaning of the Company's rules and its progressive disciplinary procedures. And the October 8th incident is therefore the second major offense. Consequently the penalty of discharge was mandated and justified.
In the Matter of the Arbitration between

International Association of Machinists and Aerospace Workers, AFL-CIO

and

General Electric Company
Caribe Plant Operations and
General Electric Circuit Breakers

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated July 22, 1970 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Luz Pabon Sandoval is reduced to a one month disciplinary suspension. She shall be reinstated but without back pay.

Eric J. Schmertz
Arbitrator

DATED: June 1, 1971
STATE OF New York )
COUNTY OF New York)

On this 1st day of June, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
International Association of
Machinists and Aerospace Workers, AFL-CIO
and
General Electric Company
Caribe Plant Operations and
General Electric Circuit Breakers

Opinion

In accordance with a Strike Settlement Agreement dated July 22, 1970 between General Electric Company, Caribe Plant Operations and General Electric Circuit Breakers, Inc., hereinafter referred to as the "Company," and 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 a dispute over the propriety of the discharge of Luz Fabon Sandoval and whether she should be reinstated.

Hearings were held in San Juan, Puerto Rico on February 5 and 6, 1971 at which time Mrs. Sandoval, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressively waived.

This proceeding was closely tried in considerable detail by the parties over the equivalent of three hearing days and both sides filed post hearing briefs. A careful study of the entire record persuades me that a determination of the issue
boils down to a matter of proof. Therefore I shall deal with
that matter and accordingly, except as they relate to the
matter of proof, find unnecessary a recitation and analysis of
all the facts and contentions advanced by the parties during
the course of the hearing.

The Company charges that the grievant had a "poor attitude"
about her work and a record of excessive absenteeism and late-
ness; and that on August 6, 1969 she engaged in "horse play"
in the plant, and used obscene language and struck a fellow
employee. The Company asserts that considering her entire re-
cord, her discharge, triggered by the events of August 6, 1969
was justified.

There is no doubt in my mind that the Company considered
all of these charges in deciding on the penalty of discharge.
But I am persuaded that the most serious charge was that of
striking a fellow employee and that the Company decided upon
the penalty of discharge because of that act.

The grievant denies that charge (striking employee Delores
Correa in the back with her fist as both walked down the plant
aisle). She also disputes the charge of "poor attitude" (which
are the subject of several "contact reports" in the grievant's
personnel record); admits the first part of the charge of
horse play (untying or pulling a kerchief off one employee's
head) and does not dispute her record of absenteeism and late-
ness but offers explanations in mitigation (marital difficul-
ties and illnesses of her child, herself and immediate family).

This is a disciplinary case with the burden on the Company
to prove its reasons for the discharge by clear and convincing evidence. The record in connection with the charges of "poor attitude," horse play and excessive absenteeism and tardiness meet this test. But the evidence on the critical act, namely the assault, has not been proved to the level of the traditional standard.

Based on the grievant's own admissions and uncontroverted testimony of witnesses, I am convinced that the grievant dried her hands on the shirt of a fellow-employee or engaged in some similar act, (the disputed part of the "horse play" charge) and pulled the kerchief off the head of another employee during working hours on August 6, 1969. That the Company complained and spoke to her about her "poor attitude" is substantiated in various contact reports and the persuasive testimony of managerial representatives. Her chronic record of absenteeism and lateness is not seriously disputed, and there is no question that the Company warned her about it.

But the evidence on the alleged assault is inconclusive one way or the other. Miss Correa testified to it, together with the nature of the obscene language which the grievant allegedly used in conjunction with striking her. The grievant's denial was equally vigorous and equally unshaken. The testimony of employee Nilda Reyes who stated that she saw the assault was, in my judgment, equivocal and indecisive (by example, she could not describe or act out how the grievant struck Miss Correa). And the Company declined to produce at the hearing Miss Reyes' written report of the incident. The testimony
of Santiago Velez in support of the grievant's position is similarly inconclusive. He stated that he saw and heard the grievant and Miss Correa talking and overheard unflattering comments each to the other, but saw no assault or fight. Yet I am not persuaded that he was on the scene long enough or gave the situation sufficient attention to be able to know with certainty whether there was or was not an assault. The balance of the evidence regarding the alleged assault comes from secondary sources and cannot be deemed determinative.

Consequently the record before me on the critical question of whether the grievant aggressively struck Miss Correa is both unclear and a stand-off. As such it fails to achieve the clear and convincing level traditionally required in disciplinary matters. This is not to say that the grievant did not commit the assault; but rather that the evidence in the record does not support that contention up to the standard of proof required.

Hence the issue narrows, without the required proof of assault, to whether the grievant's discharge was justified on the remaining grounds. I conclude it was not. Work attitude, absenteeism and horse play are grounds singly or collectively for disciplinary action. But it is well settled, that absent a specific contract provision or an explicit work rule which attaches the penalty of summary discharge to those offenses, the principle of "progressive discipline" is to be used where those offenses have been committed. In other words the penalty of discharge for those offenses is proper only as the final penalty after the employee's record has failed to improve follow-
ing the lesser penalties of warning and suspension. In the instant case neither the contract nor the Company's booklet incorporating its work rules provide for summary dismissal for these offenses (as it does by contrast for "fighting"). In other words, it is clear that a poor work record, absenteeism and tardiness and horse play, although offenses subject to disciplinary action, are not amongst those carrying the penalty of summary dismissal.

