AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Federal Labor Union #22703
AFL-CIO

and

Kerr Glass Manufacturing Corporation
Keyport Plant

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated December 7, 1969 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company did not violate the Agreement dated December 7, 1969 by its action of assigning Estelle Anderson a departmental seniority date of November 1, 1962.

Award

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

On this 7th 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. 1330 0256 71
In the Matter of the Arbitration between
Federal Labor Union #22703
AFL-CIO

and
Kerr Glass Manufacturing Corporation
Keyport Plant

In accordance with Section VII of the Collective Bargaining Agreement dated December 7, 1969 between Kerr Glass Manufacturing Corporation, Keyport Plant, hereinafter referred to as the "Company," and Federal Labor Union #22703, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the sole Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the Agreement dated December 7, 1969 by its action of assigning Estelle Anderson a departmental seniority date of November 1, 1962? If so what shall be the remedy?

A hearing was held in Hazlet, New Jersey on September 1, 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 parties expressly waived the contractual tri-partite Board of Arbitration and the Arbitrator's oath.

Prior to March 16, 1967, Mrs. Anderson was a member of the bargaining unit and worked in the Finishing Department. Thereafter, through October 2, 1970 she was in a non-bargaining unit salaried position. On October 3, 1970 she was laid off from
her salaried job, and October 5, 1970 returned to a bargaining unit position, again in the Finishing Department. The Company calculated her department seniority date, for the purpose of her return to the Finishing Department bargaining unit, as of November 1, 1962. The Company contends that it did so properly in accordance with Section VI Paragraph 24 of the Collective Bargaining Agreement.

The Union asserts that Paragraph 24 is not applicable because it covers only plant-wide seniority, not departmental seniority; that in the alternative, if Paragraph 24 is applicable, Mrs. Anderson's seniority rights were totally vitiated thereunder because she spent more than two years out of the bargaining unit. Instead, the Union argues that the applicable contract clause is Paragraph 23 of Section VI, and that under the language of that clause Mrs. Anderson lost her departmental seniority and her right to return to the Finishing Department because she failed to affirmatively choose (i.e. give notice) of her intention to retain her departmental seniority, when she was transferred to the salaried position. In short, it is the Union's argument that Mrs. Anderson could only return to the bargaining unit as a "new hire" when she was laid off from the salaried position; and consequently without any accumulated seniority, she had no right to return to the Finishing Department prior to the recall of others on layoff.

I am unable to accept the Union's contractual theory. Paragraph 23 Section VI is not applicable because, clearly, it relates to transfers between bargaining unit departments. It covers those situations where an employee is transferred from
one job to another in different departments covered by the
Collective Bargaining Agreement; and per force those jobs and
departments are within the bargaining unit. In the instant
case Mrs. Anderson left a bargaining unit job and went to a
non-bargaining unit salaried position not covered by the con-
tract and hence not covered by the language or intent of Par-
agraph 23.

It is equally clear that Paragraph 24 is the appropriate
contract clause covering the movement of employees from the
bargaining unit to non-bargaining unit jobs and back again to
the bargaining unit. It speaks expressly of the situation where
"an employee (is) promoted or transferred from a position with-
in the bargaining unit to a position outside the bargaining
unit, who, thereafter, is returned to a position within the
bargaining unit ..." There can be no serious dispute that that
is the factual situation in the instant case.

Nor can I interpret Paragraph 24 in the manner advanced
by the Union. I am satisfied that Paragraph 24 was intended
to set forth a formula to measure an affected employee's
departmental as well as plant-wide seniority. Neither the
words departmental or plant-wide are used. Instead the pert-
inent language of that clause reads:

The employee shall be credited for seniority pur-
poses.(Emphasis added).

I am persuaded that the word "seniority," as used above,
encompasses both departmental and plant-wide seniority. The
history of Paragraph 24 allows for no other conclusion. In
predecessor contracts Paragraph 24 expressly used the words
departmental and plant-wide in defining the seniority which it established or measured. Both words were dropped from the later version of Paragraph 24, but there is no evidence that either was dropped in favor of the other. For the Union to argue that the present word "seniority" applies only to "plant-wide seniority" is to leave unexplained what happened to the prior inclusion of "departmental" seniority. The only logical answer is that the present wording, which uses the sole word "seniority" was intended to collectively include the previous references to both departmental and plant-wide seniority. In other words, as the paragraph historically and expressly covered both departmental and plant-wide seniority, its later reference to "seniority," absent any evidence of a change in its historical intention, must embody within the single word both types of seniority under the contract.

Finally I cannot agree with the Union that Paragraph 24 should be read to vitiate Mrs. Anderson's departmental seniority because she spent more than two years outside the bargaining unit. It simply does not say that. Rather it sets forth how the seniority of such an employee is to be calculated. And the formula is clear. The employee receives credit for all previous service in the bargaining unit (acquired prior to transfer to the non-bargaining unit job) plus time spent outside the bargaining unit up to a maximum of two years. Obviously then, a period of time outside of the bargaining unit in excess of two years does not cause an affected employee to lose all his seniority. Rather that excess period just may
not be included in calculating the employee's total departmental and plant-wide seniority. In the instant case the Company calculated Mrs. Anderson's seniority correctly in accordance with the formula set forth in Paragraph 24. It gave her credit for her previous service in the bargaining unit plus only two years of service outside of the bargaining unit; (though she spent more than two years in the non-salaried position.) Her seniority date of November 1, 1962 was reached in this manner and is therefore contractually accurate and sustained.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Was there just cause for the discharge of Moe Solotoff? If not what shall be the remedy?

A hearing was held at the American Arbitration Association on June 15, 1971 at which time Mr. Solotoff, 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 Company charges the grievant with "dishonesty in employment" within the meaning of Section V of the contract. It contends that an automobile which the grievant serviced needed, among other things, new points and a condenser; that the grievant reported the need for this repair; that he drew new points and a condenser from the stock room; that he certified on the work sheet that he installed the new points and condenser; but that in fact he did not install them though the customer was charged for that work and the grievant paid for doing it. Obviously if this is sustained the test of just cause for discharge would be met.

As in many similar matters an answer to the stipulated issue
narrow to a matter of credibility. If, as the Company asserts, the grievant offered conflicting explanations at the time the Company discovered continuing trouble with the automobile in question, his story in the arbitration hearing simply cannot be believed. Specifically, the Company contends that upon the failure of the automobile to run properly after repair, and when confronted by the results of a Company investigation showing either the original points and condenser were left in the car or had been replaced by a type not used by the Company, the grievant replied "nobody changes condensers here," and then first stated that he installed points and a condenser obtained from his tool box because those he drew from the parts department were defective; but later (the next morning) claimed he had in fact installed the very points and condenser which he drew from the parts department. The latter position is the one he maintained at the arbitration hearing, and which he says he maintained throughout the investigation.

Clearly, to uphold the Company's assertion is to find that the grievant's inconsistent statements constitute a fatal admission against interest, because there could be no logical conclusion other than that he sought to hide the real facts.

The quantity of the evidence, namely the testimony of three Company witnesses, support the Company's version of what the grievant said at the point of investigation. Only the grievant testified on his own behalf contrary-wise. The question therefore is whether the quantity of the Company's case is sufficiently credible and thus convincing up to the standard required in
discharge cases. I conclude it is.

I find no believable basis in the record to support a conclusion that the three Company witnesses deliberately falsified their testimony. Though the Union suggests that one of them testified maliciously because of some incident regarding a carburetor (unrelated to the facts in the instant dispute) that suggestion is much too vague to support a claim of either bias or malicious falsification; and even if used to discount that testimony it in no way diminishes the corroborating testimony of the other two.

Significantly and finally, any real doubt on the question of credibility must be resolved presumptively in favor of the Company because of the grievant's prior record at two prior employers. Though prior similar offenses do not in and of themselves prove a subsequent similar charge, an employee's employment history, especially where he has had similar past difficulties, is highly relevant in determining sharp issues of credibility. This is well settled both in the courts and in arbitration. The grievant concedes that he was disciplined by two prior employers for offenses similar to the Company's charge in the instant case.

The Union argues that for the grievant to have committed that type of offense again would be senseless because a small amount of monetary value was involved. Yet, because many offenses or misconducts are objectively senseless - yet committed - the senselessness or irrationality of an act of misconduct is simply not a convincing ground upon which to judge that the offense did not take place.
If the grievant did not commit the offense herein charged merely because it was "senseless" he would not have engaged in similar senseless acts at previous places of employment - yet he did, by his own admission.

The totality of the evidence, the consistent testimony of the three Company witnesses as to what the grievant said at or shortly after the time of the incident, viewed against the backdrop of the grievant's conceded similar difficulties at two prior places of employment, lead me to resolve the pivotal question of credibility in favor of the Company.

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

There was just cause for the discharge of Moe Solotoff. The reason for his discharge does not entitle him to five days notice under Section V of the contract.

Eric J. Schmertz
Arbitrator

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

On this 22nd 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.

Case No. 1330 0436 71
In the Matter of the Arbitration between

Motion Picture Laboratory Technicians Union, Local 702 Welfare Fund; Motion Picture Laboratory Technicians Union, Local 702 Pension Fund

and

Manchester Laboratories, Inc.

The Undersigned as Permanent Arbitrator under the Agreement between the above named parties, and having duly heard the proofs and allegations of the above named Funds; and the above named Employer having failed to appear at the hearing after due notice, makes the following AWARD:

For the period February through September, 1971
Manchester Laboratories, Inc. owes the above named Pension Fund the sum of $11,251.79.

For the period May through September 1971 Manchester Laboratories, Inc. owes the above named Welfare Fund the sum of $3519.84.

These sums are past due. Therefore Manchester Laboratories, Inc. is directed to pay said sums to the respective Funds with interest forthwith.

Manchester Laboratories shall also reimburse the Funds jointly in the amount of $150.00 representing the Arbitrator's fee for services.

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

On this 1st 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.
PERMANENT ARBITRATOR, MOTION PICTURE FILM LABORATORIES INDUSTRY

In the Matter of the Arbitration between:

Motion Picture Laboratory Technicians Union, Local 702 Welfare Fund; Motion Picture Laboratory Technicians Union, Local 702 Pension Fund

and

Manchester Laboratories, Inc.

