AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

American Federation of Television and Radio Artists (AFTRA)

and

Herman Spero Productions, Inc.

Award

The Undersigned having been duly designated in accordance with the Arbitration Agreement between the above named parties and having been duly sworn and having duly heard the claims and counter-claims of said parties at the first hearing on October 18, 1971; and having duly heard the counter-claims of AFTRA at the second hearing on August 14, 1972, Herman Spero Productions, Inc. having expressly declined to appear at said second hearing, makes the following AWARD:

1. Herman Spero Productions, Inc. and AFTRA are signatories to the 1963-66 AFTRA National Code of Fair Practice for Network Television Broadcasting. Also, Herman Spero Productions, Inc. is a signatory to a rider to said Code whereby it is agreed to abide by the terms and conditions of the 1966-69 AFTRA National Code of Fair Practice for Network Television Broadcasting.

2. Herman Spero Productions, Inc. was the Producer of a program entitled "Upbeat." As a result of disputes between AFTRA and Herman Spero Productions, Inc. concerning payment to performers on said show, the parties entered into an Agreement dated September 19, 1969.

3. As compensation to performers for service performed and as contributions to AFTRA Pension & Welfare Funds, Herman Spero Productions, Inc. owes, in uncontested claims, the sum of $35,871.75.
4. Herman Spero Productions, Inc. claim for return of all or a portion of a $10,000 Security Bond posted with AFTRA is denied. AFTRA is authorized to use said Bond as an offset against what is owed its members and what is owed the AFTRA Pension & Welfare Fund as set forth in item #3 above.

5. Accordingly Herman Spero Productions, Inc. is directed to pay forthwith to AFTRA on behalf of AFTRA members owed compensation and on behalf of the AFTRA Pension & Welfare Fund, the net sum of $25,871.75 with interest, representing payment of the uncontested claims herein.

6. The Arbitrator's fee of $500.00 shall be shared equally by the parties. Therefore Herman Spero Productions, Inc. shall also pay to AFTRA the sum of $250.00 representing the Producer's share of the Arbitrator's fee paid by AFTRA.

7. The foregoing is without prejudice to the rights of AFTRA to maintain an action against Herman Spero Productions, Inc. on additional, and contested claims.

Eric J. Schmertz
Arbitrator

DATED: August 1972
STATE OF New York
COUNTY OF New York

On this day of August, 1972, 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 1103 70
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration, between

Local 634 Printing Specialties and Paper Products Union

and

Immont Corporation

Award

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

The change in the shot mill operator's duties did not constitute the introduction of a new type of machinery within the meaning of Article XXXI Section 2 of the current agreement between the parties.

Eric J. Schmertz
Arbitrator

DATED: May 1972
STATE OF New York )ss.:
COUNTY OF New York)

On this day of May, 1972, 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 0941 71
In the Matter of the Arbitration between
Local 634 Printing Specialties and Paper Products Union
and
Inmont Corporation

Opinion

In accordance with Article III of the Collective Bargaining Agreement dated October 15, 1969 between Inmont Corporation, hereinafter referred to as the "Company," and Local 634 Printing Specialties and Paper Products Union, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Does the change in the Shot Mill Operator's duties constitute the introduction of a new type of machinery within the meaning of Article XXXI Section 2 of the current agreement between the parties? If so should the rate for the job be increased, and if so by how much retroactive to October 22, 1970 (exclusive of the period May 14, 1970 to August 23, 1971).

A hearing was held at the offices of the American Arbitration Association on January 19, 1972 at which time representatives of the Company 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.

Thereafter on February 9, 1972, accompanied by representatives of the parties, the Arbitrator made a plant visitation to observe the job operation in question.

The parties filed post hearing briefs.

Article XXXI Section 2 reads:
If any new types of machines are introduced during the term of this Agreement, the Company will notify the Union as much in advance as possible and will discuss any applicable rates. If no agreement has been reached when such a machine is ready to operate, the Company will set tentative rates and all rates finally set will be retroactive to the date of the operation of the machine. If the Company and the Union are unable to agree, rates will be subject to arbitration in accordance with the grievance machinery contained herein.

The threshold question is whether the change in the Shot Mill operation, by the introduction of a second "shot mill" or grinder (with accompanying supporting equipment) constitutes a new type of machine within the meaning of the foregoing contract clause.

In my view a "new type" of machine is not limited to a totally new species not previously utilized in the factory. Rather, a new type of machine can come into being by significant modifications, changes or additions to existing equipment. For if this were not the case the Company could make substantial changes in existing equipment by combining machinery or by multiplying existing equipment in such a way as to significantly and unreasonably increase the duties, responsibilities and demand of an operator. And under that circumstance neither the operator (nor the Union on his behalf) could seek an adjustment in pay during the life of the contract no matter how arduous or significantly more difficult his job became as a result.

Therefore I conclude that the phrase "new type" of machinery includes modifications or changes in existing equipment where the result is to significantly increase production or to render the operator's job more demanding or more difficult,
physically or mentally. In short both new machinery not previ-ousely employed and significant changes in existing equipment, the effect of which is to significantly increase the obliga-
tions and demands of the operator beyond what they had been when the wage rate was bargained, would warrant a new rate in accordance with the procedures of the foregoing contract clause.

The question then is whether the undisputed change in the shot mill operation met this test. I conclude that it did not.

The introduction of a second grinder with attendant support-
ing equipment, did not increase production. Twice as much was manufactured, but no faster than before. That quantity spent twice as much time in the grinding operation with the result that no greater amount was produced within the allotted time.

Though the quality was better (and this was the purpose for the second shot mill or grinder) the level of ultimate production, based on the weight of the evidence before me, was only a rest-
oration of the quantity produced earlier by the single shot mill before an interim reduction designed to improve quality.

I do not see the significance of the Union's argument that even if production was not increased the Company benefited economically from the improvement in quality and that the oper-
ator should share in that economic benefit by a wage increase.

The fact is that the Company must either produce a quality product or lose its customers. The evidence indicates that unless the quality of this product was improved the Company stood to lose existing customers. The improved quality mere-
ly retained the business which the Company previously had and there is no evidence that new business and new profits were obtained because of an improved quality resulting from the double grinding shot mill operation.

The Union has established that with the introduction of a second grinder, the operator is now called upon to perform more of the same duties he previously performed. But added duties does not automatically mean added difficulties or demand, either physical or mental. This job is not rated under a traditional job evaluation plan, so that its elements have not been evaluated by an objective point system. Rather, as I see it, the operator has been paid a negotiated contract rate for the performance of duties required in the operation of the shot mill for the regular hours of his shift. The introduction of additional duties within those regular hours does not necessarily mean that his job is more difficult, more demanding, or significantly changed to the extent that a pay increase would be warranted.

For example, though it is clear that the operator must perform additional cleaning work, (such as the cleaning of magnetic screens) for three to five hours a week, there is no evidence that he does not have sufficient time within his regular shift to perform that work; or that those additional duties interfere with any of his other responsibilities; or that he is required to perform two or more sets of duties at the same time. Also there is no evidence that this additional work constitutes a significant increase in the physical demand of the job. The
same is true with regard to the observation of gauges, dials and attention to additional valves. The two grinders are positioned in close proximity and I cannot conclude that periodic observation of an additional set of gauges, dials and valves, albeit an additional duty, constitutes a significantly additional responsibility for the operator.

Also whether on a significant basis the operator is now required to dump and mix more bags of chemicals and other material into the mixing equipment, is not clear. The operator "thinks" he does, but it appears to me that he does so quite infrequently. One and at times two additional batches are mixed in a 48 hour period. So considering the continuous nature of this work, this additional duty will fall to any one operator only from time to time. Hence it cannot be deemed a significant extra regular duty.

In summary, I do not find, based on the record before me that there has been either a significant or unreasonable increase in the duties required of the shot mill operator during his regular shift hours which would warrant an upward revision of his present wage rate.

Absent a job evaluation plan under which the extent of job complexities, demand and responsibilities can be objectively determined; and absent other evidence of an unreasonable increase in what is required and expected of an operator, either physically or mentally, the mere increase in certain duties for which there is ample time within the regular work shift, is not enough to transform the changed job operation into a "new type
of machinery," warranting a new wage rate within the meaning of Article XXXI Section 2 of the contract.

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

In the Matter of the Arbitration between

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

and

Iona Garage, 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 Trustees; the above named Company having failed to appear after due notice, makes the following AWARD:

For the period March 2, 1971 to June 30, 1972 Iona Garage, Inc. owes the Taxicab Industry Pension Fund the sum of $2700.67.

For the period March 2, 1971 to June 30, 1972 Iona Garage, Inc. owes the Taxicab Industry Health & Welfare Fund the sum of $6301.57

Said sums are past due. Therefore Iona Garage, Inc. is directed to pay the foregoing sums to said Funds forthwith with interest.