Also the nature of the particular horse play involved, albeit of potentially serious consequences, was not, in my judgment, so manifestly dangerous or malicious as to warrant anything more than a moderate penalty within the "progressive discipline" formula. The grievant's absenteeism and tardiness, the extent and scope of which I deem to be excessive, cannot be totally excused even if beyond her fault because of illnesses and marital difficulties. It is well settled that in the interest of production requirements, an employer need not tolerate an employee's unpredictable attendance no matter what the cause and even if beyond the employee's control. Therefore no matter how bona fide the grievant's explanations may be, they are irrelevant to the Company's right to require better attendance of her.

Critical however is the fact that though the grievant was notified and warned about her work attitude and record of absenteeism and tardiness, the Company took no further step to impress upon her that a failure to improve would place her job in jeopardy. But that is the purpose of the principle of "progressive discipline." For single offenses which are not in
and of themselves serious enough to warrant summary dismissal, the process of warning and then suspension, before the ultimate penalty of discharge is designed not only to notify the employee that he might lose his job if his record does not improve, but also to serve as a rehabilitative measure.

So far as the grievant's work record and absenteeism are concerned, the Company did not go beyond the warning step and thereby did not afford the grievant this traditional notice and opportunity before imposing the penalty of discharge. And as already indicated the horse play incident, whether treated separately or added to the grievant's prior work record was not so serious as to justify by-passing the suspension penalty within the "progressive discipline" formula.

In short, absent proof of the assault, the remaining offenses warrant some disciplinary penalty but less than discharge. Considering the entire record I am satisfied that the appropriate penalty is a suspension of one month.

Accordingly, the grievant's discharge is reduced to one month's disciplinary suspension to run for a period of one calendar month from the date of her discharge. She is to be reinstated. I have decided not to award her back pay for the balance of the period of her dismissal because I am not satisfied that she made an adequate effort to seek other employment, and hence mitigate damages during the period of her unemployment. I am mindful of the fact that the Puerto Rican economy during this period has been slow if not recessionary. But mitigation does not require that an employee achieve other employment; but rather only that he made a good faith effort
to seek it. I do not think the grievant made that effort.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Cemetery Workers and Greens Attendants
Union, Local 365 Service Employees
International Union, AFL-CIO

and

Greenwood Cemetery

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

1. The grievance of Henry Schuler for additional pension payments is denied.

2. The grievances of those employees listed in the Union's letter of May 3, 1971 are granted. They shall receive for the year 1971 the greater amount of vacation time which they had received in the immediate prior year(s).

DATED: November 15, 1971
STATE OF New York )
COUNTY OF New York )

On this 15th day of November, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0551 71
In the Matter of the Arbitration between
Cemetery Workers and Greens Attendants Union, Local 365 Service Employees
International Union, AFL-CIO

and

Greenwood Cemetery

In accordance with the Arbitration Agreement between
Local 365 Cemetery Workers and Greens Attendants Union, AFL-CIO, hereinafter referred to as the "Union," and Greenwood Cemetery, hereinafter referred to as the "Employer," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

1. What additional pension payment, if any is due Henry Schuler?

2. What is the proper additional vacation time due, if any, to the employees listed in the Union's letter of May 3, 1971?

A hearing was held at the offices of the American Arbitration Association on August 5, 1971 at which time representatives of the Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. Affected employees were also present. The parties filed post hearing briefs.

The contract documents applicable to these cases are the 1967-1968 "Basic Contract;" the arbitration Award of Arbitrator Hugh E. Sheridan dated May 6, 1970 and his subsequent explanatory letter dated August 10, 1970.

The Union contends that Mr. Schuler did not receive full credit towards his pension entitlement for his earlier period.
of service as a seasonal employee, pursuant to Section 3 of Mr. Sheridan's pension decision which reads:

When a seasonal employee becomes a regular employee his total months of employment shall be added from the beginning of his employment and applied to all service as a regular employee for purposes of retirement benefits.

In addition to including the full time he worked as a regular employee, Mr. Schuler received only 60% credit for his previous service as a seasonal employee (referred to as "Regular B"), as provided in the Pension section of the Basic Contract.

The question simply is whether, as applied to Mr. Schuler's grievance, Mr. Sheridan's Award eliminated the aforementioned 60% provision and substituted in its place full credit for periods of seasonal employment for those employees who thereafter became regular employees.

I answer the question in the negative. Section 3 of Mr. Sheridan's pension decision must be read together with his explicit explanation in his letter of August 10, 1970. His explanation reads:

Page 4 - Pension, Section 3 - This clause applies to a seasonal employee who becomes a regular employee on or after January 1, 1971.

This explanation excludes Mr. Schuler. He became a regular employee prior to January 1, 1971. Mr. Sheridan has explained that Section 3 of his pension decision is applicable prospectively - only for employees who had both seasonal and regular service, but who became regular employees on or after January 1, 1971. Accordingly Mr. Schuler's pension rights
remain determined by the Basic Contract provisions applicable and to employees who had worked both seasonally/regularly, and who became regular employees before January 1, 1971.