The Undersigned as Permanent Arbitrator under the Agreement between the above named parties, and having duly heard the proofs and allegations of the above named Funds; and the above named Employer having failed to appear at the hearing after due notice, makes the following AWARDS:

For the period February through September, 1971 Manchester Laboratories, Inc. owes the above named Pension Fund the sum of $11,251.79.

For the period May through September 1971 Manchester Laboratories, Inc. owes the above named Welfare Fund the sum of $3519.84.

These sums are past due. Therefore Manchester Laboratories, Inc. is directed to pay said sums to the respective Funds with interest forthwith.

Manchester Laboratories shall also reimburse the Funds jointly in the amount of $150.00 representing the Arbitrator's fee for services.

Signature
Eric J. Schmertz
Permanent Arbitrator

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

On this 1st 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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

National Union of Hospital and Nursing Home Employees Division of RWDSU, Local 1199-E, AFL-CIO

and

Maryland General Hospital

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 1, 1970 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

There was just cause for the discharge of Hilda Spence.

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

National Union of Hospital and Nursing Home Employees Division of RWDSU, Local 1199-E, AFL-CIO

and

Maryland General Hospital

In accordance with Article 13 of the Collective Bargaining Agreement dated January 1, 1970 between Maryland General Hospital, hereinafter referred to as the "Hospital," and the National Union of Hospital and Nursing Home Employees Division of RWDSU Local 1199-E, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

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

A hearing was held in Baltimore, Maryland on July 22, 1971 at which time Mrs. Spence, hereinafter referred to as the "grievant," and representatives of the Union and Hospital, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The grievant, a Nursing Aide, was discharged on April 5, 1971 because of a record of excessive absenteeism. She received warnings about that record on September 4, 1966, July 2, 1967, July 19 and December 17, 1970, and a Reprimand on February 22, 1971.
The excessive nature of the grievant's absentee record is not disputed by the Union and hence need not be recited in detail. Instead the Union asserts that the penalty of discharge was too severe. It advances what it considers to be certain mitigating circumstances, together with a contention that the Hospital erred procedurally in imposing the penalty of discharge.

By way of mitigation, the grievant and the Union on her behalf contend that the record of absenteeism during 1970 and until April, 1971 were due to circumstances beyond the grievant's fault or control, namely because of certain medical problems in general and other physical conditions resulting from an automobile accident. Also it argues that because the grievant's attendance record improved during the year 1969, when she received no warning notices, the prior years of 1966, 1967 and 1968 should not be held against her. And therefore her attendance record should not have been deemed cumulatively unsatisfactory. Procedurally, the Union points to the fact that the Hospital gave the grievant a Reprimand on February 22, 1971 after the warning of December 17, 1970 when that warning expressly stated: "This is the final warning. The next offense will mean termination." The Union asserts that the Hospital failed to do what it said it would do following the warning of December 17, 1970; that to reprimand the grievant rather than discharge her when her attendance record did not improve, constituted a waiver of the Hospital's right to impose the penalty of discharge thereafter.

Certain rules are so well settled that they hardly need
to be repeated here. One is that excessive absenteeism, regardless of the reason, is grounds for disciplinary action. And, where that record of absenteeism persists following lesser disciplinary penalties, the offending employee may be discharged even if his absences are due to conditions or circumstances beyond his fault or control. Though there may be illogical aspects to those rules (namely the imposition of rehabilitative disciplinary measures under circumstances where the employee is unable to improve because of illness or physical disabilities beyond his control) the rules are nonetheless universally accepted, simply because an employer, to effectively operate his business or institution, has the right to expect prompt and regular attendance from his employees. Clearly, this is true in a hospital where absenteeism may have a bearing on patient care and imposes additional burdens not only on the employer, but on other employees who must take up the slack.

Accordingly, in the application of this well recognized rule, the grievant's poor attendance record during the last year and a half of her employment even if due to medical and physical conditions beyond her fault and control, cannot be excused by the Arbitrator. It is for the Hospital, not the Arbitrator, to decide whether those circumstances may be considered in mitigation, and in this case the Hospital has chosen not to do so.

I am unable to conclude that the grievant's improved attendance record during 1969 vitiates either her poor record between 1966 and 1968 or her subsequent unsatisfactory record of 1970-
1971. The contract does not provide for the removal of warning notices after passage of a subsequent satisfactory period. More important however, the consecutive years 1966 through 1968 are not sufficiently far removed from her poor attendance record of 1970 and 1971 to render the former immaterial. On the contrary, considering the proximity of the years involved, it is logical to conclude that 1969 was an exception to her general pattern of poor attendance (represented by the years 1966 through 1968 and again in 1970 and 1971). And considering the extent of her absenteeism during the latter year and a half, and the acknowledged reasons which appear in large part to be chronic in nature without any real indication of improvement (i.e. her allergic rashes and periodic leg and back disabilities), I cannot find unreasonable the Hospital's conclusion that the grievant's attendance record would continue unsatisfactory.

Hence, though no doubt she is entitled to commendation for improving her record during 1969, and I am sure she made a sincere effort to do so, I cannot accept the Union's argument that her improved record in that single year should be weighed so much in her favor as to overturn the discharge following a resumption, for almost a year and a half of her pattern of poor attendance.

Nor can I find anything about the Hospital's procedure in this case to be fatal to the propriety of the discharge. The Employee Handbook, promulgated by the Hospital and admittedly disseminated amongst the employees including the grievant, sets forth the Official Rules of Conduct for Employees of Maryland
General Hospital, none of which the Union protested as unfair and unreasonable. The Rules expressly provide that "chronic or habitual absenteeism" is "cause for suspension and/or discharge." Here the Hospital followed a reasonable rule of "progressive discipline" by warning the grievant four times and reprimanding her once before imposing the penalty of discharge. Obviously the Hospital did not act precipitously. It accorded the grievant notices that her attendance record was unsatisfactory and gave her ample opportunity to improve, if she could, before terminating her. That the Hospital did not suspend her before discharge cannot be construed as an error because the undisputed rules provide for suspension or discharge in the alternative. The latter need not be preceded by the former in a chain of disciplinary penalties.

Finally I do not see how an issuance of the Reprimand in February, 1971, after a "final warning" in December, 1970 can be deemed prejudicial to the Hospital's case. Irrespective of whether or not internal Hospital procedures (set forth in the Supervisor's Manual) prescribe the issuance of a Reprimand after a final warning, as a more severe penalty, the Reprimand did nothing more than again notify the grievant that her attendance record had not improved; that the Hospital continued to view it as unsatisfactory; and to give her a short reprieve - indeed some gratuitous additional time to do better. I am not persuaded that by doing so the Hospital either lost, waived, or abandoned its right to imposing the final penalty of discharge if her attendance record failed to improve. Therefore, when thereafter
she continued to absent herself from work beyond a reasonable number of times, the Hospital properly imposed the penalty of discharge.

Arbitrator

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

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

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of certain Members

The Undersigned as Impartial Chairman between the above
named parties and having duly heard the proofs and allegations
of said parties, makes the following AWARDS:

The grievance of Isidore Cook against Sandan Manage-
ment Corp. was settled during the hearings. Mr. Cook
was paid the sum of $101.55 for 8 days lost, based on
average earnings. His discharge is expunged from his
employment record. He is not at any time to return
to the employ of this Company. This represents full
settlement of Mr. Cook's grievances under the Collect-
ive Bargaining Agreement but has no bearing on any
pending court litigation between Mr. Cook and the Com-
pany, its personnel either corporate or individually.

The grievance of James DiBlasi against Dover Garage
for pro rata vacation pay for 1969-1970 is denied.
I do not find that Mr. DiBlasi was subjected to har-
asment within the meaning of Article XII Section 3
of the Collective Bargaining Agreement.

The grievance of Al Sysler against Cordi Garage is
granted. I hold that the private agreement entered
into on December 2, 1969 between the Company and Mr.
Sysler in which he agreed to return to work "as a
new driver" and "waived all rights and benefits from
previous employment" is unenforceable. It is well
settled that private agreements between the employers
and individual employees, which are inconsistent with
or waive rights under the Collective Bargaining Agree-
ment, are invalid, unless expressly affirmed or agreed
to by the Union or a Union representative with author-
ity to negotiate contractual changes or exceptions.
Otherwise the terms of the Collective Bargaining Agree-
ment affecting the covered employees are preeminent. In
this case I do not find that the written statement of
December 2, 1969 met the test of validity. Therefore
when Mr. Sysler returned to work on December 4, 1969
he retained and resumed all rights which he had previous-

The discharge of Morris Chemick by Ike Garage is reduced to a disciplinary suspension. I am not persuaded that the unusual numbers of time that Mr. Chemick pulled in to the garage before the prescribed quitting time was due to an illness so severe as to make it either impossible or injurious to him to stay out the full shift. I have previously held that except for offenses warranting immediate dismissal, the Employers of this Industry should follow the traditional rule of progressive discipline - namely warning, suspension and then discharge if the improper conduct continues. Here the grievant was warned but not suspended. His earlier suspension, in a different job classification, for an entirely different offense, and which predated the warning for "pulling in early," cannot be deemed as a suspension within the meaning of the progressive discipline rule. Therefore Mr. Chemick shall be reinstated but without back pay and the period between the discharge and his reinstatement shall be deemed a disciplinary suspension.

The grievances of Harry Blitzer against Ike Garage and Fabian A. Benitez against Checker Garage were withdrawn.

Eric J. Schmertz
Impartial Chairman

DATED: November 1, 1971
STATE OF New York SS.
COUNTY OF New York

On this 1st 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.
In the Matter of the Arbitration between
Trustees, Taxicab Industry Pension Fund;
Trustees, Taxicab Industry Health & Welfare Fund

and
Essex Maintenance Corp;
Jaycee Service Corp;
Meter Operating Corp.

The Undersigned, as Impartial Chairman under the collective Bargaining Agreement between the above named parties and having duly heard the proofs and allegations of the parties at hearings attended by representatives of the above named Funds and each above named Employer, renders the following AWARD:

For the period November 1, 1970 through February 28, 1971, Essex Maintenance Corp. owes the Taxicab Industry Pension Fund the sum of $6262.21.

For the period November 1, 1970 through February 28, 1971 Essex Maintenance Corp. owes the Taxicab Industry Health & Welfare Fund the sum of $14,611.84.

The above sums owed are past due. Accordingly Essex Maintenance Corp. is directed to pay the above sums to said Funds forthwith with interest.

For the period November 1, 1970 through March 1, 1971 Jaycee Service Corp. owes the Taxicab Industry Pension Fund the sum of $6214.47.