DATED: July 1972
STATE OF New York )ss:
COUNTY OF New York)

On this day of July, 1972, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

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

In the Matter of the Arbitration between
Trustees, Taxicab Industry Pension Fund
Trustees, Taxicab Industry Health and Welfare Fund
and
Jaylen Operating Corp.

The Undersigned, as Impartial Chairman between the above named parties and having duly heard the proofs and allegations of the Trustees; the Employer failing to appear after due notice, makes the following AWARD:

For the period of March 2, 1971 through February 29, 1972 Jaylen Operating Corp. owes the Taxicab Industry Pension Fund the sum of $17,818.74.

For the period March 2, 1971 through February 29, 1972 Jaylen Operating Corp. owes the Taxicab Industry Health & Welfare Fund the sum of $41,577.06.

The above sums are past due. Therefore Jaylen Operating Corp. is directed to pay said sums to said Funds forthwith with interest.

Eric J. Schmertz
Impartial Chairman

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

On this day of 1972, 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
Association of Legal Aid Attorneys
and
Legal Aid Society

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

1. The Society did not violate the grievance procedure of the contract by refusing to discuss the "Attica grievance" after arbitration had been demanded.

2. The Society did not violate Article V Section 3 of the contract by its letter of November 22, 1971 to Attica inmates without prior notice to or consultation with certain staff attorneys.

3. There was not a settlement of the "Attica grievance" at Step 2 of the grievance procedure.

DATED: August 7, 1972
STATE Of New York )ss.:
COUNTY OF New York)

On this 7th day of August, 1972, 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 0294 72
In the Matter of the Arbitration between
Association of Legal Aid Attorneys and
Legal Aid Society

The stipulated issues are:
1. Whether the Society violated the grievance procedure of the contract by refusing to discuss the "Attica grievance" after arbitration had been demanded?
2. Whether the Society violated Article V Section 3 of the contract by its letter of November 22, 1971 to Attica inmates without prior notice to or consultation with certain staff attorneys?
3. Was there a settlement of the Attica grievance at Step 2 of the grievance procedure? If so is it binding on the Society?

A hearing was held on July 7, 1972 at which time representatives of the Association and the Society appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

I find it more logical and orderly to deal with Issue 3 first, and then issues 1 and 2.

I find no settlement of the grievance at Step 2. I do not see how Mr. Hellerstein could have unequivocally "promised" to send a second letter to the prisoners at Attica, and at the same time advise the staff attorneys that he would discuss their request for such a letter with Mr. Carr, the Society's Attorney in Chief. Carr was Hellerstein's superior. By stating that
the objections of the staff attorneys to the letter of November 22, 1971 would be discussed or taken up with him (a statement not disputed by the Association), Hellerstein must have meant that Carr's approval was necessary before any second explanatory letter could be prepared and sent to the prisoners. This clearly negates any express promise or assurance by Hellerstein that another letter in fact would be transmitted.

I cannot find, as a matter of contract breach, that the Society violated the grievance procedure by refusing to discuss the grievance after arbitration had been demanded. The Society's contractual obligation is to follow the grievance procedure; to hold meetings at the various steps of that procedure; and to accord the Association full opportunity to present its grievance during each step of the grievance procedure. But once that procedure has been exhausted, both substantively and chronologically, and the Association has initiated its last step, namely demanding arbitration, there is no further obligation to return to a preliminary step and again hold a grievance meeting on the issue unless both sides voluntarily agree to do so. A demand for arbitration is notice that the prior steps of the grievance procedure have been complied with, exhausted or waived, and that the grievance is ready for the terminal step of arbitration. This is not to say that it is wise as a matter of good labor relations for an employer not to again discuss a grievance after arbitration has been demanded, but only that he is not again required to do so, provided as here, the grievance procedure was previously employed, its
steps complied with, and arbitration demanded.

I do not find that the Society violated Article V Section 3 by its letter of November 22, 1971 to Attica inmates without prior notice to or consultation with certain staff attorneys.

My decision is based on a limited ground, namely that the work of the staff attorneys, in interviewing and counseling Attica inmates subsequent to the uprising, did not establish as between those inmates and the attorneys, an attorney-client relationship within the meaning of Article V Section 3 of the contract.

The work at Attica was of short duration - a matter of days. The undisputed testimony of Hellerstein was that it was under his active supervision, at least so far as the Society's staff attorneys were concerned. For the most part individual prisoners were seen only once and for a very short period in any single day. Also undisputed is Hellerstein's testimony that he instructed the staff to advise the inmates interviewed that they could not again expect to see the same attorney. Moreover, the work at Attica by the Society and its staff attorneys was in conjunction with similar work undertaken by the legal branches of other groups. The work was integrated on a cooperative basis among these various groups for the purpose not of representing inmates either individually or collectively in any actual or potential proceeding against them, but solely to inform them of their general rights with regard to certain upcoming governmental investigations of the uprising.

In other words, I do not find that any prisoners had "an
individual staff attorney ... assigned to his cause" within the meaning of Article V Section 3 of the contract. Nor do I find that there was a "case" on behalf of any of the prisoners within the staff attorneys' "ambit of responsibility."

Accordingly, because the circumstances of this particular situation do not meet the conditions and requirements of Article V Section 3 of the contract, the Society had no contractual obligation to give notice to or consult with the staff attorneys before discussions with the FBI and the preparation and sending of the letter of November 22, 1971. This is not to say that it is either wise or good personnel practice not to involve staff attorneys in such matters, but only that as a matter of contract, the Society, in this instance, was not required to do so.

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

In the Matter of the Arbitration
between

Motion Picture Laboratory Film Technician Local 702

and

Manchester Color Labs, 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 Union; and the above-named employer having failed to appear at the Hearing after due notice, makes the following award:

That the Manchester Color Labs, Inc. owes the sum of Eighty-two Thousand Seven Hundred Eighteen and 02/100 ($82,718.02) Dollars to Motion Picture Laboratory Film Technicians Union, Local 702, for and on behalf of the persons named in the attached schedule, Exhibit A, in the amounts set forth opposite the name of each person thereon.

These sums are past due. Therefore Manchester Color Labs, Inc. is directed to pay said sums to the Union with interest forthwith for distribution by the Union to each of the named persons in the amounts set opposite their names in Schedule A.

Manchester Color Labs, Inc. shall also reimburse the Union in the amount of $300.00 representing the arbitrator’s fee for services rendered in connection herewith.

Dated: April 4, 1972

Eric J. Schwartz
Permanent Arbitrator

On this day of April, 1972, before me personally appeared and came Eric J. Schwartz 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

Manchester Color Labs, 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 Color Labs, Inc. owes the above named Pension Fund the sum of $11,261.79.

For the period May through September 1971 Manchester Color Labs, Inc. owes the above named Welfare Fund the sum of $3619.84.

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

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

April 5, 1972

Dated: November 1, 1971
STATE OF NEW YORK
COUNTY OF NEW YORK

On this 5th day of November, 1972, before me personally came and appeared Eric J. Schertz 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.

Notary Public

*Signature*

[Notary Public's Seal]
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

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

AWARDS

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 Leonard Wilkins against Jackson Maintenance for break-down pay for February 3, 1970 is granted. The grievant's testimony that the night dispatcher told him that no other cars were available after his car was towed back to the garage, stands unrebutted. Accordingly Jackson Maintenance shall pay the grievant break-down pay calculated in accordance with Article XIII of the contract.

The grievance of James Nelson against Cab Operating for 50% commission retroactive to January 29, 1968 and for a third week of vacation pay for the vacation years 1967-1968, 1968-1969 and 1969-1970 is denied. I hold that the grievant could and should have taken steps, considerably earlier, to establish his prior service in the Industry.

The petition of Circle Maintenance Corp. to discharge Robert Lowich is granted. I find that on May 5, 1971 Lowich initiated and led an unauthorized work stoppage in violation of Article XXIV of the contract. I have repeatedly stated in prior Awards and rulings that a violation of Article XXIV especially as here, by an employee with special responsibility to uphold as well as administer all provisions of the contract, including the "no-strike" and arbitration clauses constitutes cause for summary discharge.

The grievance of Ernest Stark against AAR was settled in the course of the hearing, in payment of one week's vacation pay in the amount of 1/2 of the average of the two vacation payments in each of the two years in dispute.
The grievance of Monroe Newman against Helen Garage for additional vacation pay for the vacation year 1969-1970 is denied. I hold that credit for "disability" days within the meaning of Article XII of the contract is for those days which an employee receives disability benefits. Here the grievant claimed but was denied disability benefits.