Nor can I accept the Union's contention that Schuler is entitled to greater pension credit under that portion of Mr. Sheridan's Award which reads:

Where benefits in a contract are presently in excess of those specified herein, there shall be no lowering of present working conditions.

The contract in existence between the parties prior to Mr. Sheridan's Award did not provide for a pension benefit in excess of those specified in his decision. And more specifically, Mr. Schuler had not previously enjoyed a higher retirement benefit than that which the Employer accorded him in the instant case. Therefore I find no basis upon which the "continuation of prior better benefits" ruling can be invoked in this grievance.

Therefore the Employer accorded Mr. Schuler the correct amount of credit for his service as a Regular B (seasonal) employee as well as the correct amount of credit for his subsequent service as a regular employee under the Pension provisions of the Basic Contract. And as the Sheridan Award did not alter the applicability of those provisions to Mr. Schuler, his grievance for additional pensions payments must be denied.

The latter argument, namely, the application of Mr. Sheridan's ruling continuing benefits in excess of those specified in his Award, though inapplicable to the Schuler grievance, is, in my judgment, determinative of the grievances of those employees listed in the Union's letter of May 3, 1971. It is
undisputed that those grievants received greater vacation benefits in prior years than they received in 1971. I find it immaterial whether this was caused by crediting them for periods of seasonal employment as well as regular employment; by a partial integration of seasonal and regular seniority lists; or because of a clerical error. The fact is that in prior years each of the grievants received more vacation than the Employer contends they are now entitled to under the Sheridan Award.

As to those grievants I deem their prior vacation eligibility to be "a working condition" and "benefit" within the meaning of Mr. Sheridan's ruling in the second paragraph of page 2 of his Award. Accordingly irrespective of the specific vacation provisions set forth in that Award, the prior vacation benefits which these grievants enjoyed shall be continued. Accordingly those employees listed in the Union's letter of May 3, 1971 shall receive the greater amount of vacation which they had received in the prior year(s).

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

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Cemetery Workers and Greens Attendants Union, Local 365 Service Employees International Union, AFL-CIO

and

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International Union, AFL-CIO

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of service as a seasonal employee, pursuant to Section 3 of Mr. Sheridan's pension decision which reads:

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In addition to including the full time he worked as a regular employee, Mr. Schuler received only 60% credit for his previous service as a seasonal employee (referred to as "Regular B"), as provided in the Pension section of the Basic Contract.

The question simply is whether, as applied to Mr. Schuler's grievance, Mr. Sheridan's Award eliminated the aforementioned 60% provision and substituted in its place full credit for periods of seasonal employment for those employees who thereafter became regular employees.

I answer the question in the negative. Section 3 of Mr. Sheridan's pension decision must be read together with his explicit explanation in his letter of August 10, 1970. His explanation reads:

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Nor can I accept the Union's contention that Schuler is entitled to greater pension credit under that portion of Mr. Sheridan's Award which reads:

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The contract in existence between the parties prior to Mr. Sheridan's Award did not provide for a pension benefit in excess of those specified in his decision. And more specifically, Mr. Schuler had not previously enjoyed a higher retirement benefit than that which the Employer accorded him in the instant case. Therefore I find no basis upon which the "continuation of prior better benefits" ruling can be invoked in this grievance.

Therefore the Employer accorded Mr. Schuler the correct amount of credit for his service as a Regular B (seasonal) employee as well as the correct amount of credit for his subsequent service as a regular employee under the Pension provisions of the Basic Contract. And as the Sheridan Award did not alter the applicability of those provisions to Mr. Schuler, his grievance for additional pensions payments must be denied.

The latter argument, namely, the application of Mr. Sheridan's ruling continuing benefits in excess of those specified in his Award, though inapplicable to the Schuler grievance, is, in my judgment, determinative of the grievances of those employees listed in the Union's letter of May 3, 1971. It is
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As to those grievants I deem their prior vacation eligibility to be "a working condition" and "benefit" within the meaning of Mr. Sheridan's ruling in the second paragraph of page 2 of his Award. Accordingly irrespective of the specific vacation provisions set forth in that Award, the prior vacation benefits which these grievants enjoyed shall be continued. Accordingly those employees listed in the Union's letter of May 3, 1971 shall receive the greater amount of vacation which they had received in the prior year(s).

Eric J. Schmertz
Arbitrator
New York City
Office of Collective Bargaining

In the Matter of the Fact Finding

between

Committee of Interns and Residents of New York City

and

New York City Health and Hospitals Corporation

Report and Recommendations of the Impasse Panel
Case No. I-69-70

Before the Impasse Panel
Dr. Emanuel Stein, Chairman
Daniel G. Collins
Eric J. Schmertz

Appearances
For Committee of Interns and Residents of New York City
Murray A. Gordon, P.C., Attorney for the Committee of Interns and Residents of New York City
by Murray A. Gordon, Esq.
Michael J. Horowitz, Esq. of Counsel

For New York City Health and Hospitals Corporation
Proskauer, Rose, Goetz & Mendelsohn, Esqs., Special Counsel for New York Health and Hospitals Corporation
by L. Robert Batterman, Esq., of Counsel

Robert H. Pick, Esq., Assistant Director of Labor Relation of the City of New York
The proceeding takes place pursuant to Section 1173.7. ofC of the New York City Collective Bargaining Law, Chapter 54 of the Administrative Code. The Impasse Panel held a total of ten daily hearings between January 13 and March 23, 1971 and, in addition spent one full day observing the work of interns and residents at Kings County Hospital. The testimony filled 1447 pages and 69 exhibits, many multiple, were received in evidence. Each party submitted a post-hearing brief and the Committee of Interns and Residents submitted a reply brief, the last being received on April 9, 1971. Thereafter the Impasse Panel met in executive session.