For the period November 1, 1970 through March 1, 1971 Jaycee Service Corp. owes the Taxicab Industry Health & Welfare Fund the sum of $14,500.43.

The above sums are past due. Accordingly Jaycee Service Corp. is directed to pay the above sums to said Funds forthwith with interest.
For the period December 1, 1970 through February 28, 1971 Meter Operating Corp. owes the Taxicab Industry Pension Fund the sum of $3396.50.

For the period December 1, 1970 through February 28, 1971 Meter Operating Corp. owes the Taxicab Industry Health & Welfare Fund the sum of $7925.15.

The above sums are past due. Accordingly Meter Operating Corp. is directed to pay the above sums to said Funds forthwith with interest.

Eric J. Schmertz
Impartial Chairman

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

and

Mobile Transit System, Inc.

The Undersigned, as Impartial Chairman under the Collective Bargaining Agreement between the above named parties and having duly heard the proofs and allegations of the parties at a hearing on September 13, 1971 at which representatives of the parties appeared, makes the following Award:

For the month of February, 1971 Mobile Transit System, Inc. owes the Taxicab Industry Pension Fund the sum of $1,243.77.

For the month of February, 1971 Mobile Transit System, Inc. owes the Taxicab Industry Health & Welfare Fund the sum of $2,950.28

For March 1, 1971 Mobile Transit System, Inc. owes the Taxicab Industry Pension Fund the sum of $42.00

For March 1, 1971 Mobile Transit System, Inc. owes the Taxicab Industry Health & Welfare Fund the sum of $98.00.

Mobile Transit System, Inc. has failed to make the above payments which are past due. Therefore Mobile Transit System, Inc. is directed to make said payments in the amounts set forth above, to said Funds forthwith with interest.

Eric J. Schmertz
Impartial Chairman
DATED: September 17, 1971  
STATE OF New York ) ss.:
COUNTY OF New York)  

On this 17 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.
In accordance with Article XIII of the Collective Bargaining Agreement dated February 1, 1970 between Local 8-3660, Oil, Chemical and Atomic Workers International Union, hereinafter referred to as the "Union" and National Lead Company, Titanium Pigment Division, hereinafter referred to as the "Company", the Undersigned was selected as the sole arbitrator to hear and decide the following stipulated issue:

What shall be the disposition of Grievance No. 70-77 dated October 18, 1970?

A hearing was held at the Company plant on April 15, 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 parties waived the Arbitrator's oath and the contract provision for a tri-partite Board of Arbitration. The parties filed post-hearing briefs.

I do not reach the merits of the grievance. Rather, based on the record before me I am compelled to conclude that
the Union agreed to and accepted the plan which later gave rise to the grievance, both before and during its implementation by the Company, and that therefore the Union waived any substantive rights it may have had to subsequently complain.

Specifically, it is clear and uncontroverted that the Company discussed its plans to combine certain jobs and the proposed resultant manning with the Union at several meetings before the plan was put into effect; that the Union at those meetings suggested changes and written explanations, with which the Company complied; that the detailed manner of application of the plans to affected employees was jointly worked out; and following implementation, specific Union objections including its demand that the manning crew in a particular department be increased as the condition for "settlement of the problem," were all agreed to and undertaken by the Company.

In short, by any traditional standard, the Company's action was not unilaterally promulgated, but rather bilaterally negotiated with the Union, with considerations given each to the other for acceptance. No other logical conclusion is possible from the unrefuted testimony of Company witnesses on pages 64 thru 90 of the transcript of the hearing.

It is immaterial that subsequent to the implementation of the program, the Union grieved and did not withdraw its grievance. That procedural step in no way restored the Union's right to substantive relief. For in agreeing to the Company's
program (as revised by Union demands), the Union abandoned any right it may have had to later complain when what was agreed upon was put into effect.

Accordingly the Undersigned Arbitrator, having duly heard the proofs and allegations of the parties, makes the following AWARD.

Grievance No. 70-77 dated October 18, 1970 is denied.

DATED: July 7, 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.
In the Matter of the Arbitration between

New Rochelle Teachers Association

and

New Rochelle Board of Education

CASE NUMBER: 1339-0760-71

AWARD OF ARBITRATOR

The undersigned Arbitrator(s), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 1, 1970, and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The School District violated the contract by not making sabbatical leave appointments for the 1971-1972 school year. The District shall forthwith promulgate the sabbatical list, notify the eligible teachers involved and grant them their sabbatical leaves of absence pursuant to Article X, Section 28 of the contract.

DATED: June 25, 1971
STATE OF NEW YORK
COUNTY OF NEW YORK

SS.:
The stipulated issue is:

Has the School District violated the contract by not making sabbatical appointments for the 1971-1972 school year? If so what shall be the remedy?

A hearing was held at the New Rochelle City Hall on June 24, 1971 at which time representatives of the above named parties, hereafter referred to respectively as the "Federation" and the "District", appeared, and were afforded full opportunity to offer evidence and argument to examine and cross-examine witnesses. The Arbitrator's oath was expressly waived.

I find that on its face the critical language of Article X, Section B8 of the contract is ambiguous. It is subject, with equal logic, to the sharply different interpretations advanced by the District and the Federation. It can be construed as placing the granting of sabbatical leaves within the discretionary authority of the District. If so, Title D, Section 1, Article V of the Civil Service Law is applicable and preeminent, and the leaves would be prohibited. But it can be
interpreted just as persuasively to mandatorily require the District to grant sabbaticals, or at least those of the type involved herein, to the teachers eligible under the conditions set forth. If so there is then an enforceable contract right to sabbatical leaves which was in existence prior to the effective date of the amended Civil Service Law, and that Law (i.e. Title D, Section 1, Article V), by its own terms is inapplicable, and the sabbaticals must be granted.

The pertinent part of the first paragraph of Section B8, upon which the District relies, reads:

"Sabbatical leaves may be granted to tenured teachers upon the recommendation of the Superintendent subject to the following conditions and limitations" (underscoring supplied).

Traditionally the word "may" is permissive and the sentence therefore could support the District's claim of discretionary authority regarding sabbaticals. But that sentence does not stand alone. A later introductory sentence to sabbatical leaves of Types 1, 2 and 3 uses the mandatory word "shall", reading:

"Sabbatical leaves shall be granted on the following basis" (underscoring supplied).

The first quoted sentence above can be interpreted to apply to all that follows thereafter, or in other words only if the District decides to grant sabbaticals must the contractual provisions that follow under Section B8 be mandatorily adhered to in determining which teachers are eligible.
Such an interpretation is of course supportive of the District's position in this case.

On the other hand a different interpretation is equally sound in my judgement. Sabbaticals of Types 1, 2 and 3 may be deemed as mandatory if the stipulated conditions are met, by virtue of their introductory sentence that they "shall be granted". The Type 4 sabbatical, by the terms of its own contract paragraph is undisputedly within the discretion of the Superintendent (an express discretionary authority not found in the paragraphs covering Types 1, 2 and 3). If the first sentence of Section B8, which uses the word "may" is designed to cover all four types of sabbaticals and sets up the conditions of sub-paragraphs a, and b. as threshold requirements for all four sabbaticals, it is then apparent why the word "may" was used. For in order to encompass the mix of four types of sabbaticals, three of which are mandatory (Types 1, 2 and 3), and one of which is discretionary with the District (Type 4), only a permissive introductory word could be used. What is controlling therefore is the later and more specific contract language, which mandates sabbaticals of Types 1, 2 and 3, and places discretion in the hands of the Superintendent only with regard to Type 4. As there are no Type 4 applicants involved in this case, this latter interpretation favors the Federation's claim that the sabbaticals sought are an enforceable contract right.
The well settled approach in such a circumstance is for the Arbitrator to look to past practice and to what took place at negotiations to determine what the parties intended the contract language to mean.

Without exception the practice each year of the contractual relationship (for the last seven years up to the instant dispute) has been to grant sabbatical leaves. Four years ago when, as this year, the District faced a comparable financial crisis, it laid off a substantial number of tenured and probationary teachers but yet granted sabbaticals. I conclude that by not curtailing or denying sabbaticals then, when such a step was an obvious method of saving money, and when the contract language of the disputed clause was even more favorable to the District's present position, the District must have considered the sabbatical program to be a contract obligation, rather than discretionary.

Also in the negotiations of the present contract it is the uncontroverted testimony of the Federation that the critical language was called to the District's attention; that the Federation expressly stated that it deemed the language to be mandatory provided the eligibility conditions were met; and that the District representative answered in a manner that reasonably led the Federation to believe that while the District did not wish to change the language, it recognized and agreed with the Federation's interpretation.

In short, by practice and express discussion at negotiations I am constrained to resolve the ambiguity in favor of the Federation's interpretation. Therefore the disputed sabbatical
leaves involved in the instant case are an enforceable contract right to which the eligible teachers are contractually entitled.

Bound by the terms of the contract, the Arbitrator has no authority to excuse the District from that obligation, no matter how meritorious the District's case on its budget crisis may be, and no matter how sympathetic with that problem this Arbitrator may be.

Accordingly the District shall forthwith promulgate the sabbatical list; notify the eligible teachers involved and grant them their sabbatical leaves of absence pursuant to Article X, Section B8 of the contract.
In the Matter of the Arbitration between
Newark Morning Ledger Co.
and
Newark Printing Pressmen's Union
Local #8

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 discharges of Gerald Abramson and David West on the night shift commencing April 7, 1971 are sustained.

Eric J. Schmertz
Arbitrator

DATED: August 24, 1971
STATE OF New York )\ss.
COUNTY OF New York)

On this 24th day of August, 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
Newark Morning Ledger Co. and
Newark Printing Pressmen's Union Local #8

The stipulated issue is:
Whether or not the discharges of Gerald Abramson and David West on the night shift commencing April 7, 1971 should be sustained?

Hearings were held at the offices of the Publisher on April 8 and May 6, 1971 at which time Messrs. Abramson and West, hereinafter referred to as the "grievants," and representatives of the above named Publisher and Union, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived, and the parties filed post hearing briefs.

After a thorough review of the entire record before me I am satisfied that my decision can be rendered without an elaborate Opinion.