The grievance of Sid Cherna against Ike Garage for an additional 1% commission from May 5, 1960; 50% of a third week of vacation pay for the vacation year 1969-1970 and for a full second and third week vacation pay for 1970-1971 is granted. I find that on February 16, 1970 the grievant did not terminate his employment, but rather changed his status from full time to part time driver. I also hold that on May 5, 1970 when he resumed work full time he was not a new employee. For the same reasons set forth in my Award of November 1, 1971 in the grievance of Al Sysler against Cordi Garage, the private written agreement entered into by the grievant and representatives of the Employer is not enforceable. Accordingly I find no break in the grievant's service with this Employer since he began work for this garage in May 1965. Accordingly considering his prior employment elsewhere he has accumulated the requisite 15 or more years in the Industry, the last three of which have been with his present Employer. He therefore meets the requirements for three weeks vacation with pay under Article XII Section 1(b) of the contract, and he was so qualified for the vacation years 1969-1970 and 1970-1971. As it is undisputed that he worked 206 days during the former vacation year and over 230 in the latter vacation year, he is entitled to the amounts of vacation pay as claimed.

Based on my foregoing holding that he did not terminate his employment on February 16, 1971 or any time thereafter, and was not a new hire on May 5, 1970, I find that he also meets the eligibility requirements for the additional 1% commission (50%) from May 5, 1970. As of that date he was a full time taxi driver, and he had had at least 10 years of Industry-wide seniority, the last 3 years of which were in the present garage.

Eric J. Schmertz
Impartial Chairman
DATED: January 14, 1972
STATE OF New York ) ss.:  
COUNTY OF New York)

On this 14th day of January, 1972, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between

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

and

Metropolitan Taxicab Board of Trade 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 AWARD:

The grievance of M. Rivera against Helen Garage was withdrawn from arbitration.

The grievance of Ramos against Dynamic Garage (Eden) is dismissed with prejudice because of failure of the grievant to appear at the hearings on August 10 and August 23, 1972 after due notice.

The grievance of Harry Gonzales against Gore Garage (Eden) was settled during the hearing. Without prejudice to the positions of the parties, the Employer is to pay the grievant the sum of $28.80 in full settlement of the grievant's claim.

The grievances of Felix Santiago, Fredy Reinoso, Angelo Santiago, Varciso Pena and Juan Bou against Gore Garage (Eden) are dismissed with prejudice because of the failure of said grievants to appear at the hearings on August 10 and August 23, 1972 after due notice.

The grievance of J. Garagolo against Tone Operating is granted as follows:

The grievant's discharge is reversed on procedural grounds. In a previous Award regarding grounds for discharge for "low bookings" I ruled that a "progressive discipline" formula must be followed. And that before the penalty of discharge for "low bookings" was proper, the affected employee must be first given a written warning and then suspended. Neither was done in the instant case (although the grievant was warned orally.)
That this discharge took place prior to the aforementioned Award does not mean that the "progressive discipline" formula is waived. Accordingly the discharge shall be expunged from the grievant's personnel record. He shall not be reinstated because he does not seek reinstatement. However he is entitled to whatever benefits he would have received had he not been discharged, except back pay for the five days between the date of his discharge and his re-employment elsewhere. I find that during those five days he made no effort to seek employment elsewhere and hence he is not entitled to pay for those days lost.

The grievance of I. Cook against Jofan Garage is denied. It is undisputed that the Employer was reluctant to hire the grievant because of the grievant's prior difficulties at other garages, and only did so on the urging of a Union official to give the grievant "a chance." Therefore in view of that circumstance I cannot now believe that the Employer would falsely testify about the subsequent difficulties he had with the grievant. I am satisfied that his testimony, at least in substantial or significant part was accurate. It disclosed an irreconcilable incompatibility between the grievant and the Employer, for which I find the grievant primarily responsible, and which negates a continuation of that employee-employer relationship. Accordingly there was just cause for the grievant's discharge.

Eric J. Schmertz
Impartial Chairman

DATED: September 5, 1972
STATE OF New York ) ss.
COUNTY OF New York)

On this 5th day of September, 1972, 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 3036 New York City taxi Drivers Union, AFL-CIO
and
Metropolitan Taxicab Board of Trade, Inc. on behalf of Cornell, Circle and Iota Garages

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

The grievance of B. Portney against Circle Garage and the grievance of D. Zugar against Iota Garage were settled during the course of the hearing.

The grievance of A. Kassler against Cornell Garage over a split vacation for 1970-1971 is denied. Though the grievant had some difficulty with some managerial personnel for which he may not have been at fault, I do not find that it reached the level of "harassment."

DATED: August 1972
STATE OF New York ) ss.:
COUNTY OF New York)

On this day of August, 1972 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between

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

and

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

The Undersigned, as Impartial Chairman between the above named parties and having duly heard the proofs and allegations of the parties at hearings on November 29 and December 6, 1972, renders the following Opinions and Awards:

The grievances of E. Brown et al vs. Clinton Garage for Christmas bonuses for the years 1970 and 1971 are granted.

Pursuant to my authority under Article XXV Section 2 Step 1, the Union is excused from its failure to timely file its grievance for Christmas bonus for 1970. (Its grievance for Christmas bonus for 1971 was filed and/or made known to the Employer in timely fashion.) I conclude that forebearance caused the Union and the employees to withhold a formal grievance covering the 1970 Christmas bonus claim - to give the Employer a chance to improve his economic status. But I am satisfied that the Union and the employees did not intend thereby to waive the 1970 bonus. When the Employer failed again to pay a Christmas bonus in 1971 it was appropriate for the Union and the employees to grieve for both years.

Article XXXIX (Christmas Bonus) reads:
The Employer shall continue to pay Christmas bonus to inside service, maintenance and other personnel covered by the terms and provisions of this Agreement, if the Employer paid such bonus as a matter of past practice.

Despite his denial, I find that the Employer did have a past practice of paying Christmas bonus. He paid it to the grievants in 1968 and again in 1969. I am satisfied that those payments in each of those two preceding years constitute a practice, requiring its continuation, within the meaning of Article XXXIX of the contract. Accordingly the Employer is directed to pay to the grievants Christmas bonuses for each of the years 1970 and 1971 in the amounts he paid each grievant in the year 1969.

The grievances of E. Veve and J. Silvestry against Metro are granted to the following extent:

The Employer, despite his good intentions to train and introduce new "inside" personnel into the industry, did not have the unilateral right to employ "trainees" to perform work within the classification of Bodyman-Helper at a wage rate less than the contract rate for that classification.

Accordingly from the time the grievants commenced work on a full time basis in July 1972 until they were laid off in early September 1972 they should have been paid the Bodyman-Helper's contract rate. The Employer shall pay them the difference between what they received and the contract rate of Bodyman-Helper for that period of time. (This does not apply to the month of June 1972, when the grievants worked only part time while still attending school.)
The Employer has the right to lay off employees for lack of work. I am satisfied that in September 1972 when the grievants were laid off, the Employer did so not solely because the Union demanded the contract rate of pay, but also because they were surplus and not needed as Bodyman-Helpers. In other words I find that because the Employer could not continue them as trainees, their services were not needed in any other capacity to handle the available work in the shop, and hence their layoffs were proper.

The discharge of C. Woldenberg by Iota Garage is reduced to a disciplinary suspension. Based on the evidence before me I am persuaded that the grievant was discharged because of an accident, and that the charge that he cut the meter wire arose for the first time subsequent to his termination. It is well settled that the propriety of a discharge turns on the reason for the discharge at the time that the discharge is effectuated. This is not to say that subsequent to the discharge an employer may not conduct an investigation and collect evidence in support of the reason why the employee was fired. But he cannot fire an employee for one reason, and thereafter develop new and different reasons to support the discharge. (Of course where an employee has been discharged for one particular reason, new and different charges disclosed or developed after that discharge, though not supportive of that discharge, may be grounds for a new action against the employee including a subsequent discharge.)

Here I conclude that the grievant was fired as soon as
the Dispatcher saw that a new cab had been damaged. Later it was discovered that the meter wire was cut and the grievant was accused of that offense on a later day.

In prior decisions I have made clear that cutting a meter wire is a dischargeable offense, irrespective of the employee's past record. But here the charge of cutting the meter wire post-dated the grievant's discharge and simply was not the reason he was fired, and though material to a subsequent disciplinary penalty which the Employer may impose on this grievant, is not relevant to the instant discharge.

I am not prepared to hold in this case, considering the nature of the particular accident involved, that the penalty of summary dismissal is warranted. So far as the record before me is concerned there is no evidence that the grievant had prior accidents. (Though by his own admission he had had one working elsewhere since his discharge.)

The appropriate penalty in my judgment under the particular facts in this case, without establishing a precedent for any other case, is a disciplinary suspension. Accordingly if he chooses to do so the grievant is entitled to be reinstated by this Employer but without back pay. And the period of time between his discharge and his reinstatement shall be deemed a disciplinary penalty for the accident.

However the rights of the parties regarding the allegations of a cut meter wire are expressly reserved and as indicated, no determination of that charge is made herein.
The grievance of Seymour Liebowitz vs. Tone Garage was settled by and between the parties.

Eric J. Schmertz
Impartial Chairman

DATED: December 29, 1972
STATE of New York )ss.:
COUNTY OF New York)

On this 29th day of December, 1972, 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.
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

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 57th Street Management, Inc.

The stipulated issue is:

Is the Equalization Award of the Impartial Chairman dated February 4, 1969 applicable to the grievances herein? If so to what extent and with what remedy, if any?