The Background of the Impasse

The Committee of Interns and Residents of New York City (the "CIR") is the duly recognized bargaining representative for interns and residents (sometimes referred to collectively as "house staff officers") employed by the New York City Health and Hospitals Corporation (the "Corporation"). On September 30, 1970, the contract between the Corporation's predecessor, the City of New York, and the CIR expired. Thereafter, negotiations for a new contract between the Corporation and the CIR reached an impasse.

There are a total of 1,112 house staff officers in the bargaining unit represented by the CIR, all but 67 of whom are
employed in one or another of five Corporation hospitals: Bellevue, Harlem, Bronx Municipal Hospital Center, Kings County and Metropolitan. The distribution of interns and residents by class of positions is as follows:

<table>
<thead>
<tr>
<th>Position</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intern, Dental Intern</td>
<td>220</td>
</tr>
<tr>
<td>1st year Resident and Dental Resident</td>
<td>258</td>
</tr>
<tr>
<td>2nd year Resident and Dental Resident; Junior Psychiatrist-1st year Resident</td>
<td>276</td>
</tr>
<tr>
<td>3rd year Resident; Junior Psychiatrist-2nd year Resident</td>
<td>205</td>
</tr>
<tr>
<td>4th year Resident; Junior Psychiatrist-2nd year Resident</td>
<td>119</td>
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<tr>
<td>5th year Resident</td>
<td>24</td>
</tr>
<tr>
<td>6th year Resident</td>
<td>10</td>
</tr>
</tbody>
</table>

Interns and residents are employees of the Corporation. At the same time, their work is prescribed by and fulfills the requirements of professional training programs approved by the American Medical Association. Interns must be graduates of approved medical schools. Internship is not in New York, as in a number of states, a prerequisite to licensure for medical practice, and a large percentage of the Corporation's interns are so licensed. In any event the internship year generally is regarded as a desirable, if not essential, experience for a beginning physician. While advanced medical school students also receive clinical training, the internship is the medical graduate's first intensive exposure to clinical practice under conditions of professional and legal responsibility.
Completion of an internship is a prerequisite to acceptance in a residency program. The content and duration of such programs must be approved by the American Medical Association. Completion of a residency program ("Board eligibility") is a prerequisite for "Board certification" as a specialist in a particular branch of medicine. While such certification is not a legal or professional requirement for specialty practice, given the present policies of major hospitals on patient-admitting privileges for physicians, board eligibility or Board certification is as a practical matter necessary for such practice in most, if not all, urban areas.

Within the Corporation's hospitals, it appears to be structurally intended that interns work under the direct supervision of first-year residents. Residents are to be supervised by other residents in the year senior to them in their specialty, and there is a chief resident. Ultimate responsibility for patient care and for supervision of interns and residents in each specialty is vested in a chief of service and attending physicians, who normally hold professional rank in the voluntary hospitals and the major medical schools with which the Corporation's hospitals are affiliated or associated. In practice, however, because of the volume of work, the hours worked and especially in emergency wards, interns and residents often handle problems on their own initiative without prior consultation with a "supervisor," and not infrequently without any consultation at all.

Internship and residency programs are intensive educational experiences, in which the medical school graduate pro-
gresses first to proficiency in basic clinical techniques and skills and ultimately to a high level of competence in a specialized field. This training is accomplished primarily through work experience at every level, and substantially supplemented by participation in "grand rounds" and attendance at lectures conducted by more experienced physicians.

Internship and residency programs are extremely demanding both in terms of time and energy. Long hours with frequent nights on-call, often with few opportunities for rest, are the rule. This is in part due to the limited number of house staff officers which the Corporation can accommodate in approved internship and residency programs, in which each participant must be rotated through a large variety of clinical experiences. There is no question that house staff officers in the Corporation's hospitals provide a high level of medical care for patients and that patient care understandably takes precedence over all other of their activities. The patients whom the Corporation's hospitals serve are for the most part from the underprivileged sections of the City, and these hospitals are most often the sole providers of medical service for those communities. Both the quality of and the emphasis upon patient care do not, of course, minimize the role of the programs as training instrumentalities for the production of highly skilled specialists.