There is no question that on the night shift involved, the grievants consciously disregarded and declined to carry out the new instructions and orders of the acting foreman relating to the "button man" work assignment and the procedure for his periodic relief. Instead the grievants performed the work and relief in the same manner as on previous nights, contrary to the instructions of the acting foreman on the night involved. It is conceded that the acting foreman's new in-
structions and orders were effectively communicated to the grievants and to the Union prior to the grievants' failure and declination to comply.

Unless the grievants can be excused on the basis of either or both of the defenses raised on their behalf, the Publisher would be correct in its characterization of this case as a "garden variety case of insubordination..." in violation of the Pressroom Office Rules; and the discharges would be justified.

The grievants and the Union on their behalf rely on two defenses, namely that they had the right to disregard and decline to carry out the acting foreman's new instructions because of (1) the "status quo" clause of the contract and (2) because compliance with those orders and instructions would jeopardize their health (a well settled exception to insubordination).

During my now expired tenure as Impartial Chairman under the contract between the parties, I repeatedly stated in official rulings and Awards in prior cases that employees are required to comply with orders and instructions of supervision; to perform the work assigned; and thereafter to use the grievance and arbitration procedures of the contract if the propriety of those orders, instructions and assignments are challenged. Those rulings and Awards were consistent not only with general well established principles of industrial relations, but with the specific Pressroom Office Rules which I previously held to be reasonable, valid and effectively disseminated amongst the employees and the Union, and binding on them. So at the outset
of the shift on the night of April 7, the Union and the grievants knew or should have known the views of this Impartial Chairman regarding the primacy of the foreman's orders and the effectiveness of the Office Rules. The introductory paragraph of those Rules states that "the orders and instructions of foreman and assistant foreman shall be obeyed at all times," and Rule #21 reads "Insubordination is cause for immediate dismissal."

I call attention to the significant fact that reliance on the "status quo" clause was not among the Union's defenses in those prior cases in which my rulings and Awards on this point were made. Objections or disagreements by the Union with those rulings and Awards were not then or since based on the contractual "status quo" provision.

In my view, considering all that transpired during my tenure as Impartial Chairman, and particularly the circumstances of the cases and the positions of the parties in connection with my prior rulings and Awards, I deem it too late for the Union to now attempt to rely on an interpretation of the "status quo" clause which, if adopted, would totally negate those prior rulings and decisions. I was then and remain convinced of the contractual correctness of those rulings and Awards. Irrespective of how the "status quo" clause might be interpreted in a situation of "novel impression" I must conclude that with regard to the duty of an employee to comply with the orders of the foreman, subject to the right to thereafter grieve, my prior rulings and Awards set the course of conduct the parties were to follow and are therefore preeminent, at least through this case.
And even if there be disagreement with this latter conclusion, the legitimacy of that disagreement is laid to rest by the results of top level discussions between the parties at Bal Harbor, Florida, prior to the final execution of the current agreement of the contract. I am persuaded that at that meeting the authorized representatives of the parties agreed that the orders of the foreman would be carried out despite disputes or disagreements over their propriety, leaving any challenge to the grievance and arbitration provisions of the contract. The Bal Harbor meeting dealt especially with this point. The reasons for doing so were not academic. Historically the parties had had difficulties regarding the procedures to be followed when employees and supervision disagreed on the propriety of an order, instruction or work assignment promulgated by the foreman or acting foreman. Work stoppages, discharges and other disciplinary action grew out of this basic dispute, and the Bal Harbor meeting was particularly designed to work out an acceptable understanding. The evidence shows that the Publisher obtained the Union's agreement to a procedure and course of conduct consistent with the Publisher's position in this case, and consistent with my prior rulings and Awards. Therefore even assuming some merit to a disagreement with my view that on this question my prior rulings and Awards are preemptive, the Bal Harbor conference achieved the same result. In short, irrespective of any interpretation of the "status quo" clause, by agreeing to comply with the orders of supervision subject to a subsequent grievance, the Union effect-
ively waived any right it may have had to invoke the "status quo" clause as a defence to a charge of insubordination, and accepted the prior rulings and Awards on this subject.

Appropriately and therefore fortunately (because of the expiration of my term as Impartial Chairman) I need not, in a "lame duck" capacity, interpret the "status quo" clause under the facts in this case. Consequently and again appropriately and fortunately neither the parties nor the new Impartial Chairman will be "burdened" by any such ruling which might have a prospective effect. Properly I leave the interpretation of the "status quo" clause to my successor if and when a case involving that issue arises before him.

Remaining is the Union's second defense - that the grievants had the right to disregard the orders and instructions because to carry them out would have seriously jeopardized their health. The Union has not proved its case on this point. The only medical testimony in the record is that of a physician who testified in support of the Publisher's contention that the paper dust in the "button" area was not injurious to the health of the button operator. Though inconclusive in many respects, his testimony was neither so frail nor impeached as to support the Union's claim that the paper dust was a health hazard. Important however, is that the Union's "health case" is based on a contention that paper dust is injurious cumulatively over a period of years. Assuming arguendo the accuracy of that contention, I do not find it determinative under the instant set of facts. The question here is not whether either or both of the grievants would have been exposed to the paper dust for an
extended number of years or even months or weeks. Rather it is simply whether exposure on the night in question was immediately injurious to their health. Frankly I doubt that exposure on a single night or even over a series of nights during which a grievance could have been expeditiously processed and an arbitration Award promptly rendered if necessary, would constitute an immediate health hazard within the meaning of the exception to the rule on insubordination. Obviously I make no judgment on whether exposure over a series of years is injurious to an employee's health. I find that no matter what that answer be, exposure on the night involved or over the short period required to test the merits of the situation in the grievance procedure was not proved to be a condition injurious to their health.

Accordingly, absent acceptance of either defense advanced by the Union the grievants' conscious failure to carry out and respond to the express orders and instructions communicated to them by their acting foreman regarding the handling of the "button man" work assignment on the night shift of April 7, 1971 was a contract and work rule violation carrying a proper penalty of discharge.

Eric J. Schmertz
Arbitrator
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration between

Local 812 Soft Drink Workers Union, IBT.

and

Pepsi-Cola Metropolitan Bottling Company, Inc.

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

1. Ivanhoe Gadpaille shall be paid for April 23 and April 24, 1971.

2. The discharge of Joseph H. Yates was proper.

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

On this third 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. A71-1163
In accordance with Article 10 of the Collective Bargaining Agreement dated June 1, 1968 between Pepsi-Cola Metropolitan Bottling Company, Inc., hereinafter referred to as the "Company," and Local 812 Soft Drink Workers Union, IBT., hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issues:

1. Is Ivanhoe Gadpaille entitled to pay for April 23 and April 24, 1971?

2. Was Joseph H. Yates properly discharged under the terms of the contract? If not, what shall be the remedy?

A hearing was held at the offices of the New York State Board of Mediation on August 25, 1971 at which time Messrs. Gadpaille and Yates, hereinafter referred to as the "grievant(s)" and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

Grievance of Ivanhoe Gadpaille

The grievant was denied the opportunity to work on April 23 and April 24, 1971 because he failed to "clear through the Com-
pany's medical department" when he returned to work at the beginning of his shift at 5 P.M. on April 23 following two days out of work due to an injury.

The Company contends that on April 21 when the grievant left work because of the injury he was told by his foreman "to be sure to see the Company nurse before he returned to work," and that this requirement is a well established Company rule, well known to the employees.

The grievant denies any knowledge of any such rule prior to his attempt to return to work on April 23. He disputes the foreman's statement that he was told to see the Company nurse before reporting back to work. He states that the first he learned of any such requirement was shortly before 5 P.M. on April 23 when he was asked by his foreman if he had been authorized to return to work by the Company's medical office. He then went to that office, but because it was at or shortly after 5 P.M., it was closed. As that was Friday evening the next opportunity to see the Company nurse was not until April 26, which he did; following which he returned to work.

It is conceded that the Company's rule requiring a visit to its nurse or medical department before returning to work under the circumstance in the instant case has never been promulgated in writing, posted or disseminated in written form amongst the employees. It seems to me that such a rule, with such import, especially when it may deprive an employee of the chance to return to work after recovery from an injury sustained in the plant, should be in written form and posted or otherwise distributed to the employees.
This case is a good example of why that should have been done. A written and well disseminated rule leaves no doubt as to its existence and hence no question as to its applicability. Had the Company done so, there would be no question in my mind that the grievant knew or should have known of it and he and the Union would have been bound, because such a rule in my judgment is substantively reasonable.

But because the rule was not promulgated in writing, nor posted, nor communicated in written form to the employees, I cannot conclude, in view of the sharply conflicting testimony, that the grievant knew of it or should have known of it. Even if his foreman did tell him on April 21 to "see the nurse" before returning to work, the foreman did not make it clear that his return to work was conditional on the visit to the nurse. Also the Company's testimony that it has told other employees similarly situated to clear through the medical department before reporting back on the job, suggests to me that the Company's policy in this regard is neither well established nor well known by the employees. For if it was, such statements each time would be redundant and unnecessary. Again it points up the manner by which a well disseminated written rule eliminates both uncertainty and the need for oral reminder whenever an applicable situation arises.

Accordingly I find that the Company has not met its burden of showing the well established and well known nature of the rule upon which it relies. Failing to promulgate that rule in the traditional manner, (i.e. in writing,) leaves significant doubt as to whether the grievant knew of it or was told about
it prior to April 23; and I give him the benefit of that doubt.

Therefore the Company is directed to pay the grievant at his regular rate of pay for April 23 and April 24, 1971.

Grievance of Joseph H. Yates

Contrasted with the foregoing grievance this issue involves, in part at least, a Company rule which was promulgated in writing and posted in the plant. That rule reads:

Any employee who has to leave the premises for any reason must report to his supervisor and request his permission.

The evidence discloses that the grievant breached this rule. On May 12, 1971, without permission and during a break period, the grievant left the Company plant and went to a nearby fire house admittedly to report what he considered to be a fire violation in the plant. Also, earlier during his shift and during his regular working time, instead of returning to his work place as directed by a management representative, he went to the security office, used a Company phone and called the police emergency No. 911 and requested an ambulance. Subsequently, a police car and ambulance came to the plant in response to that call.

Frankly I am unable to accept the grievant's explanation for these actions. He states that he did these things because he needed immediate medical attention and was denied medical assistance by the Company. Neither the facts surrounding this case nor the past practices of the Company support the grievant's charge.