The grievants, Messrs. James Johnson, Antonio Bermudez, Otis Davis, Eurique Diaz, Eurique Cruz and Juan Garcia, all classified as Bodymen, seek both equalization of pay amongst themselves and with three more senior Bodymen, namely Messrs. Thomas Hughes, Raymond Gracteroly and Lynn Peterson.

A hearing was held on August 23, 1972 at which time the grievants and representatives of the Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

My Equalization Award of February 4, 1969 held it to be an inequity and subject to correction where:

"An employee is paid less than some other employee(s) in the same classification, though he is of substantially equal or greater seniority and possesses relatively equal or greater skills and performs substantially the same or more difficult work."

I ruled that in such a situation the pay of the former shall be increased to the level of the latter for the period of time such condition obtained, retroactive to January 29, 1969.
All the foregoing named employees occupy the Bodyman classification. There is no evidence that they are not relatively equal in skill. There is no evidence that they do not perform substantially the same work. Therefore it is on the remaining standard, namely seniority, that the answer to the stipulated issue turns.

Among the grievants themselves, Messrs. Davis, Diaz, Cruz and Garcia are all paid alike. The question is whether any or all of them should be increased to the higher level of Bermudez (who receives 5% more effective 11/17/69,) or to the level of Johnson who receives 15% more (5% effective 1/29/68, 5% effective 11/17/68 and 5% effective 11/17/69.) And additionally whether Bermudez is entitled to be raised to the level of Johnson.

The answer depends upon the meaning of "substantially equal seniority" within the meaning of my Equalization Award of February 4, 1969. I now interpret that phrase to mean six months or less; or in other words where employees' dates of seniority with the same employer are six or less months apart, they are "substantially equal in seniority," within the meaning of my Equalization Award.

On this basis none of the grievants qualify for equalization of their pay with any other employee of this employer similarly classified. Bermudez is from nine months to twenty-three months senior to Messrs. Davis, Diaz, Cruz and Garcia, so the latter four are not eligible to be increased to Bermudez' level. And Johnson is more than sixteen months senior to Bermudez, so the latter is not eligible to be increased to Johnson's pay level.
Manifestly therefore none of the grievants are entitled to be raised to the level of Messrs. Hughes, Gracteroly and Peterson. The latter three employees enjoy seniority with this employer which predates 1966. The grievants are from two to five years junior.

This is not to say that because the grievants are paid incentive rates, and by consequence achieve earnings in excess of the contract rate, my Equalization Award does not apply. Had the criteria of the Equalization Award been met the fact that this employer's incentive system generates higher pay levels would not have barred application of the principles of that Award.

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

The grievances of James Johnson, Antonio Bermudez, Otis Davis, Eurique Diaz, Eurique Cruz and Juan Garcia for equalization of pay pursuant to the Impartial Chairman's Equalization Award of February 4, 1969 are denied.

Eric J. Schmertz
Impartial Chairman

DATED: September 1972
STATE OF New York )ss.: 
COUNTY OF New York)

On this day of September, 1972 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company pay the following Timers the proper rate of severance pay when they were laid off in March 1971? James Sills, Michael Parella, Angelo Russo, Gene Zippo, Ronald Ergen, Peter DiMarco, Stellios Zacharopoulos. If not what shall be the remedy?

I interpret the word "week(s)" under the column headed Severance Pay in Section 11(a) of the contract to mean the actual pay which the affected employee was receiving when laid off or terminated under the provisions of that Section.

Up to their layoff the grievants had been receiving a weekly rate of pay in excess of the contract or "book rate." In other words their rates of pay were "red circled." It is the red circled rate which constituted their actual weekly compensation, and it is that pay to which they were entitled when laid off. The Company erred when it paid them the weekly "book rate" only.

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

The Company did not pay the grievants the proper rate of severance pay when they were laid off in March 1971. The Company shall pay them the differ-
ence between the "book rate" and the "red circled" weekly compensation which they had been receiving up to the time of their layoff in accordance with the schedule set forth in Section 11(a) of the contract.

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

Eric J. Schmertz
Permanent Arbitrator

DATED: May 1972
STATE OF New York )ss:
COUNTY OF New York)

On this _ day of May, 1972 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

ANTHONY SODANO, LOUIS SODANO,
ALEX CELI, JOHN NORELLI and
JOSEPH ANDIOLA

- and -

PABST BREWING COMPANY

Arbitrator: Eric J. Schmertz

Hearings: Newark, New Jersey
September 23, 1969
November 19, 1970
June 12, 1972

Appearances: Company
Stryker, Tarns & Dill
by John C. Lifland, Esq.
33 Washington Street
Newark, N.J. 07102

Grievants
Craner & Brennan
by John A. Craner, Esq.
1143 East Jersey Street
Elizabeth, N.J. 07201

Local 153
Nicholas Buydos, President
James Marion, Shop Steward

New Jersey Brewers' Association
Thomas J. Hayes
All of the grievants in this matter were formerly employed for lengthy periods of time by Krueger Brewing Company ("Krueger") and were in the employ of Krueger when that company went out of business at a time shortly before February, 1961. All were members of Local 153, Brewery Workers Joint Local Executive Board of New Jersey ("Local 153") throughout the period of their employment at Krueger as well as the precise period with which we are here concerned. Under the terms of Section 4.3-1(a) of the contract between Local 153 and various members of the New Jersey Brewers' Association ("Association") including Pabst Brewing Company ("Pabst") grievants were thus Regular Employees; Section 4.3-1(a) reads, in pertinent part, as follows:

"4.3-1(a) Regular employees are those employees, under the jurisdiction of Local 153 listed at the Office of the Association on the Joint Executive Board Regular Employee List dated March 15, 1957, or must have worked for the same Company under the jurisdiction of Local 153 for 225 days in any period of 52 consecutive weeks after June 1, 1964 to attain regular employee status and be added to such List..."

This status of Regular Employee on the books of the Association gives an employee certain rights to employment and re-employment in the event of lay-off not only with the company for which he works but with other companies in the Association. When a Regular Employee resigns from his job with an Association member or when, as in this case, the member company by which he has been employed goes out of business, he becomes an Unattached Regular Employee; as such he has the right to be hired ahead of casual,
extra and Junior Regular Employees by any Association member which has job openings. It was in this status of Unattached Regular Employees that grievants commenced working for Pabst at various dates between February 1, 1961 and March 3, 1961. No regular five-day week job openings were available at Pabst at that time and they obtained work by shaping up at the Local 153 union hall and subsequently through direct contact at Pabst on a day-to-day basis. A substantial amount of the work accepted by each of the grievants during the ensuing twelve to fifteen month period was not under the jurisdiction of Local 153 but under Local 843, another local of the Brewery Workers Joint Board. The testimony of the witness Buydos is to the effect that grievants preferred working under the Local 843 jurisdiction because they could work days instead of working at night as they would have to have done on Local 153 work. Although this testimony is contested by grievants, its credibility is enhanced by the fact - conceded by the grievants and established by litigation which reached the National Labor Relations Board - that grievants made considerable efforts over an extended period of time to transfer their union membership from Local 153 to Local 843. I think it more than coincidence that grievants took steps "to protect ourselves" with regard to seniority rights as Local 153 employees of Pabst only when their attempts to transfer to Local 843 were at the point of failure and at a time when opportunities for free-lance work in the Local 843 juris-
diction were becoming increasingly unavailable.

Whatever their motivations and intentions may have been, however, the fact is that they made no attempt, knowledge of which may be charged to Pabst, to establish their status as Regular Employees of Pabst until May of 1962 when they filed letters of intent, as prescribed by Section 4.5-3 of the contract, to be placed on the Regular Employee seniority list. Section 4.5-3 reads as follows:

"4.5-3 An unattached regular employee (not on a seniority list of another Company), who held such status prior to June 1, 1964 or more than two (2) years upon written notice to the Personnel Department of the Company in which he is employed, shall have the right to be placed on the regular employee seniority list of that Company and his seniority date shall be his most recent starting date with such Company."

Grievants were thereafter placed on the seniority list for Local 153 employees with seniority dates which eliminated most or all of the time worked prior to the filing of the letters of intent - the "written notification" required by Section 4.5-3 - in May 1962. They maintain that their seniority should have dated from the respective February and March 1961 dates when they first shaped up for work at Pabst and regardless of whether the work they performed in the ensuing period until the filing of their letters of intent was in the Local 153 or Local 843 jurisdiction. This claim carries with it the implicit contention that breaks in continuity of their employment during this period (and the unrefuted testimony of the witness Jacknain establishes that there were such
breaks in the employment of each of the grievants) should also be ignored.