Not many years ago house staff officers were essentially regarded as trainees and paid a very small stipend. As late as 1961, interns in the City hospitals were paid $2900 inclusive of living out allowance, and this figure had increased to
only $5430 by 1967. However, the next year saw a substantial rise in house staff salaries, with the salary scale of $5430 to $7330 for intern to sixth year resident replaced by a scale of $9000 to $12,000. Under the most recent CIR contract, for the period October 1, 1969 to September 30, 1970, the following salary scale, inclusive of $1500 annual living-out allowance, was in effect:

<table>
<thead>
<tr>
<th>Position</th>
<th>Salary</th>
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<tbody>
<tr>
<td>Intern, Dental Intern</td>
<td>$10,300</td>
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<tr>
<td>1st year Resident and Dental Resident</td>
<td>11,000</td>
</tr>
<tr>
<td>2nd year Resident and Dental Resident</td>
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</tr>
<tr>
<td>Jr. Psychiatrist-1st year Resident</td>
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</tr>
<tr>
<td>3rd year Resident; Junior Psychiatrist</td>
<td>12,000</td>
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<tr>
<td>2nd year Resident</td>
<td></td>
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<tr>
<td>4th year Resident; Junior Psychiatrist</td>
<td>12,500</td>
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<tr>
<td>3rd year Resident</td>
<td></td>
</tr>
<tr>
<td>5th year Resident</td>
<td>13,000</td>
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<tr>
<td>6th year Resident</td>
<td>13,500</td>
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<td>Chief Resident differential</td>
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The 1969-1970 contract between the CIR and the City, provided, as of January 1, 1970, an annual Welfare Fund contribution of $125 per house staff officer. Interns and residents received three and four weeks' annual vacation, respectively, with the proviso that any vacation could be reduced by one week as required by the "needs of a given service," in which case the affected house staff officer received one additional week's salary. The City also provided fully paid health and hospital insurance and acted as malpractice indemnitor. There was no pension plan for house staff officers.

The CIR Proposals

The CIR contends that interns and residents, collectively, are fully qualified physicians; that they render vital medical
service to the hospitals; that that service is much greater than
the training they receive from their work; and that they should
be granted pay and other benefits accordingly as follows:

1. Effective October 1, 1970, a salary, inclusive of
living out allowance, of $15,000 for interns, and for residents
a salary scale from $17,500 to $25,000 in five equal annual
steps, with a differential of $1500 for chief residents.

2. When any given residency requires a prerequisite
residency in a different specialty, the residency year for
salary purposes be calculated on the basis of cumulative tenure.

3. A $250 annual Welfare Fund contribution per house
staff officer.

4. Reimbursement for tuition upon satisfactory completion
of courses, conferences or workshops approved by the appropri-
ate medical boards of each hospital in cumulative sum not to
exceed $350 per annum for each house staff officer.

5. On-call rooms accommodating not more than two house
staff officers, with hot water, shower and toilet facilities
for each two rooms.

6. Reduction of vacation only in the event "unanticipa-
tible emergency" requires the house staff officer's presence,
with vacation time worked at the requirement of the Corporation
paid for at the same rate as that paid to per session physicians.

7. A salary increase, in the event the consumer price in-
dex for New York City at the end of any contract year exceeds
the index at the end of the preceding contract year by more than
three percent, of a percentage equal to the cost-of-living per-
centage increase above three percent. In its post-hearing brief
the CIR has modified this proposal to require only that its contract be re-openable for negotiation of a cost-of-living clause if the City or the Corporation should grant such a benefit to any other labor organization.

The Corporation's Responses

1. In its post-hearing brief, the Corporation has set forth a salary counterproposal which would in three steps over a thirty-three month period beginning October 1, 1970, establish a salary scale from $12,000 for interns to $16,300, exclusive of chief residency differential, for 6th year residents. The Corporation proposes that for the period October 1, 1970 to September 30, 1971, interns be paid $10,900 and 1st year residents $11,600, with a differential of $500 for each successive residency year, to a maximum of $14,100 for 6th year residents; that for the period October 1, 1971 to September 30, 1972, interns be paid $11,500 and 1st year residents $12,200, with a differential of $600 for each successive residency year to a maximum of $15,200; and that for the period October 1, 1972 to June 30, 1973, interns be paid $12,100 and 1st year residents $12,800 with a differential of $700 for each successive residency year to a maximum of $16,300.

2. The Corporation has not stated a position on the treatment for salary purposes of years spent in a prerequisite residency.

3. The Corporation has proposed a $25 per year increase in its Welfare Fund contribution, to a total of $150, effective October 1, 1971.
4. The Corporation has rejected the CIR's proposal for tuition reimbursement.

5. The Corporation has rejected the CIR's proposal regarding on-call facilities insofar as it would require major renovation. The Corporation has proposed, within the limits of physical space and finances, to make reasonable efforts to upgrade on-call facilities and to give greater attention to the sufficiency of such facilities in any new construction.