It is undisputed that the grievant has frequently requested medical attention of the Company and often asked to be taken
to a hospital in the Company's station wagon. On no occasion was his request denied. Therefore I consider it unbelievable that on May 12 the same Company representatives who previously accorded him medical attention denied a similar request. The grievant testified that during the early evening of May 12 he fell and hit his head; and thought he was seriously injured. (He testified that he thought his head was "split open"). He stated that he appealed to Supervisor Graham for medical assistance. Graham denies any such request by the grievant, asserting that the grievant only complained that a fire door was blocked by some pallets. It seems to me that had the grievant been as injured as he claimed it would have been apparent to Graham. Under that circumstance, whether or not the grievant expressly asked for medical aid, I believe Graham would have provided assistance as he and other representatives had done in the past. And logically he would have especially done so if the grievant had in fact requested aid. Therefore I must conclude that the grievant was neither so injured as to be in obvious need of medical attention, nor did he request medical assistance.

The frailty of the grievant's contention that he was injured and in need of medical treatment is further evidenced by his trip to the fire department. Had he been seriously or even noticeably injured I doubt he would have been physically able to go to and from the fire house as quickly as he claims. Also it is well known that fire houses have emergency medical equipment or are able to obtain emergency medical attention as needed. Had the grievant been noticeably injured or had he been legitimately interested in obtaining medical treatment, it would have
been provided him or he could have obtained it at the fire house. But he did not. He admits that he went to the fire house not for medical attention which he claims he so desperately needed, but solely to report that a fire door at the plant was blocked. In short that sole intention is totally inconsistent with his claim that he was in need of emergency medical attention and that his acts were solely designed to get medical aid. And therefore that claim lacks credibility.

Considering the entire record before me I have no choice but to conclude that the grievant disregarded instructions to return to work; left the Company premises without permission; called the police and summoned an ambulance, all for the purpose of embarrassing the Company and disrupting its normal operations. I find that the grievant's acts not only violated the above stated rule, but were retaliatory in nature; apparently an outgrowth of what appears to be an unexplained hostility towards the Company. I find these acts to be manifestly inconsistent with a normal and expected employment relationship and contrary to an employee's normal duty to orderly redress complaints against his employer through the grievance and arbitration provisions of the contract or in other adjudicatory forums. The grievant's acts were unnecessary and possibly vengeful and therefore a termination of that employment relationship is justified.

Accordingly the grievant's discharge was proper under the terms of the contract.

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

The Public Utility Construction and Gas Appliance Workers of the State of New Jersey, Local 274, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO, and the Public Utility Gas Manufacturing Workers of the State of New Jersey, Local 450, United Association of Journeymen and apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

and

Public Service Electric and Gas Company

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement effective May 2, 1967 between Public Service Electric and Gas Company, Gas Production Department Central Division and Hudson Division, hereinafter referred to as the "Company," and the Public Utility Construction and Gas Appliance Workers of the State of New Jersey, Local 274, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO, and the Public Utility Gas Manufacturing Workers of the State of New Jersey, Local 450, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, hereinafter referred to as the "Unions," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:
Under Article V Section 1 of the contract between the Company and Local 450 and Article VI Section 1 of the contract between the Company and Local 274 should Independence Day, 1970 have been observed as a holiday on Friday, July 3, 1970, or Saturday July 4, 1970? If the latter to what remedy are the affected employees entitled?

A hearing was held at the Company offices in Newark, New Jersey on November 18, 1970 at which time representatives of the Unions and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. Post hearing briefs were filed.

The pertinent contract clause is the same in both contracts. It reads:

The following days shall be recognized as holidays:

.............. (f) Independence Day
..............
(or the days on which they are publicly observed).

Particularly significant, in my judgment, is the ending phrase:

"or the days on which they are publicly observed."

Clearly, this means that the parties contemplated the possibility that during the contract any of the enumerated holidays might be publicly celebrated on a day different from its traditional calendar date. Equally foreseeable was the fact that a change in the public celebration of a holiday could be brought about only by proclamation of an official or group, authoritative in the public sector. This of course includes the Governor of the State of New Jersey.

I am persuaded that Governor Cahill's Executive Orders
numbered 6 and 7 declaring Friday, July 3, 1970 as the date for the observance of Independence Day for State employees and as a bank holiday, constituted a public observance of Independence Day, 1970 within the meaning of Article V and Article VI Sections 1 of the respective contracts involved herein.

Accordingly the Unions' grievance is denied. I make the following AWARD:

The observance of Independence Day, 1970 on Friday, July 3, 1970 was proper under Article V Section 1 of the contract between the Company and Local 450 and Article VI Section 1 of the contract between the Company and Local 274.

DATED: January 11, 1971
STATE OF New York )
SS.
COUNTY OF New York)

On this 11th day of January, 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

Motion Picture Laboratory Technicians Union, Local 702 Welfare Fund; Motion Picture Laboratory Technicians Union, Local 702 Pension Fund

and

Radiant Laboratories, Incorporated

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

For the period July through September 1971 Radiant Laboratories owes the above named Pension Fund the sum of $4932.10.

For the period June through September 1971 Radiant Laboratories owes the above named Welfare Fund the sum of $3222.93.

These sums are past due. Therefore Radiant Laboratories is directed to pay said sums to the respective Funds forthwith.

Radiant Laboratories shall also reimburse the Funds jointly in the amount of $150.00 representing the Arbitrator's fee for services.

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

On this 1st 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.
In the matter of the Arbitration between

Motion Picture Laboratory Technicians Union, Local 702 Welfare Fund; Motion Picture Laboratory Technicians Union, Local 702 Pension Fund

and

Radiant Laboratories, Incorporated

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

For the period July through September 1971 Radiant Laboratories owes the above named Pension Fund the sum of $4932.10.

For the period June through September 1971 Radiant Laboratories owes the above named Welfare Fund the sum of $3222.93.

These sums are past due. Therefore Radiant Laboratories is directed to pay said sums to the respective Funds forthwith.

Radiant Laboratories shall also reimburse the Funds jointly in the amount of $150.00 representing the Arbitrator’s fee for services.

AWARD

Erie J. Schmertz
Permanent Arbitrator

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

On this 1st day of November, 1971, before me personally came and appeared Erie 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
Transport Workers of Philadelphia
and
Southeastern Pennsylvania Transportation Authority

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

The claim of Mrs. Mary A. Lewis for a disability pension under Section 705 of the contract is denied.

February 22, 1971

Eric J. Schmertz
Chairman

February 1971

Arthur W. Wilkens
Concurring

February 1971

Earl Kidd
Dissenting

1430 0153 70 M
In the Matter of the Arbitration between
Transport Workers of Philadelphia
and
Southeastern Pennsylvania Transportation Authority

The dispute involves the claim of Mrs. Mary A. Lewis for a disability pension under Section 705 of the Collective Bargaining Agreement.

As I see it two conditions characterize an employee who is permanently incapacitated within the meaning of Section 705 of the contract. First he suffers from a medical disability (either physical or mental) of a chronic, continuing and permanent nature; and second, because of that disability he is unable to perform or attend to his job with the Company on a minimal basis of skill and regularity.

The best evidence of the first condition is medical testimony and supporting medical documentation. But the best evidence of the second circumstance is not necessarily the view of an attending physician, who is not familiar with the details and requirements of the job involved, but rather the affected employee's record of attendance and performance on that job.

Both sets of evidence are present in the instant case. Based thereon I am persuaded that the grievant was not only permanently disabled at the time of her discharge, but also on and before that time was permanently incapacitated within the meaning of that phrase in Section 705 of the contract.
But because these two conditions pre-dated the minimum of 15 years of service as required by Section 705; plus the undisputed fact that the Company has and may terminate permanently incapacitated employees before they have reached 15 years of service, the grievant is not eligible for a disability pension.

The record reveals, both in the form of medical documentation and through testimony of her personal physician, that as early as October 1964 the grievant suffered from physical disabilities of a "permanent" nature. The remaining question simply is whether so disabled, she was or was not permanently incapacitated from employment with the Company.

I am persuaded that her sparse attendance; indeed virtually non-attendance to her assigned job over an extended period of time prior to her termination; including the period of time immediately prior to her dismissal after she was given a "last chance" to do simple "tripper work," is attributable to her physical disability. And that because that disability was permanent in nature, her inability to attend to her assigned jobs on a regular basis meant that she was permanently incapacitated from doing so.

To be eligible for disability pension under Section 705 of the contract an employee must be both permanently incapacitated and have achieved at least 15 years of service. The grievant met the first qualification but not the second and is therefore not eligible.

Eric J. Schmertz
Chairman
In the Matter of the Arbitration
between
Local 445 IUE, AFL-CIO

and
Sperry Gyroscope Division and
Sperry Systems Management Division of
Sperry Rand Corporation

The stipulated issue is:

What was the agreed upon grievance settlement
which the Arbitrator directed the parties to
comply with in his Award of August 16, 1971?

A hearing was held at the Company offices on October 25,
1971 at which time representatives of the above named parties
appeared and were afforded full opportunity to offer evidence
and argument and to examine and cross examine witnesses. The
Arbitrator's oath was expressly waived.

I find that initially the Company attempted to confine
the Union's grievance to four publication typists in the Gyro
Department. However, I find that the Union made it clear to
the Company that its grievance covered publication typists in
three Departments, namely Gyro, Systems and the Training School.
I find that thereafter the agreement reached between authorized
representatives of the Union and Company covered those publica-
tion typists in all three Departments which the Union claimed
were performing bargaining unit work. I find that the publica-
tion typists to which the Union was then referring were all
but a few publication typists then employed.

So that there is no further indefiniteness it is my rul-
ing that the agreement reached between the parties in settle-
ment of the Union's grievance was sufficiently broad to include
the present eleven publication typists who are not now in the
bargaining unit.

Accordingly I make the following AWARD:

The agreed upon grievance settlement which the
Arbitrator directed the parties to comply with in
his Award of August 16, 1971 covered all but a few
of the non-bargaining unit publication typists in
the Gyro, Systems, and Training School Departments
which the Union in April of 1970 claimed were per-
forming bargaining unit work. I rule that the
agreement was sufficiently broad to cover the
eleven publication typists who at present are not
in the bargaining unit.

Eric J. Schmertz
Arbitrator

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

On this 1st 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 fore-
going instrument and he acknowledged to me that he executed the
same.
In the Matter of the Arbitration between

Local 445 IUE, AFL-CIO

and

Sperry Gyroscope Division and Sperry Systems Management Division of Sperry Rand Corporation

The stipulated issue is:

What was the agreed upon grievance settlement which the Arbitrator directed the parties to comply with in his Award of August 16, 1971?