Section 4.5-3 of the contract clearly contemplates the situation, comparable to that of the grievants, in which a Regular Employee on the books of the Association leaves the employ of one Association member, whether by resignation or lay-off, goes to work for another Association member without becoming a full-time, five-day-a-week employee and thereafter does become a five-day-a-week employee, signifying that he wishes to be added to the seniority list of the company in the bargaining unit in which he is employed. When he does so, the Section provides, his seniority is back-dated to his most recent starting date and that it is the latest such date that will be used. The contract does not spell out the meaning of this distinction nor clearly show how an employee might have two or more starting dates but the testimony of two witnesses, one the President of the union and the other a representative of the Company who are the parties to the contract in question, makes it abundantly clear. The testimony of these two witnesses, Buydos and Jacknain, respectively, shows that when a man is employed in any capacity other than that of a regularly scheduled five-day-a-week employee, be he an unattached regular, an extra or a casual employee, any break in the con-
tinuity of his employment, even if for only one day and regardless of whether it is due to illness, lack of work or for any other reason, results in a loss of the time previously worked for all purposes; the next day that he works is his most recent starting date. After an employee has been added to the roster this condition changes and absences from work, unless they exceed the prescribed requirements with regard to duration or justification, have no adverse affect on the employees' job tenure or continuity for various purposes including those of seniority.

The record shows further that the grievants worked during the approximately fifteen month period in question here for the most part outside of the jurisdiction of Local 153 and that during that same period there were days when they did not work at all including one day shortly before the filing of their letters of intent to accept regular employment status as Local 153 employees of Pabst. Thus, even if there were validity to their contention that all employment with Pabst regardless of whether in the Local 153 or the Local 843 jurisdiction should be credited to them, there would be the matter of breaks in continuity of their employment on days when they did not work at all.

Grievants argue that their work both in the Local 843 and the Local 153 jurisdiction during the subject period should be counted in establishing their seniority "since it is the employer that one looks to, not the Union, in determining seniority!" This is over-
simplification. One may look to the employer for the ministerial acts which establish and record one's seniority and one certainly looks to the employer for certain of the benefits flowing from seniority. But one also looks to the unit in which that seniority is to operate; and one surely looks to the contract obtained by the collective bargaining representative of that unit to determine whether the concept of seniority exists in the shop, if so, how it is obtained and, once obtained, how it operates.

I find nothing in the contract nor in the testimony and evidence before me in this matter to support the view that a man may avoid the low seniority assignments which would be his as a full-time employee in the unit of which he is a member during the early years of his employment with a company; that he may instead perform non-unit work of a more desirable nature; and that he may thereafter take equal place in the seniority roster of his unit with men who, during the same period, have performed only unit work gradually working from less desirable to more desirable work assignments and other improved conditions attributable to their earned seniority in the unit. Nor am I persuaded that equity would be served by such a conclusion. Yet that is the result that grievants seek. That the contract between Local 153 and Pabst is distinct from its contract with Local 843, although they appear in the same booklet; that the rights and duties of Local 153 employees of Pabst derive exclusively from the Local 153 contract; and that the seniority rights which
grievants invoke are a matter in which Pabst, Local 153 and the
grievants all have interests which are entitled to consideration
are points clearly established by the first two provisions of
the contract, Sections 0.1 and 0.2 which read as follows:

"0.1 This Agreement shall be binding upon the Union
and each of the above-named Locals and the Association
and the above-named Companies. The liability of the
Association and of any Company and of any Union and of
any Local hereunder and the responsibility of the Asso-
ciation and of any such Company or of the Union and of
and Local for its compliance with the provisions of
this Agreement shall be several, and not joint.

"0.2 Unless otherwise provided herein to the contrary
"employees" as used in this Agreement shall be construed
to refer to the employees of the Companies who are par-
ties to this Agreement in the unit for which the Union
was certified by the National Labor Relations Board on
March 9, 1953."

Based upon the transcript of testimony and the evidence form-
ing the record herein and having considered the respective post-
hearing briefs of the parties, I find and conclude that:

1. beginning on various dates between February 1, 1961
and March 3, 1961 and until their filing of letters of
intent to become regular employees of Pabst on a
regularly scheduled basis, grievants were unattached
regular employees working on an irregular basis both
in regard to continuity of days worked for Pabst
and with respect to their performance of both unit
work and non-unit work during the approximately
fifteen month period here in question;

2. that their "most recent starting dates" as contem-
plated by Section 4.5-3 of the contract between Local
153 and Pabst was the first day of the most recent
period of unbroken and uninterrupted employment with
Pabst immediately preceding their respective filings
of letters of intent to become regularly scheduled
Pabst employees in the unit represented by Local 153.
Accordingly the Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the parties makes the following AWARD:

Pabst Brewing Company did not violate its collective bargaining agreement with Local 153 by failing to base grievants' respective seniority dates upon their respective earliest employment dates with the company. The seniority dates assigned are appropriate and are in accordance with the said collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: December 1972
STATE OF: New York
COUNTY OF New York

On this day of December, 1972 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

ANTHONY SODANO, LOUIS SODANO, ALEX CELI, JOHN NORELLI and JOSEPH ANDIOLA

- and -

PABST BREWING COMPANY

Arbitrator: Eric J. Schmertz
Hearings: Newark, New Jersey
         September 23, 1969
         November 19, 1970
         June 12, 1972

Appearances: Company,
Stryker, Tarns & Dill
by John C. Lifland, Esq.
33 Washington Street
Newark, N.J. 07102

Grievants
Craner & Brennan
by John A. Craner, Esq.
1143 East Jersey Street
Elizabeth, N.J. 07201

Local 153
Nicholas Buydos, President
James Marion, Shop Steward

New Jersey Brewers' Association
Thomas J. Hayes
All of the grievants in this matter were formerly employed for lengthy periods of time by Krueger Brewing Company ("Krueger") and were in the employ of Krueger when that company went out of business at a time shortly before February, 1961. All were members of Local 153, Brewery Workers Joint Local Executive Board of New Jersey ("Local 153") throughout the period of their employment at Krueger as well as the precise period with which we are here concerned. Under the terms of Section 4.3-1(a) of the contract between Local 153 and various members of the New Jersey Brewers' Association ("Association") including Pabst Brewing Company ("Pabst") grievants were thus Regular Employees; Section 4.3-1(a) reads, in pertinent part, as follows:

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This status of Regular Employee on the books of the Association gives an employee certain rights to employment and re-employment in the event of lay-off not only with the company for which he works but with other companies in the Association. When a Regular Employee resigns from his job with an Association member or when, as in this case, the member company by which he has been employed goes out of business, he becomes an Unattached Regular Employee; as such he has the right to be hired ahead of casual,
extra and Junior Regular Employees by any Association member which has job openings. It was in this status of Unattached Regular Employees that grievants commenced working for Pabst at various dates between February 1, 1961 and March 3, 1961. No regular five-day week job openings were available at Pabst at that time and they obtained work by shaping up at the Local 153 union hall and subsequently through direct contact at Pabst on a day-to-day basis. A substantial amount of the work accepted by each of the grievants during the ensuing twelve to fifteen month period was not under the jurisdiction of Local 153 but under Local 843, another local of the Brewery Workers Joint Board. The testimony of the witness Buydos is to the effect that grievants preferred working under the Local 843 jurisdiction because they could work days instead of working at night as they would have to have done on Local 153 work. Although this testimony is contested by grievants, its credibility is enhanced by the fact - conceded by the grievants and established by litigation which reached the National Labor Relations Board - that grievants made considerable efforts over an extended period of time to transfer their union membership from Local 153 to Local 843. I think it more than coincidence that grievants took steps "to protect ourselves" with regard to seniority rights as Local 153 employees of Pabst only when their attempts to transfer to Local 843 were at the point of failure and at a time when opportunities for free-lance work in the Local 843 juris-
diction were becoming increasingly unavailable.

Whatever their motivations and intentions may have been, however, the fact is that they made no attempt, knowledge of which may be charged to Pabst, to establish their status as Regular Employees of Pabst until May of 1962 when they filed letters of intent, as prescribed by Section 4.5-3 of the contract, to be placed on the Regular Employee seniority list. Section 4.5-3 reads as follows:

"4.5-3 An unattached regular employee (not on a seniority list of another Company), who held such status prior to June 1, 1964 or more than two (2) years upon written notice to the Personnel Department of the Company in which he is employed, shall have the right to be placed on the regular employee seniority list of that Company and his seniority date shall be his most recent starting date with such Company."

Grievants were thereafter placed on the seniority list for Local 153 employees with seniority dates which eliminated most or all of the time worked prior to the filing of the letters of intent - the "written notification" required by Section 4.5-3 - in May 1962. They maintain that their seniority should have dated from the respective February and March 1961 dates when they first shaped up for work at Pabst and regardless of whether the work they performed in the ensuing period until the filing of their letters of intent was in the Local 153 or Local 843 jurisdiction. This claim carries with it the implicit contention that breaks in continuity of their employment during this period (and the unrefuted testimony of the witness Jacknain establishes that there were such
breaks in the employment of each of the grievants) should also be ignored.