6. The Corporation has rejected the CIR's proposal regarding vacations.

7. The Corporation has rejected both the CIR's original and modified proposals for a cost-of-living clause.

Discussion

A. Salaries

We believe that several basic conclusions must be drawn from the voluminous record in this proceeding: First, the interns and residents in the Corporation's hospitals are professional employees who, under taxing conditions, perform services essential to the life and health of millions of residents of the City including particularly those in underprivileged communities, and these facts must be accorded significant weight in setting their salary scale. Second, without in any way detracting from their professional status and service, interns are nevertheless beginning professionals undergoing their first intensive clinical experience, a part of which is recognized training, and there is a wide gap between their skill levels and responsibilities and those of the residents, particularly the senior and chief residents. Third, the
City is beset by an unprecedented financial crisis which is not of its making and which it does not have at present the economic or legal resources to resolve. This financial problem is equally relevant to every new contract settlement with every organization representing City or Corporation employees. Irrespective of the absolute dollar cost of any such settlement, which is a factor of the number of employees involved and the City's share of salary and other benefit costs, principles of fairness and practicability require that the financial plight of the City be taken into account in an even-handed manner. The financial crisis of the City is such that even the correction of demonstrated salary scale inequities may have to be postponed or at least minimized. Fourth, the cost-of-living in New York City, as measured by the Consumer Price Index, has increased appreciably since the last upward adjustment of house staff officers' salaries, and a new contract for house staff officers must at a minimum restore their real income position.

Taking into account all of the foregoing factors, we believe that the following is a fair and reasonable salary scale, inclusive of living out allowance, for house staff officers for the two year period beginning October 1, 1970:

<table>
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<tbody>
<tr>
<td>Intern, Dental Intern</td>
<td>$11,300</td>
<td>$12,300</td>
</tr>
<tr>
<td>1st year Resident and Dental Resident</td>
<td>12,300</td>
<td>13,300</td>
</tr>
<tr>
<td>2nd year Resident and Dental Resident; Junior Psychiatrist-1st year Resident</td>
<td>13,000</td>
<td>14,000</td>
</tr>
<tr>
<td>3rd year Resident; Junior Psychiatrist-2nd year Resident</td>
<td>13,700</td>
<td>14,700</td>
</tr>
<tr>
<td>4th year Resident; Junior Psychiatrist-3rd year Resident</td>
<td>14,400</td>
<td>15,400</td>
</tr>
</tbody>
</table>
This salary scale would increase the intern's salary by $1000 as of October 1, 1970 and another $1000 as of October 1, 1971, and would, retroactive to October 1, 1970, increase the intern-to-first year resident differential from $700 to $1000 and increase the differentials for each other residency year and for chief residency from $500 to $700, except for the sixth year of residency where, because of demonstrated experience, skill and service, we feel there should be, in the second year of the contract, a substantial and further monetary differential totaling $1700 over the fifth year resident. As of October 1, 1971, the resultant salary for the 6th year resident would be $17,800 and if a chief resident, $18,500.

For the intern, the recommended salary scale represents, on the present base, a 9.7 percent increase per year retroactive to October 1, 1970, and more than offsets the 7.4 percent rise in the consumer price index during the period of 1969-1970. Moreover, in establishing as a first step an $11,300 salary for the intern for the period ending September 30, 1971, the recommended scale places the intern generally within the current salary range for comparable beginning professional employees in the City service. The recommended scale also places the current salary of the interns in the Corporation's hospitals above that in all but a few of the voluntary and public hospitals in the New York area that have been called to our attention and would as of October 1, 1971, be matched in only one such hospital. The recommended current salary for interns would also place their salary ahead of the scale in all but one other public or voluntary hospital in the United States that has been called to our attention. While
we wish that our recommended salary for interns in the Corporation's hospitals was exceeded by none, we cannot in good conscience, particularly in the face of the City's prevailing financial crisis, recommend a higher figure.

We believe that the recommended increases covering residents in the differential between internship and residency years, the differentials between residency years and the chief residency differential, are amply supported by the greatly increased skill and responsibility levels of physicians as they progress from medical school graduates to highly competent resident specialists. The Corporation itself has apparently recognized this in offering differential increases in its salary counterproposal. At the 6th year resident level we are, for example, recommending a salary that will be approximately 45 percent greater than the interns' salary as of October of this year, as compared to 31 percent under the most recent contract. Were it not for the present financial crisis we would be inclined to recommend even further improvements at the senior resident levels.

In making the foregoing salary comparisons we are aware of the CIR's objection to use of position titles without supporting evidence to show comparability of duties and working conditions. Normally this objection would be well taken, but it is not persuasive in this case, where the position titles are specifically descriptive of progress through internship and residency programs whose content is prescribed on a uniform, nationwide basis by the American Medical Association. We are also aware of the CIR's objection to comparisons with public or voluntary hospital salaries
established other than by collective bargaining. We are disposed to give greater weight to the results of collective negotiations but we cannot disregard other situations, particularly when they constitute a substantial segment of the whole picture. We note in connection, however, that the salary scales we recommend would for the current period as well as after October 1, of this year, exceed by a substantial degree the scale established pursuant to fact-finding at the Boston City Hospital and would exceed by an even greater degree that established at the Washington, D.C., General Hospital after a work stoppage. Only at Los Angeles County Hospital will collective negotiations have produced a higher scale, and for the reasons we have stated we do not believe that the Corporation and City can reasonably be expected to match the Los Angeles figures.