A hearing was held at the Company offices on October 25, 1971 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived.

I find that initially the Company attempted to confine the Union's grievance to four publication typists in the Gyro Department. However, I find that the Union made it clear to the Company that its grievance covered publication typists in three Departments, namely Gyro, Systems and the Training School. I find that thereafter the agreement reached between authorized representatives of the Union and Company covered those publication typists in all three Departments which the Union claimed were performing bargaining unit work. I find that the publication typists to which the Union was then referring were all but a few publication typists then employed.

So that there is no further indefiniteness it is my ruling that the agreement reached between the parties in settlement of the Union's grievance was sufficiently broad to include
the present eleven publication typists who are not now in the bargaining unit.

Accordingly I make the following AWARD:

The agreed upon grievance settlement which the Arbitrator directed the parties to comply with in his Award of August 16, 1971 covered all but a few of the non-bargaining unit publication typists in the Gyro, Systems, and Training School Departments which the Union in April of 1970 claimed were performing bargaining unit work. I rule that the agreement was sufficiently broad to cover the eleven publication typists who at present are not in the bargaining unit.

Eric J. Schmertz
Arbitrator

DATED: November 1, 1971
STATE OF New York )as:
COUNTY OF New York)

On this 1st 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.
In the Matter of the Arbitration between
Local 445 IUE, AFL-CIO and Sperry Gyroscope Division and Sperry Systems Management Division of Sperry Rand Corporation

Award

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

The Company's failure to implement an agreed upon grievance settlement violates the contract. Therefore the Company violated the contract by assigning the disputed work to non-bargaining unit publications typists. The Company shall either cease and desist from making such assignments or place the non-bargaining unit employees assigned to that work in the bargaining unit.

DATED:
STATE OF New York
COUNTY OF

On this /6/ day of August, 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 445 IUE, AFL-CIO

and

Sperry Gyroscope Division and
Sperry Systems Management Division of
Sperry Rand Corporation

In accordance with the Arbitration provisions of the Collective Bargaining Agreement between Sperry Gyroscope Division and Sperry Systems Management Division of Sperry Rand Corporation, hereinafter referred to as the "Company," and Local 445 IUE, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Has the Company violated the contract by assigning the disputed work to non-bargaining unit publica-
tions typists?

If so, it is stipulated that the Company will either cease and desist from making such assignments, or place the non-bargaining unit employees assigned to that work in the bargaining unit.

A hearing was held at the Company offices on June 11, 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 Arbitrator's oath was expressly waived. The parties filed post hearing briefs and the hearings were declared closed as of July 16, 1971.

I do not reach the merits of the issue because I am persuaded that the dispute was substantively settled between the
parties by representatives with authority to do so, prior to
the most recent contract negotiations. I find the terms of
that settlement coincide with the relief the Union seeks in
this arbitration.

I do not find that that settlement was conditional or
contingent upon the completion of full contract negotiations;
nor was it subject to ratification by or during those negotia-
tions. Instead, the authorized representatives of the parties
agreed on the terms of the settlement leaving only mere formal-
ization (presumably in writing) to the time when the contract
negotiations were to take place. That the act of formalizing
what had previously been agreed to did not take place, does
not, in my judgment, vitiate the settlement. I find nothing in
the contract requiring grievance settlements to be in writing;
nor, absent any specific contract requirement, do I know of
any rule which requires a grievance settlement to be reduced
to writing before it becomes binding on the parties. On the
contrary, though a written settlement agreement is better evi-
dence when the parties are in dispute over whether an agree-
ment was reached, it is not a required condition of a settle-
ment. And here the Union's testimony regarding the understand-
ing reached by authorized representatives of the parties con-
cerning the terms of the grievance settlement stands unrefuted
by the Company.

For the Company not to implement a grievance settlement,
either by failing to formalize what had been unconditionally
agreed to, or by failing to put the substantive terms of the
settlement into effect, is violative of the intent of the grievance procedure of the contract.

Accordingly the Company shall either cease and desist from assigning the disputed work to non-bargaining unit publications typists or place those non-bargaining unit employees assigned to that work in the bargaining unit.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Local 8-438, Oil, Chemical and Atomic Workers International Union, and E. R. Squibb & Sons, Inc.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated November 19, 1969 and having duly heard the proofs and allegations of the Parties, Awards as follows:

Level 13 laboratory technicians in classifications presently covered by the Agreement between the parties dated 1970-1973 headed "Laboratory Training Program" are not entitled to 15¢ an hour increase effective October 1, 1969 under the Collective Bargaining Agreement. Their grievance is denied.

Dated: August 2, 1971
State of New York )
County of New York)

On this 2nd day of August, 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 10 70
In the Matter of the Arbitration
between
Local 8-438, Oil, Chemical and
Atomic Workers International Union,
AFL-CIO
and
E. R. Squibb & Sons, Inc.

In accordance with Article VIII Section 3 Step 4 of the Collective Bargaining Agreement dated November 19, 1969 between E. R. Squibb & Sons, Inc., hereinafter referred to as the "Company," and Local 8-438, Oil, Chemical and Atomic Workers International Union, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Are the Level 13 laboratory technicians in classifications presently covered by the agreement between the parties, dated 1970-1973, headed "Laboratory Training Program," entitled to 15¢ an hour increase effective October 1, 1969 under the Collective Bargaining Agreement.

A hearing was held in New Brunswick, New Jersey on June 10, 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 parties expressly waived the Arbitrator's oath. The hearings were declared closed upon receipt of the stenographic record.

As I see it the question is not whether the laboratory technicians are skilled tradesmen in the general occupational sense, but rather whether those classifications are "skilled trades" within the meaning of Section 13 of the Memorandum of
Agreement entered into in November, 1969. That Section reads:

**Skilled Trades**

Effective October 1, 1969 employees in skilled trades and their apprentice classifications will receive a 15c per hour trades differential.

I answer the contractual question in favor of the Company. The pertinent documents including the Memorandum of Agreement of November, 1969, the current Collective Bargaining Agreement, and the Laboratory Training Program dated 1970-1973 persuade me that the laboratory technicians in the classifications involved are not among the "skilled trades" covered by the foregoing provision.

There is no dispute that as of October 1, 1969 the laboratory technicians were not, under any circumstance, covered by Section 13 of the Memorandum of November, 1969. They had not, by that date, completed the training program referred to in the stipulated issue. Following the Union's theory that they acquired the prescribed skill upon completion of that program, they had not yet qualified. For that very reason it is also undisputed that the laboratory technicians were not deemed skilled trades under the predecessor Collective Bargaining Agreements between the parties.

Nor, even under the Union's theory could they be considered as part of the skilled trades at the time the current contract was negotiated. That contract, like the Memorandum of Agreement referred to above, was negotiated and effective (as of November 19, 1969) four months before the first laboratory technician graduated from the training program (in March, 1970).
The issue therefore narrows to whether it was intended by the parties that subsequently, after the affected laboratory technicians completed their training program, they would fall and be covered by Section 13 of the November, 1969 Memorandum of Agreement. I find no such intent. It is stipulated that the training program was well under way when the current Collective Agreement was negotiated. Indeed, Article X Section 12 of the contract makes express reference to the specific type of training program involved herein. Therefore the parties knew that sometime following the negotiation of the contract, laboratory technicians would complete that training program. It seems to me that had they intended the technicians to receive a 15¢ an hour wage increase upon completion of the training program, some such provision would have been incorporated in the new three year Collective Bargaining Agreement. But no such provision was negotiated. On the contrary, the rate structure for the Level 13 technicians is specifically set forth in Exhibit "A" of the contract, and there is no modification or exception for completion of the training program which was then in progress. Significantly Article X of the contract expressly states that the classifications, descriptions and rate ranges "shall remain unchanged for the duration of this Agreement."

Hence, as the contract makes no provision for an increase of 15¢ an hour in the pay of the laboratory technician upon completion of the training program, the Level 13 rate structure for those classifications as set forth in Exhibit "A" must
have been meant to remain unchanged throughout the term of the contract, as mandated by the foregoing quoted section of Article X.

On the other hand the contract does indicate how Section 13 of the Memorandum of Agreement of November, 1969 was to be applied. The rate structure identifies those classifications within the skilled trades to whom the 15¢ an hour differential attaches. Specifically they are the maintenance trades classifications, so identified within Exhibit "A". The laboratory technicians involved in this case are not among them.

Also Section VIII (Wage and Training Time Structure) of the Laboratory Training Program (1970-1973) sharply disputes the Union's theory. It seems to me that if the laboratory technicians were to enjoy the 15¢ an hour wage increase as a "skilled trade" upon completion of the Laboratory Training Program, the terms of that program would either so provide, or at least would be silent on the wage the technician was then to receive. But Section VIII sets up a specific hourly rate of pay and a rate structure applicable to "all classifications" covered by the training program .... "upon successful completion of laboratory training program time." That language speaks for itself. And as to the grievants in this case, those rates coincide with the Level 13 Rate Structure set forth in the current contract. Also as in the contract, the rates of pay delineated in the Laboratory Training Program and applicable upon successful completion of that program, do not include any provision for or even reference to a 15¢ an hour trades differential.
The Department of Labor diplomas, certificates, and other documents relating to the "skill" which the laboratory technician gains following completion of the Laboratory Training Program relate, in my judgment, to what I said at the outset was not the question in this case - namely the general occupational skill of the classifications involved. However, these documents are not germane to the contractual question at issue.

For all the foregoing reasons I hold that the Level 13 laboratory technicians involved in the instant case did not become a "skilled trade" within the meaning of the contract upon completion of the Laboratory Training Program; and accordingly their claim for a 15¢ an hour trades differential wage increase is denied.

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

Local 2352, American Federation of Government Employees, AFL-CIO

and

U. S. Army Watervliet Arsenal

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named Parties and dated June 24, 1970 and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The grievance of Mr. Louie Andersen dated April 29, 1970 is not arbitrable.

Eric J. Schmertz
Arbitrator

DATED: May 19, 1971
STATE OF New York ) ss.:
COUNTY OF New York)

On this 19 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 2352, American Federation of Government Employees, AFL-CIO

and

U.S. Army Watervliet Arsenal

In accordance with Chapter VI Section E, Sub-Section (2) of the Agreement dated June 24, 1970 between U.S. Army Watervliet Arsenal, hereinafter referred to as the "Employer" and Local 2352, American Federation of Government Employees, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Is the grievance of Mr. Louie Andersen dated April 29, 1970 arbitrable?