Section 4.5-3 of the contract clearly contemplates the situation, comparable to that of the grievants, in which a Regular Employee on the books of the Association leaves the employ of one Association member, whether by resignation or lay-off, goes to work for another Association member without becoming a full-time, five-day-a-week employee and thereafter does become a five-day-a-week employee, signifying that he wishes to be added to the seniority list of the company in the bargaining unit in which he is employed. When he does so, the Section provides, his seniority is back-dated to his most recent starting date and that it is the latest such date that will be used. The contract does not spell out the meaning of this distinction nor clearly show how an employee might have two or more starting dates but the testimony of two witnesses, one the President of the union and the other a representative of the Company who are the parties to the contract in question, makes it abundantly clear. The testimony of these two witnesses, Buydos and Jacknain, respectively, shows that when a man is employed in any capacity other than that of a regularly scheduled five-day-a-week employee, be he an unattached regular, an extra or a casual employee, any break in the con-
tinuity of his employment, even if for only one day and regardless of whether it is due to illness, lack of work or for any other reason, results in a loss of the time previously worked for all purposes; the next day that he works is his most recent starting date. After an employee has been added to the roster this condition changes and absences from work, unless they exceed the prescribed requirements with regard to duration or justification, have no adverse affect on the employees' job tenure or continuity for various purposes including those of seniority.

The record shows further that the grievants worked during the approximately fifteen month period in question here for the most part outside of the jurisdiction of Local 153 and that during that same period there were days when they did not work at all including one day shortly before the filing of their letters of intent to accept regular employment status as Local 153 employees of Pabst. Thus, even if there were validity to their contention that all employment with Pabst regardless of whether in the Local 153 or the Local 843 jurisdiction should be credited to them, there would be the matter of breaks in continuity of their employment on days when they did not work at all.

Grievants argue that their work both in the Local 843 and the Local 153 jurisdiction during the subject period should be counted in establishing their seniority "since it is the employer that one looks to, not the Union, in determining seniority". This is over-
simplification. One may look to the employer for the ministerial acts which establish and record one's seniority and one certainly looks to the employer for certain of the benefits flowing from seniority. But one also looks to the unit in which that seniority is to operate; and one surely looks to the contract obtained by the collective bargaining representative of that unit to determine whether the concept of seniority exists in the shop, if so, how it is obtained and, once obtained, how it operates.

I find nothing in the contract nor in the testimony and evidence before me in this matter to support the view that a man may avoid the low seniority assignments which would be his as a full-time employee in the unit of which he is a member during the early years of his employment with a company; that he may instead perform non-unit work of a more desirable nature; and that he may thereafter take equal place in the seniority roster of his unit with men who, during the same period, have performed only unit work gradually working from less desirable to more desirable work assignments and other improved conditions attributable to their earned seniority in the unit. Nor am I persuaded that equity would be served by such a conclusion. Yet that is the result that grievants seek. That the contract between Local 153 and Pabst is distinct from its contract with Local 843, although they appear in the same booklet; that the rights and duties of Local 153 employees of Pabst derive exclusively from the Local 153 contract; and that the seniority rights which
grievants invoke are a matter in which Pabst, Local 153 and the grievances all have interests which are entitled to consideration are points clearly established by the first two provisions of the contract, Sections 0.1 and 0.2 which read as follows:

"0.1 This Agreement shall be binding upon the Union and each of the above-named Locals and the Association and the above-named Companies. The liability of the Association and of any Company and of any Union and of any Local hereunder and the responsibility of the Association and of any such Company or of the Union and of and Local for its compliance with the provisions of this Agreement shall be several, and not joint.

"0.2 Unless otherwise provided herein to the contrary "employees" as used in this Agreement shall be construed to refer to the employees of the Companies who are parties to this Agreement in the unit for which the Union was certified by the National Labor Relations Board on March 9, 1953."

Based upon the transcript of testimony and the evidence forming the record herein and having considered the respective post-hearing briefs of the parties, I find and conclude that:

1. beginning on various dates between February 1, 1961 and March 3, 1961 and until their filing of letters of intent to become regular employees of Pabst on a regularly scheduled basis, grievances were unattached regular employees working on an irregular basis both in regard to continuity of days worked for Pabst and with respect to their performance of both unit work and non-unit work during the approximately fifteen month period here in question;

2. that their "most recent starting dates" as contemplated by Section 4.5-3 of the contract between Local 153 and Pabst was the first day of the most recent period of unbroken and uninterrupted employment with Pabst immediately preceding their respective filings of letters of intent to become regularly scheduled Pabst employees in the unit represented by Local 153.
Accordingly the Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the parties makes the following AWARD:

Pabst Brewing Company did not violate its collective bargaining agreement with Local 153 by failing to base grievants' respective seniority dates upon their respective earliest employment dates with the company. The seniority dates assigned are appropriate and are in accordance with the said collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: December 1972
STATE OF: New York)
COUNTY OF New York)

On this day of December, 1972 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In the Matter of the Arbitration between

Local 812 Soft Drink Workers Union and

Pepsi-Cola Metropolitan Bottling Co., Inc.

AWARD and

OPINION

The stipulated issue is:

Was the dismissal of Michael H. Foster on October 15, 1971 proper under the contract? If not what shall be the remedy?

A hearing was held on February 14, 1972 at the New York State Board of Mediation, at which time Mr. Foster, hereinafter referred to as the "grievant," and representatives of the above 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.

Based on the record before me I find no reason why Company witnesses would falsely testify against the grievant or fabricate the incidents and observations which they detailed. To accept the grievant's version of the events is to conclude that those Company witnesses maliciously constructed a false case against him. There is nothing in the record from which any such conclusion or even inference can be drawn.

Accordingly I accept the Company's version of the events and hold that the grievant committed the offense charged and that summary discharge is therefore mandated under Article 12 of the contract.
Accordingly the Undersigned makes the following AWARD:

The dismissal of Michael H. Foster on October 15, 1971 was proper under the contract.

Eric J. Schmertz
Arbitrator

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

On this day of February, 1972, 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
Utility Lodge Local 405 and
Pratt & Whitney, Inc.

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

The Company correctly chose to apply the SUPPLEMENT TO APPENDIX J to Mr. Fortier upon his return to the Utility Man position in Department 37 on August 30, 1971. His proper rate of pay on that date shall be determined by application of the Altieri Award.

DATED: August 31, 1972
STATE OF New York ) ss.
COUNTY OF New York)

On this 31st day of August, 1972, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1230 0160 71
In the Matter of the Arbitration between Utility Lodge Local 405 and Pratt & Whitney, Inc.

The issue is whether the grievant, Oscar J. Fortier, was properly paid when he returned to a Utility Man position in Department 37 on August 30, 1971.

A hearing was held at the Company offices in West Hartford, Connecticut on May 22, 1972, at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived.

FACTUAL BACKGROUND

The pertinent aspects of Mr. Fortier's work record at the Machine Tool Division, which dates from April 1, 1957, are as follows: On March 22, 1965, he entered Department 37 as a Utility Man (Occupation No. 670, List No. 50, Job Level 7), a bonus paid position. On July 18, 1970, he transferred to Department 31, also as a Utility Man (same Occupation List and Job Level), still on bonus. On September 3, 1970, Mr. Fortier exercised his seniority rights and, in lieu of layoff, bumped into an Inspector Helper position in Department 120 (Occupation No.425, List No. 74, Job Level 6), a day rated position. He remained there until August 30, 1971, when he exercised his seniority to return to Utility Man position in Department 37.
In the October 1970 contract negotiations, the parties agreed to convert all incentive rated (bonus) positions to a measured day rate status. The Department 37 Utility Man position was one occupation affected.

Upon his return to the Utility Man Position on August 30, 1971, the Company assigned Mr. Fortier a $3.58 hourly rate, the then current measured day rate for that Job Level No. 7 position. (See APPENDIX B, page 51 of the contract.)

The Union asserts that Mr. Fortier should, instead, have been assigned an hourly rate of $3.77, a differential of 19 cents per hour.

The dispute comes into sharper focus when the 1970 negotiations for a new collective bargaining agreement are reviewed.

A major issue in the 1970 negotiations was the Company's proposal to have all incentive (bonus) positions in the Machine Tool Division change over to measured day rated positions. Its initial proposal would have entailed a reduction in earnings for nearly 95% of employees affected.

The Company subsequently modified its position and proposed, in brief, that incentive rated employees who were actually working on October 2, 1970, be "red circled" at a rate based upon their individual straight time average earned rate, as computed on June 1, 1970, if such rate would be higher than the measured day rate to be established for the position. Further, the Company proposed that employees so "red circled" would retain their "red circle" rate as long as they held the same position occupied on October 2, 1970, and would have their "red circle"
rate increased by the same amount as any general increase which would be negotiated. Agreement upon the Company's revised proposal was reached prior to the contract's expiration. The terms of that accord now appear in APPENDIX J (pages 59, 60) of the current Agreement.