In making our salary recommendations we have given only small weight to the CIR's suggestion that salaries for house staff officers be set by reference to hours worked by interns and residents and hourly rate-of-pay comparisons with non-professional or part-time professional employees. As professionals in various fields, ourselves, we know that the long hours spent in pursuit of professional competence, particularly in the beginning years of practice, cannot realistically be a measure of professional compensation. We do not mean to suggest, though, that the Corporation has a license to require house staff officers to work or be unreasonably on-call for as many hours at it chooses. We understand that the hours worked by interns and residents reflect the substantive requirements
of their particular training programs and the implication of those requirements for the staffing of services. The matter of the per session physician's rate of pay in the Corporation's hospitals has also been stressed to us. However, per session physicians are only part-time employees and their service takes place entirely outside the context of the internship and residency programs. Moreover, if the per session rate were to be the measure of their salaries, house staff officers would, on a comparable work-time basis, have to be paid at the rate of approximately $56,000 per annum. The CIR has not, however, in its contract proposals or arguments suggested anything like this level of compensation for house staff officers. Under the circumstances we do not believe that the per session rate is a determinative factor in the new salary scale for interns and residents.

We are similarly disinclined to give weight to any suggestion that house staff officers, for salary purposes, be treated akin to industrial apprentices with their compensation levels progressing toward the median salary level of attending physicians in the Corporation's hospitals. In fact, when this suggestion was presented directly to the CIR's very experienced expert witness, he responded negatively.

We believe that the approach we have taken is the sound one. We view house staff officers as valuable public servants who are entitled to a beginning professional salary scale that recognizes their varying levels of skill, experience and supervisory responsibility. In this connection, we can see no
justification, given the valuable and intensive services house staff officers perform, for any "discount" against their compensation to reflect educational costs of the training programs in which they participate. Nor do we believe that we can or should speculate on what would be the cost or other consequences of attempting to substitute for house staff officers some other system of hospital staffing.

If our salary recommendations are accepted, they will entail substantial retroactive salary adjustments. We would in any event wish such adjustments to be made as promptly as possible. Prompt payment of retroactive salary is particularly important in the case of the interns and residents, at least some of whom will complete their programs and leave the Corporation's service at the end of this academic year.

B. Calculation of Residency Years

We discern no justification, and none has been suggested to us, for not including, for salary purposes, time spent by a resident in another, prerequisite residency. Moreover, recognition of such cumulative service is apparently now the practice in at least some Corporation hospitals. Accordingly we recommend that the CIR's proposal on this point be accepted.

C. Welfare Contribution

The City has agreed in its City-wide contract with District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, to increase its welfare contribution for the
great majority of its employees to $175 per annum per employee effective January 1, 1971 and to $250 effective January 1, 1972. No evidence or persuasive argument has been presented to us that the same benefits should not be accorded to house staff officers. Accordingly we recommend the Corporation's welfare fund contribution for each house staff officer be increased to $175 per annum effective January 1, 1971 and to $250 effective January 1, 1972.

D. Tuition Reimbursement

Reimbursement for tuition, to the extent that it is available for any City or Corporation employee, is provided as an incentive to improve work competence and advancement through education in the employee's field. This justification for tuition reimbursement hardly seems applicable to the house staff officer, who as a participant in an internship or residency program is engaged in a rigorous educational program leading to professional certification in the field of the house staff officer's interest and service. We recommend that the CIR's proposal for tuition reimbursement be rejected.

E. On-Call Facilities

The testimony concerning on-call facilities, as well as our own observations of such facilities at one Corporation hospital, convinces us that adequate sleeping quarters and related conveniences often are lacking. On the other hand, the CIR's proposal for limits on room occupancy and the number of
persons using other facilities obviously could not be implemented in many hospitals without dislocation of patients, new construction, or major structural renovation. Given the present financial plight of the City, major construction expenditures for this purpose cannot realistically be recommended. The Corporation, though, has offered to give emphasis in future construction to on-call facilities, and to provide for reasonable refurbishing of existing facilities to the extent that major structural changes and/or large costs are not involved. We think that the Corporation's proposal represents the direction to be taken. Accordingly we recommend that the Corporation agree to take reasonable steps to up-grade on-call facilities to the extent this may be accomplished without new construction, major structural renovation or other large costs. We also recommend that a joint Administration-CIR committee be established at each hospital concerned to develop proposals for implementation of the foregoing recommendations.

F. Vacations

Presently vacations may be reduced to the extent of one week to accommodate the "needs of a given service," with compensation, in addition to vacation pay, at the house staff officer's regular rate for any such vacation time worked. The CIR proposes to permit reduction only in the case of "un-anticipatable emergency" and also to pay for vacation time worked at the per session rate. "Unanticipatable emergency," we understand, would not encompass the difficulty of providing va-
cation period coverage occasioned by the prescribed size of the normal house staff.

We cannot recommend either of these proposals. Given the fact of internship and residency programs, and the varying limitations that they impose on staffing of services, we do not believe it would be fair to the Corporation or the patients to require that a service be covered by part-time employees where the normal staffing pattern of interns and residents would not provide coverage during the vacation period. Moreover, the present vacation arrangements guarantee interns two weeks off and residents three weeks. We also agree with the Corporation that house staff officers should not be paid at the per session rate for work performed within the context of their particular internship and residency programs. Accordingly, we recommend that the CIR's proposals regarding vacations be rejected.