A hearing was held at the offices of the Employer in Watervliet, New York on March 24, 1971 at which time Mr. Andersen, hereinafter referred to as the "grievant," and representatives of the Union and Employer, hereinafter referred to collectively as the "parties," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. Post hearing briefs were filed and the hearings declared closed as of April 27, 1971.

On first, but superficial impression, the grievance would appear to be arbitrable. The grievance protests the manner in which the Employer handled certain Suggestions filed by the
I, the undersigned, wish to file a grievance against the rejection of Suggestions #67-010-1230 and 67-005-1228 for the following reasons:

1. The above suggestions were adopted and used.
2. Watervliet Arsenal Route Sheets, DWG. E683927 and E679829 were changed to incorporate the basic concept of my suggestions.
3. Several changes reflected increased working time whereas in the areas covered by my suggestions there has been a reduction in working time estimate.
4. The alterations made on R.S. E679829 reflect neither the actual time used nor the method of operation. The exception being Lathe V/S shaper.
5. Operation #100 with regard to the old method was the prime reason that additional time was needed to machine the first 175MM Navy Cannon.
6. If the new R.S is followed (E679829) additional time has been lost since operation 90 and 60 should have been done on one set up to be followed by operation #70.
7. The estimated time of 100 hours stated for Operation #90 is also in error since it takes only 16 hours for each set (I.D. & O.D.) or a total of 32 hours.
8. In the reevaluation and second rejection of my suggestion it was thoroughly explained that my process created a condition that might generate a rejection report of major significance. However, it is an undeniable/indisputable fact that this same unacceptable suggestion was incorporated into the revised route sheet. This in turn confirms my belief that these rejections were made on a personal basis rather than the validity of the suggestions.

(Signed) Mr. Louie Andersen 72-01512

Clearly by title and substance Army Regulation AR 672-20 meets the definition of "any regulations, policies or procedures issued by higher headquarters" within the meaning of Type I Section (C) of the grievance procedure of the contract. The pertinent parts of that Section read:
Section C Applicability
(a) This procedure shall extend only to an employee's dissatisfaction over specific instances of the application and interpretation of the Agreement and situations considered Type I, II or III grievance under CPR E-2 including dissatisfactions.

1. Type I - Over specific instances of the interpretation or application of any regulations, policies or procedures issued by higher headquarters.

There can be no doubt that the grievance represents a dissatisfaction with the application of a regulation issued by higher headquarters. On that basis, irrespective of the merits of the claims raised in the grievance, the grievance would appear to be procedurally arbitrable.

Also sub-Paragraph (b) of Section C sets forth certain enumerated exclusions from the Type I, II and III grievances, which may not be grieved under the contract. And that list does not include any reference to grievances arising from the Suggestion or Incentive Award Plan.

However, none of the foregoing takes into account the express provisions of Article 4 Section C sub-Paragraph (a) of the contract which reads:

Section C Controlling Directives
a. In the administration of all matters covered by the Agreement, officials and employees are governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and Department of Army Regulations (including authoritative interpretations and rulings from government organizations that exercise control over the EMPLOYER) which may be applicable, and the Agreement shall at all times be applied subject to such laws, regulations and policies.
I am satisfied that the immediate foregoing contract section by its specific application to the "administration of all matters covered by the Agreement ..." (emphasis added) overrides any contract provision which may be construed to the contrary and preempts any provision of the contract which may be inconsistent with "any existing or future laws and regulations including policies set forth in the Federal Personnel Manual and Department of Army Regulations ...." In short under the negotiated language of Article 4 Section C (a), policies set forth in the Federal Personnel Manual shall obtain, any different or contrary provisions of the Agreement notwithstanding.

Applicable to the instant dispute is part 771 of the Federal Personnel Manual, and specifically Section 771.302 (Grievance Coverage). The pertinent part of that Section reads:

(a) Except as provided in paragraphs (b) and (c) of this section, this sub-part applies to any matter of concern or dissatisfaction to an employee which is subject to the control of agency management.

(b) This subject does not apply to:

6. Nonadoption of a suggestion or disapproval of quality salary increases, performance award, or other kind of honorary or discretionary award; (underscoring supplied).

Thus, Section 771.302 of the Federal Personnel Manual excludes from grievance coverage, nonadoption of a suggestion. And Article 4 Section C (a) of the Agreement endows the Federal Personnel Manual with preemptive authority over "all matters governed by the Agreement." In my judgment the instant grievance which protests the "rejection of Suggestions Nos. 67-010-1230 and 67-005-1228" is a complaint over "nonadoption" within the meaning of Section 771.302 of the Federal Personnel
Manual, because obviously, it protests the failure of the Employer to adopt the suggestions and to accord credit for them in a manner satisfactory to the grievant.

The Union contends that the foregoing interpretation of Section 771.302 (b (6) is negated by Section 771.311 which prohibits a negotiated grievance procedure from including only those matters set forth in (1 through 3) of Section 771.302; and that because the "nonadoption of a suggestion" is found in #(6), the Federal Personnel Manual does not oust such disputes from arbitration under the contractual grievance procedure. I do not read Section 771.311 (c) that way. Rather I interpret it to mean that the Employer and the Union are prohibited from including any express provision in a negotiated grievance procedure which makes grievable or arbitrable the matters set forth in 1 through 3 of Section 771.302 but are permitted to explicitly include the other enumerated items. In other words, the other enumerated items of Section 771.302 including item (6) (Nonadoption of a suggestion), may be grievable or arbitrable if the negotiated grievance procedure provides, by express language or reference, for their inclusion. But inclusion cannot be implied or inferred, for an express prohibition can only be negated or changed by express language setting forth the inclusion. Under the Agreement between the parties hereto, there is no express provision which includes grievances arising from the Suggestion or Incentive Award Plan within the grievance or arbitration procedures. Had the parties negotiated such a specific reference, such action would have
been permitted under Section 771.311 (c) of the Personnel Manual. But absent such contractual inclusion, the express provisions of Section 771.302 (b), especially the exclusion of disputes over "nonadoption of suggestions" remain binding on the parties, and therefore exclusions from the grievance procedure are not limited to Section C (b).

In short, under Section 771.311 (c) the Union and the Employer may specifically provide for coverage under negotiated grievance and arbitration provisions of those excluded items of Section 771.302 (b) except items 1 through 3. But absent a clear and express inclusion within a negotiated grievance procedure including item (6), the prohibitions of Section 771.302 remain. Under the instant Agreement which does not contain an explicit inclusion of item #6, I find those prohibitions still in force, as required by the application of Article 4 Section C (a) of the Agreement.

Accordingly I must conclude that the grievance is not arbitrable.

The disposition of the issue before me does not require that I determine what alternative remedies if any, the grievant may have, nor the substantive effect of his receipt of a monetary award in connection with his suggestions. Therefore, my decision on the question of arbitrability is without prejudice to the rights of the Employer, the grievant and/or the Union in some other forum or on appeal under the appeal provisions of the Incentive Awards and Suggestion Plan.

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

Chemicals & Crafts Union, Inc.

and

Union Carbide Corporation,
Chemicals & Plastics Operations
Division

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

L. The Company has not established that Ralph Montrey is physically unable to perform his job duties. Therefore the termination of Ralph Montrey on February 10, 1971 was improper. Mr. Montrey shall be reinstated to his job as Maintenance Mechanic in Building No. 105.

2. Mr. Montrey is denied back pay.

Eric J. Schmertz
Chairman

John J. Dacey
Concurring in No. 1 above
Dissenting from No. 2 above

Brian Murray
Dissenting from No. 1 above
Concurring in No. 2 above
DATED: July 1971
STATE OF New York )
COUNTY OF New York) ss.

On this 1st 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. 71 A/7331
In the Matter of the Arbitration
between
Chemicals & Crafts Union, Inc.
and
Union Carbide Corporation,
Chemicals & Plastics Operations
Division

Opinion of Chairman

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

Did the Company violate the Contract when it terminated Ralph Montrey on February 10, 1971? If so, what shall be the remedy?

Messrs. John J. Dacey and Brian Murray served respectively as the Union and Company Arbitrators on the Board of Arbitration.

A hearing was held in New Brunswick, New Jersey, on June 28, 1971, at which time Mr. Montrey, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties waived the Arbitrators' oath and filed post hearing briefs. The Board of Arbitration met in executive session on July 16, 1971.

Based on a Workmen's Compensation case between the griev-
cision of the Compensation Judge and a subsequent analysis of that case by the Company's physician and supervisory personnel, the Company decided that the grievant was physically unable to perform his duties as a Maintenance Mechanic. The Workmen's Compensation hearing took place on September 24, October 15 and November 5, 1970. The decision of the Compensation Judge was rendered on November 6, 1970. The grievant was disqualified from employment and terminated on February 10, 1971.

To come right to the point - I am not satisfied that standing alone, this Workmen's Compensation case is determinative of the grievant's physical ability to perform his duties as a Maintenance Mechanic in Building No.105, where he worked prior to termination. Something more is necessary - a connection between the disability determined by the Workmen's Compensation Board and the grievant's performance on the job; or a connection as to how the conditions of the job affect the disability. It is these connections which the Company failed to make in this arbitration. Specifically in my judgment, this Workmen's Compensation decision is persuasive in support of the Company's decision only if the Company is able to demonstrate that the grievant has been performing his job duties inadequately or unsatisfactorily because of the disability; or that the job conditions involved have aggravated or would potentially aggravate his disability. If the former is shown, the grievant's termination would be proper because of a demonstrated inability to perform his job duties. His termination would also be proper if the latter circumstance was shown because to continue him on the
job would unreasonably risk his physical well being and place
the Company in a position of unwarranted liability. But nei-
er of these essential circumstances are shown by the Workmen's
Compensation decision. The decision is limited to a finding of
a pulminary disability of 45%, occupationally connected. It
does not determine whether or not the grievant, with that dis-
ability, is physically capable of performing the job duties
from which he was terminated. In short, a Workmen's Compensa-
tion decision of disability is not a fortiori, a finding that
the employee is unable to continue at work.