Despite having reached tentative accord on this issue, a strike began October 5, 1970. One of the important unresolved issues involved the treatment of employees who, on October 2, 1970, were on layoff status from incentive rated positions. The parties resolved this problem by agreeing to what now is the SUPPLEMENT TO APPENDIX J (pages 60, 61). For reasons which will become evident below, it is appropriate to note that the SUPPLEMENT TO APPENDIX J was at issue in Case No. 12-30-0159-71, decided on July 18, 1972, by Arbitrator James V. Altieri after the close of argument in this case.

CONTRACT CLAUSE

The pertinent contract clauses are APPENDIX J, and the SUPPLEMENT TO APPENDIX J, which appear in the contract as a result of the 1970 negotiations. Reference to them may be made therein.

UNION'S POSITION

The Union argues that upon his return to the Department 37 Utility Man position on August 30, 1971, Mr. Fortier's rate of pay should have been governed by the provisions of APPENDIX J, and not the SUPPLEMENT TO APPENDIX J. The latter, it asserts has no application here since Mr. Fortier was not on layoff status on October 2, 1970. Instead he was actively at work,
albeit as an Inspector Helper. He had recall rights (later exercised) to the Utility Man position. Until such time as those recall rights expired, it insists he would not come under the SUPPLEMENT as a laid off employee.

It maintains that Section 3 of APPENDIX J is specifically applicable to Mr. Fortier in that he was one of the "...incentive employees of the Company who were actually working on October 2, 1970 ..." Therefore, he should have been "red circled" at his June 1, 1970 average earned rate.

While it does not dispute the fact Mr. Fortier was not on an incentive job on October 2, 1970, it insists that Section 3 cannot be interpreted to require that an "incentive employee" be actually working on an incentive job on that date. Rather, Section 3 required only that Mr. Fortier be an "incentive employee" on that date. He meets this test, it asserts, under the terms of Article VII, Section 5.

SECTION 5. An employee transferred from one occupation to another will retain his seniority in his former occupation for a period of one year when his accumulated seniority will be transferred to the occupation in which he is presently employed.

Under this provision, the Union contends that Mr. Fortier retained seniority on the Department 37 Utility Man incentive occupation for a one-year period following his transfer (on 9/3/70) to Department 120's Inspector Helper position. Having retained seniority in that incentive position, it argues he must be considered an "incentive employee" within the meaning of Section 3.

Applying this reasoning, it concludes that Mr. Fortier's
proper rate of pay on August 30, 1971, should have been $3.77 - a calculation reached by taking his "red circle" rate of $3.56 (based upon his individual straight time average earned rate computed as of June 1, 1970) and adding to it the general increase of 21¢ per hour to which all "incentive employees" protected by Section 3 were eligible to receive on October 5, 1970 in accordance with the terms of APPENDIX J's Section 4.

COMPANY'S POSITION

The Company denies that Section 3 of APPENDIX J applies to Mr. Fortier. Instead, it asserts that SUPPLEMENT TO APPENDIX J is controlling in his situation.

It contends that in exercising his seniority rights in September 1970 to displace (bump) another employee from the Department 120 Helper position, in lieu of lay off from Department 37, Mr. Fortier must be regarded the same as any other employee whose seniority gave him recall rights to Department 37. In short, he should be equated with all other incentive paid employees who, on October 2, 1970, were on layoff status. Such employees, it asserts, are covered by Section 1 of the SUPPLEMENT TO APPENDIX J and not by Section 3 of APPENDIX J.

Accordingly, when Mr. Fortier returned to the Utility Man position on August 30, 1971, he was properly assigned a $3.58 hourly rate since the SUPPLEMENT provides that employees with three years recall (the category into which Mr. Fortier fits) will receive not less than the appropriate contract scale at the time of recall, if it is higher than their average earned rate as of June 1, 1970. Since the position called for a $3.58
rate, it assigned that rate to him rather than his $3.56 average earned rate.

The Company maintains that in order to receive a "red circle" rate under Section 3 of APPENDIX J, to which would be added the October 1970 21¢ general increase, Mr. Fortier had to be actually working on an incentive position on October 2, 1970. Since on that date he was assigned to a day rated position, he did not fall under Section 3's coverage.

The Company lays great stress upon the 1970 bargaining history. It forcefully argues that its clear intent (in making the proposal which led to the present APPENDIX J) was to "red circle" only that narrow group of employees actually working on an incentive position as of October 2, 1970. That is only those who were immediately to be affected by the conversion to measured day rates were to be protected. The SUPPLEMENT TO APPENDIX J (the essence of which was not proposed until after the October 5, 1970 strike began) was to apply to all other employees who had held incentive rated positions, but who on October 2, 1970 were on lay off and still had recall rights to such positions, or to those who had bumped from an incentive position prior to that date. As to those employees, the Company concedes it had a "residual liability when and if they returned to their old incentive jobs." That liability was to be discharged under the terms of the SUPPLEMENT.

**OPINION**

The threshold question before me is whether the Company improperly denied Mr. Fortier, upon his return to the Department 37 Utility Man position on August 30, 1971, a rate of pay gov-
The heart of the Union's argument that Section 3 of APPENDIX J applies here rests upon its assertion that Mr. Fortier retained status as an "incentive employee" in Department 37 by virtue of the provisions of Article VII, Section 5.

Article VII deals with the subject of seniority, and Section 5 within it governs the seniority rights of employees to their former position when transferred from one occupation to another. Section 5 is intended to protect the right of an employee so transferred to retain his seniority status in his former occupation for a one year period. If he does not return to that position within that time limit, his accumulated seniority will be transferred to the position in which he finds himself.

There is no question but that Mr. Fortier had a right, which he exercised without Company protest, to return to the Utility Man position in Department 37 when the opportunity arose in August, 1971, the Section 5 one-year time period not having expired.

However, I do not conclude that his right to return to said position qualified Mr. Fortier as one of the "incentive employees of the Company who were actually working on October 2, 1970."

Mr. Fortier, of course, was not working on an incentive position on October 2, 1970. He was then an Inspector Helper in Department 120, a day-rated position. As such, he retained (for a one-year period) seniority in his Utility Man occupation by virtue of Article VII, Section 5. Retention of seniority to that position did not, in my judgment, also include the
additional right to be considered an incentive employee as of October 2, 1970.

Stated otherwise, while Article VII, Section 5 gave Mr. Fortier the right to retain seniority in his former incentive rated position, that clause cannot be construed so as also to have granted him status as an "incentive employee."

An incentive employee is, after all, one whose compensation is a direct outgrowth of an incentive plan. Once removed from that plan - even though holding a right to retain seniority to a position covered by it - an employee then engaged in a day rated occupation cannot properly be considered an "incentive employee." Had Mr. Fortier returned to his former incentive position prior to October 2, 1970, he would on that date have been an "incentive employee."

Having found that Mr. Fortier was not, by virtue of Article VII, Section 5, an "incentive employee," it follows that he was not subject to the provisions of APPENDIX J, Section 3.

An analysis of Section 3 buttresses this conclusion. The Union has argued that Section 3 does not specify that an "incentive employee" who is at work on October 2, 1970 need be working on an incentive position. That is true. Yet, it is clear to me that that was precisely what the parties intended Section 3 to mean. Given the negotiating history, no other conclusion would be logical.

APPENDIX J appeared in this Agreement for the first time following the October, 1970 negotiations along with the SUPPLEMENT TO APPENDIX J. It represents the result of a difficult negotiation problem: the conversion of the Machine Tool Division
incentive program to measured day rate.

The basic problem inherent in that conversion was dealt with in two distinct steps. First, agreement was reached as to those who were actually working on incentive positions as of October 2, 1970. Those employees, after all, were to be most directly and immediately affected by the conversion from incentive. It is only natural that they should have received primary focus. Only after their situation was resolved (shortly before the strike began) did the parties seriously turn to the effect of the conversion of others - in particular, those who had been laid off, transferred or bumped from incentive positions. In doing so they agreed upon what now appears as the SUPPLEMENT TO APPENDIX J.

APPENDIX J and its SUPPLEMENT must be read together. The two complement each other. They deal with two aspects of the same problem: how to treat employees affected by the conversion from incentive to measured day rate. Their focus is different however. APPENDIX J relates to those directly and immediately affected by the conversion - i.e., those actually performing on incentive positions on the effective date of the conversion. THE SUPPLEMENT relates to those not then on incentive positions, but who have retained seniority rights to such. It is clear to me that Mr. Fortier fits into this latter category, and not the former.

Accordingly, I find that the Company did not improperly deny Mr. Fortier, upon his return to the Department 37 Utility Man position on August 30, 1971, a rate of pay governed by the
provisions of APPENDIX J.

It remains to be determined, then, whether Mr. Fortier's rate of pay was properly established on August 30, 1971 under the SUPPLEMENT to APPENDIX J.