G. Cost of Living

No contract between the City or the Corporation and an employee organization currently contains a cost-of-living escalator. The CIR initially sought such a benefit, but has now modified its original proposal to permit contract reopening for negotiation of such a clause in the event any other employee organization is granted one.

We feel very strongly that sound labor relations are best served by contracts that establish definite terms and conditions of employment for their duration. And we believe that there has been ample demonstration both in the public and pri-
vate sectors of the undesirability of contract clauses that relate benefits for employees covered thereby to benefits that may subsequently be obtained by other groups of employees. We must, on the basis of our knowledge and in good conscience, recommend that the CIR's proposal on cost of living be rejected.

Dated: May 12, 1971

Emanuel Stein

Daniel G. Collins

Eric J. Schmertz

State of New York 
County of New York) SS:

On this twelfth day of May, 1971, before me personally came and appeared Emanuel Stein, Daniel G. Collins and Eric J. Schmertz, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they acknowledged to me that they executed the same.

Notary Public

ERNEST DOERZLER
Notary Public, State of New York
No. 09-6054600
Qualified in Bronx County
Commission expires March 30, 1977
In the Matter of the Arbitration
between
Local 145 Glass Bottle Blowers Association
and
Johns-Manville Products Corporation

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

The grievances of Messrs. Galati and Stevenson are not arbitrable.

Eric J. Schmertz
Arbitrator

DATED: May 1971
STATE OF New York )ss.: COUNTY OF New York)

On this day of May, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between

Local 145 Glass Bottle Blowers Association

and

Johns-Manville Products Corporation

In accordance with Article 20 of the Collective Bargaining Agreement effective March 5, 1970 between Johns-Manville Products Corporation, hereinafter referred to as the "Company," and Local 145 Glass Bottle Blowers Association, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide a dispute relating to the grievances of Messrs. Galati and Stevenson.

A hearing was held in Bellmawr, New Jersey on May 12, 1971 at which time representatives of the Union and Company, hereinafter referred to collectively as the "parties," appeared. The parties expressly waived the Arbitrator's oath.

The threshold question is whether the grievances are arbitrable.

The Company contends that the grievances are not arbitrable because the Union failed to move them from the third step of the grievance procedure to the fourth step within the prescribed time limit. The pertinent contract section reads:

Step 4. If the grievance is not settled in Step 3, the International Representative shall contact and arrange a meeting with the Plant Manager within seven (7) days after completion of Step 3 for the purpose of trying to resolve the issue.

The Union concedes it did not request the fourth step meeting within the seven days referred to above. It explains
that a shortage of international representatives; the illnesses of others and compelling negotiations elsewhere impeded its ability to comply with the seven day limit. It asserts however, that in its contractual relationships with employers generally, such time limits are not rigidly observed.

The amount of time between the completion of the third step and further word from the Union (either the Local or the International) is not disputed. The third step was completed on October 30, 1970; and not until December 2nd, slightly more than one month later, did a representative of the International Union contact the Company's Employment Relations Manager regarding the grievances.

As I see it the sole question is whether the time limits set forth in the various steps of the grievance procedure are mandatory or merely directory. Many cases, in other contractual relationships, have supported the "directory theory," especially where compliance with the time limits, though not precise, has been deemed substantial. But I cannot support that view under this contract and under the instant circumstances. A delay of one month, no matter what the explanation, cannot be deemed as"substantial" compliance with a seven day requirement. Moreover, the language of the grievance procedure, insofar as the time limits are concerned, clearly shows that they were intended to be strictly adhered to and therefore mandatory.

Step 1 of the grievance procedure states in its concluding sentence:
"All prescribed time limits in the subsequent steps of this procedure may be extended by mutual agreement."

That means of course, that absent mutual agreement the time limits may not be extended. Also, if the parties had not intended the time limits to be specifically followed, there would be no need or purpose for a contractual provision allowing for extensions by mutual agreement. Moreover, each time limit within each step of the grievance procedure is prefaced in its execution by the word "shall," which under traditional and customary contractual interpretation means "must." Under the foregoing contract language, as in the other steps of the grievance procedure, the movement of a grievance to the next higher level "shall" be done by the appropriate Union Representative within a set time limit - in the instant case seven days.

It is undisputed that there was no extension of that time limit by mutual agreement. Also, based on the record before me, it is clear that throughout this contractual relationship there has not been a single instance in the processing of any grievance in which the prescribed time limits were unilaterally ignored by one party and acquiesced in by the other; nor indeed has there been even an instance in which the time limits have been extended or waived by mutual agreement. Rather the practice has been strict adherence to each time limit set forth in each step of the grievance procedure.

Accordingly I must find that in negotiating these time limits the parties intended that they be strictly adhered to unless mutually extended or waived. The Arbitrator is bound
by terms of the contract. Therefore, absent any practice or evidence of a waiver or extension of the time limits (and the conversation between the Local Union President and the Plant Manager subsequent to Step 3, is altogether too hazy and inconclusive in this regard to be construed as a waiver or an extension) I must find the Union bound to those time limits as written. Hence the grievances of Messrs. Galati and Stevenson, because they were not processed from the third to the fourth step of the grievance procedure within the required time limit, may not be processed further to the arbitration stage.