The best evidence is how the employee has been performing
his job, and the job duties as they relate to his particular
disability. The record before me discloses that since the
grievant's transfer in February, 1967, from Building No.41
(a "dirty" building where chemical fumes are highly prevalent)
to Building No.105 (the second "cleanest" building of the Com-
pany's installation), the grievant has performed all the duties
assigned to him as a Maintenance Mechanic without complaint by
or about him. In other words though he suffered from a pulmin-
ary disability, that disability did not impede his satisfactory
performance of work assigned to him. What limitations were
placed on his assignments (such as to overtime, lifting and ex-
posure to fumes) were voluntarily accorded him by the Company
as early as 1967, and as thus accepted by the Company, cannot
now be pointed to as evidence of his inability to work. Though
the Company decided as a result of the Workmen's Compensation
proceeding, that the grievant could not tolerate the heavy
lifting and climbing of stairs attendant to the Maintenance
Mechanic's duties, the hard evidence is to the contrary. For the last four years, during which the grievant suffered from the pulmonary disability, he has done that work apparently to the Company's satisfaction. So, though the Workmen's Compensation case disclosed a significant pulmonary disability, occupationally incurred, the Company has not adduced evidence in this arbitration showing that because of that disability, the grievant has been unable to perform his job duties.

Also, the Company concluded, based again on the Workmen's Compensation case, that the grievant should no longer be exposed to chemical fumes, gases and other dust and dirt.

As previously indicated that judgment would be sound if the level of fumes, gases and dirt, etc. had or would potentially aggravate or compound the grievant's disability. But the record does not disclose either that circumstance or potentiality. Building No. 105 is relatively free of the offending fumes and gases. Medical evidence in the record before me indicates that during the grievant's four years of work in Building No.105 his pulmonary condition had at least stabilized if not improved. This means that the level of fumes and gases to which he was exposed as well as the other working conditions were not of sufficient intensity or quantity to aggravate his disability; nor after the passage of four years can it be said that the potential for aggravation is reasonably present.

The Company relies heavily on the grievant's testimony at the Workmen's Compensation hearing in which he expressed certain difficulties in performing his job as Maintenance Mechanic in Building No.105 - (specifically "extreme shortness of breath")
when climbing stairs or lifting heavy objects) as an admission against interest with regard to his physical ability to perform his job. Again, such testimony at a Workmen's Compensation hearing, when juxtaposed with four years of satisfactory work performance, including climbing of stairs and the handling of some heavy work, cannot, absent other proof, be interpreted as fatal to the grievant's case in arbitration. Frankly, when compared with his testimony in this arbitration, it is my conclusion that what the grievant said at the Workmen's Compensation hearing was exaggerated if not misleading. If so, the Company's remedy was to impeach that testimony at that hearing with evidence of the grievant's job performance, or to appeal the Compensation decision. But termination solely because of exaggerated or misleading testimony at the Workmen's Compensation hearing, albeit reprehensible, is not the appropriate penalty, simply because, absent other evidence supporting the Company's contentions, it is not sufficient proof that the grievant is physically unable to perform his job duties.

In some respect, however, the Workmen's compensation hearing and decision is relevant to this arbitration. Because the decision appears to establish a pulmonary disability of 45% either incurred or aggravated by the grievant's work in Building No.41 prior to February, 1967, it establishes the fact, at least in my judgment, that the grievant is disqualified from again working in Building No.41 or any other building with a comparable level of chemical fumes, gases, dust and dirt. In this regard there is no doubt that had the grievant been still employed in Building No.41 or a comparable building when the
Workmen's Compensation decision was rendered, the Company action in terminating him would have been proper. Clearly, based on that decision, the conditions in Building No. 41 had something to do with the grievant's disability. And it would be reasonable to conclude that continued exposure to the conditions in that building would aggravate his disability, and unreasonably increase the Company's further insurance liability. For, aside from the grievant's testimony referred to above, the Workmen's Compensation decision relates to a disability originally incurred prior to 1967 and to a building in which he worked prior to that date. But it did not deal with the conditions present in Building No. 105, to which the Company in 1967 had transferred the grievant because of the pulmonary disability, a condition which the Company knew of at that time. (Though the full magnitude of it was not judicially determined until the Compensation Case of 1970.) So as an accommodation to his disability, the Company removed the grievant from the very work conditions which apparently were responsible for or aggravated the disability covered by the subsequent Workmen's Compensation case. Hence that case cannot be used as a standard to judge the effect of a different set of working conditions (in Building No. 105) on the grievant's known disability.

For the foregoing reasons I find that the Company has failed to establish proper grounds for the grievant's termination.

As to remedy, the Workmen's Compensation case is also germaine. The stipulated issue gives me flexibility and discretion. I think what triggered this case in large part was the grievant's exaggerated if not misleading testimony at the
Workmen's Compensation hearing. In the face of his testimony that heavy lifting and climbing of stairs produced extreme shortness of breath or caused him to "gasp for breath" it is understandable why the Company felt that to continue him on his job would be too much of a risk for both of them. In short, the grievant is partially but significantly responsible for the position in which the Company placed him. Though I find the Company erred in terminating him, the grievant must bear some of the blame for what transpired. As such, a remedy which makes him totally whole is not justified.

I direct his reinstatement to his job as a Maintenance Mechanic in Building No.105, but as a reflection of his share of the blame, that reinstatement shall be without back pay.

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

Local 376 UAW and

Whitnon Manufacturing Company

AWARD

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated June 19, 1970 and having duly heard the proofs and allegations of the Parties, AWARDS, as follows:

The layoffs during the week of November 16 and from November 23 to December 2 did not fall within the provisions of Section 11.10 of the contract. Therefore the Company erred when it staggered layoffs of two groups of three employees each for periods of five days, without considering the order of seniority of the affected employees. The layoffs should have been based on seniority and ability as required by Sections 11.02 and 11.03 of the contract. Those senior grievants who were laid off from the Lathe Department while other employees with less seniority continued at work on jobs which the senior laid off employees could perform, shall be made whole for the time lost.

In considering which employees possessed the least seniority, Mr. Ron Carubba should be included. At the time of the layoffs involved, Mr. Carubba was either a probationary employee or a member of the bargaining unit with less seniority than any of the grievants.

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 376 UAW
and
Whitnon Manufacturing Company

In accordance with Article XV of the Collective Bargaining Agreement dated June 19, 1970 between the Whitnon Manufacturing Company, hereinafter referred to as the "Company," and Local 376 UAW 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 contract when, during the week of November 16, 1970, it laid off Walter Golas, John Buczkowski and Peter Tricarico; and when from November 23 to December 2, 1970 it laid off Sal Aparo, Juan Valcarce and Joseph Zelazko? If so what shall be the remedy?

A hearing was held at the Company plant in Farmington, Connecticut on April 26, 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 parties expressly waived the Arbitrator's oath.

The six employees referred to in the stipulated issue worked in the Lathe Department. There is no dispute that three of them were laid off during the five working days of the week of November 16; and the other three during the five working days between November 23 and December 7; and that the two
"staggered" layoffs were scheduled and effectuated without considering the seniority of the employees involved.

The Company concedes that among the three employees laid off in each of the two periods involved were those with greater seniority than other employees who were permitted to work during that period and whose jobs the senior laid off employee(s) could have performed.

The Union contends that this arrangement for two periods of "staggered" layoffs was violative of Article XI (Seniority) and particularly the sub-sections thereunder which provide for layoffs based on "seniority and ability."

The Company takes the position that the layoffs involved were of a "temporary" nature and involved circumstances covered by Section 11.10 of Article XI of the contract.

The Company contends that under that Section, which reads:

> Whenever temporary lay-offs are necessary due to conditions beyond the control of the Company which curtails production, such lay-offs will be made by the Company in accordance with operational requirements and need not be made in order of seniority. Recalls from such lay-offs will be made on the basis of operational requirements. In no event will the temporary lay-off exceed five (5) working days unless an extension is mutually agreed to by the parties to this Agreement,

the disputed layoffs, which did not in each instance exceed five days were proper without considering the "order of seniority" of the affected employees.

I am not satisfied that Section 11.10 was intended to cover the instant factual situation. It is clear that a temporary layoff as defined by Section 11.10, is one which does not exceed five working days (unless extended by mutual agree-
merit of the parties, a factor not present in this case).

Perforce that means that a layoff of more than five days duration must be covered by the other provisions of Article XI, particularly Sections 11.02 and 11.03, which mandate the laying off of employees by seniority (provided those that remain possess the ability to perform the remaining work; also a factor not in dispute in this case).

Whether or not "beyond the control of the Company" within the meaning of Section 11.10, I am not persuaded that the layoffs necessitated by the undisputed substantial fall off of work in the Lathe Department, were limited to five days. Rather it is apparent to me that the duration of the layoff in the Lathe Department was ten working days for three employees of that Department. In other words the quantity of available work required three less employees for ten days. I am not satisfied that the Company's theory of staggering the ten layoff days amongst two groups of three employees for five days in each instance, transforms ten days of reduced work into two separate temporary layoffs of five days each. Indeed if the Company's theory prevailed, layoffs of extended duration could be handled on a staggered basis by laying off portions of the work force for five days or less, rotationally, without any regard for seniority. Thereby, the seniority provisions of Sections 11.02 and 11.03 could be circumvented in all instances and thus reduced to a nullity. I am convinced that Section 11.10 was neither intended nor negotiated for that purpose.

This is not to suggest that the Company had the latter purpose in mind. On the contrary, I am sure the Company merely
wished to act equitably, and to share the available but reduced quantity of work among the total work force in the Lathe Department. But whether equitable or commendable, it was nonetheless inconsistent with Sections 11.02 and 11.03 of the contract and not within the exception set forth in Section 11.10.

Accordingly, the Company's action in laying off two groups of employees in the Lathe Department for five days each, over a total of ten days, without regard for seniority of those laid off, was violative of the Company. The Company should have laid off the three junior employees of the Lathe Department for the total ten days involved, permitting them to exercise what rights they may have had in accordance with their seniority to bump into other jobs which they could perform.

In considering which employees possessed the least seniority, the Company should have included Mr. Ron Carubba. Based on the record I find that during the periods of the layoffs referred to in the stipulated issue, Mr. Carubba was either a probationary employee or at best, a member of the bargaining unit with less seniority than any of the six employees laid off.

Those senior grievants who were laid off while others with less seniority worked at jobs which the laid off employee had the ability to perform, shall be compensated for the time lost.

Eric J. Schmertz
Arbitrator