The application of "red circle" rates to employees on lay off status (the position in which the Company has argued Mr. Fortier fits) has been arbitrated under the SUPPLEMENT recently in Case No. 12-30-0159-71 before Arbitrator Altieri. Suffice it to say that the parties have agreed to apply the Altieri Award to Mr. Fortier's situation, should I rule that the SUPPLEMENT is controlling. As the Company pointed out, while that Award would not be res judicata it would be "sufficiently compelling to be dispositive" (Tr.38.) In view of this, no fruitful purpose would be served by an attempt to interpret the SUPPLEMENT independently.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Motion Picture Laboratory Technicians Local 702 Welfare Fund;
Motion Picture Laboratory Technicians Local 702 Pension Fund
and
Radiant Laboratories, Inc.

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

For the months March through July, 1972 Radiant Laboratories, Inc. owes the Motion Picture Laboratory Technicians Local 702 Welfare Fund the sum of $1,121.64.

For the months March through July 1972 Radiant Laboratories, Inc. owes the Motion Picture Laboratory Technicians Local 702 Pension Fund the sum of $15,003.34.

The above sums are past due. Therefore Radiant Laboratories, Inc. is directed to pay said sums to said Funds forthwith with interest, plus the penalty of 1% of the unpaid balance after the 10th of each month pursuant to prior notice of the Trustees of said Funds.

The Arbitrator's fee for 1/2 day in the amount of $100.00 shall be borne by the Company. Therefore Radiant Laboratories, Inc. shall pay Local 702 Motion Picture Laboratory Technicians the sum of $100.00 representing the Arbitrator's fee paid by the Union.

Eric J. Schmertz
Permanent Arbitrator
DATED: October 18, 1972
STATE OF New York )
COUNTY OF New York) ss.

On this 18th day of October, 1972, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Whether the employer has since on or about February 1, 1972, failed to pay the proper rate of pay to Color Machine Operators, and if so, what shall the remedy be?

A hearing was held at the Laboratory on July 3, 1972 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 question is whether the rates of pay negotiated and set forth in the Memorandum of Agreement dated October 1, 1971 to October 1, 1972 for Panel Printers operating at 240 FPM should be absorbed in whole or in part within "red circle" rates of pay.

The grievants are nine Color Machine Operators, Grade 5. All were employed prior to the negotiation of the Memorandum at rates of pay in excess of the minimum contract rate. It is undisputed that their higher pay reflected merit increases and/or their special ability to run high speed machines. All but one carried these "red circle" rates from other laboratories when hired by this Company. The remaining one was granted an increase by the Company to "red circle" status.
The Company contends that because these operators enjoyed rates of pay in excess of the contract rate, and because their higher rates reflected their ability to run high speed machines, the subsequently negotiated increases in pay for the operation of Panel Printers at 240 FPM should not apply to these operators. Or at least as to them the negotiated increase should be reduced by the amount their regular rates of pay exceed the contract rate.

While I appreciate the Company's economic argument, especially when it and the Industry are presently confronted with severe financial and competitive pressures, I cannot find a contractual basis to support its position.

Article 17 of the Memorandum of Agreement dated October 1, 1971 to October 1, 1972 provides for no exceptions to the machine rates negotiated therein. As such it must be construed as applicable to all Group 5 employees performing the work covered by that Article. It did not exempt Group 5 employees who enjoyed "red circle" rates, nor did it call for any diminution in the extra money to be paid when the machines are run at 240 FPM, 360 FPM and 480 FPM by a particular operator whose regular pay rate exceeded the contract rate.

Indeed to accept the Company's argument would mean that the grievants would not receive the full pay increase negotiated in Article 17 of the Memorandum. Viewed another way, unless they received the increase on top of their actual pay, the merit increases which they previously received and presumably earned because of special abilities, and which made up part of their "red circle" rate would be eroded in whole or in part.
In my view, if Article 17 of the Memorandum was so intended - to deprive some Group 5 employees of all or a portion of the rate increase, or to subsume it within and thereby reduce or take away previously granted merit increases - the Memorandum of Agreement, negotiated after the grievants had received "red circle" rates, should have said so explicitly. In other words such an untraditional result cannot be inferred from the present, bare language of Article 17.

Accordingly the Undersigned as Permanent Arbitrator under the Collective Bargaining Agreement between the above named parties makes the following AWARD:

The Company since on or about February 1, 1972 has not paid the proper rate of pay to Color Machine Operators when they have operated the Panel Printer at 240 FPM. Their rate should have been and shall be 30¢ an hour above the individual rates of pay which they received prior to negotiation of the Memorandum of Agreement dated October 1, 1971 to October 1, 1972. The Company shall make appropriate adjustments in pay for the periods of time the grievants operated those machines at that rate of speed.

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

[Signature]

Eric J. Schmertz
Permanent Arbitrator

DATED: July 1972
STATE OF New York )ss.:
COUNTY OF New York)

On this day of July, 1972, 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. 72 A5
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration between
Society of Stage Directors and Choreographers
and
Robert L. Steele

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

The Union has failed to establish the existence of an agreement between the parties to arbitrate the instant disputes.

Accordingly, without prejudice to the rights of the parties in any other forum, the claims of Bernard Barrow and Doug Rogers are not arbitrable.

Eric J. Schmertz
Arbitrator

DATED: November 13, 1972
STATE OF New York ss.
COUNTY OF New York

On this 13th day of November, 1972, 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 0589 71
In the Matter of the Arbitration between

Ricardo Colina

and

Trans World Airlines, Inc.

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 Company has not established by clear and convincing evidence that there was just cause for the discharge of Ricardo Colina. He shall be reinstated with back pay excluding the period from June 9 to July 7, 1971, and less his earning if any, from gainful employment during the period from his discharge to his reinstatement.

Eric J. Schmertz
Chairman

William E. Malarkey
Concurring
Dissenting

Mel Brenner
Concurring
Dissenting

DATED: March 27, 1972
STATE OF New York )ss.:
COUNTY OF New York)

On this 27th day of March, 1972, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
DATED: March 1972
STATE OF New York )ss.: 
COUNTY OF New York) 

On this day of March, 1972, before me personally came and appeared William E. Malarkey to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: March 1972
STATE OF New York )ss.: 
COUNTY OF New York) 

On this day of March, 1972, before me personally came and appeared Mel Brenner 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 Ricardo Colina and Trans World Airlines, Inc.

In accordance with the applicable provisions of the Employee Grievance Procedure, the Undersigned was selected as the Chairman of a three-man Board of Arbitration to hear and decide, together with the other members of said Board, the following stipulated issue:

Was there just cause for the discharge of Ricardo Colina and if not what shall be the remedy? (It was stipulated that any back pay Award would exclude the period June 9 to July 7, 1971.)

In accordance with the Arbitration provisions of the Employee Grievance Procedure, Messrs. William E. Malarkey and Mel Brenner served as the other members of the Board of Arbitration.

A hearing was held at the Company offices on January 14, 1972 at which time Mr. Colina, hereinafter referred to as the "grievant," appeared, and was represented by counsel. Representatives of the Company also appeared, and all concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the oath of the Arbitrators.

Prior to his discharge the grievant was a ticket agent. The Company does not charge him with incompetence, or failure to follow Company rules and procedures or even negligence in
the handling of his duties. Rather the charge is most serious and unequivocal. The Company claims that the grievant knowingly participated in a larcenous scheme to fraudulently convert and transform into money for the benefit of unauthorized persons, negotiable airline ticket vouchers. In short, the charge is that he committed theft or was a willing accessory to theft.

As in all discharge cases, for its action to be upheld, the Company must meet the burden of establishing the offending employee's culpability by clear and convincing evidence as well as showing that the offense warranted the ultimate penalty of discharge. In the instant case there can be no serious dispute over the propriety of the penalty if the charge is sustained under the foregoing requisite standard.

So far as this Arbitrator is concerned it is especially important in this case, because of the seriousness of the charge and its obvious impact on the grievant's future both personally and occupationally, that the Company be required to prove the accusation clearly and convincingly. The accusation parallels a crime and although this is not a criminal proceeding with criminal penalties, and though the criminal standards of proof are not required, a finding that the grievant committed the offense charged will not only sustain his termination, but could well render him virtually unemployable elsewhere.

Within this well settled frame, and based on the entire record before me I am not persuaded that the Company has met its burden of establishing the grievant's culpability by clear
and convincing evidence. This is not to say that the grievant was not part of the planned thefts. Such a finding is unnecessary because it is not the grievant's burden to go forward and establish his innocence. Rather it is to say that the total record falls short of establishing the grievant's guilt, by the standards required in such cases.

There is no evidence in the record linking the grievant to other employees who admitted their participation in the scheme. There is no evidence that any of those persons implicated the grievant. None of those who admitted their guilt testified in this arbitration, and so far as the record before me is concerned, the investigation of those individuals did not implicate the grievant as a participant or co-conspirator.

There was no independent evidence introduced of any participation by the grievant in any of the stages of the scheme up to the point where the stolen vouchers were presented to him, as a ticket agent, for transformation into money. In other words I find nothing in the record which would link the grievant to the initial purloining of the vouchers; or their placement in a secreted location; or the use of fake identification to convert the vouchers into either money or negotiable checks. Nor is there any evidence that the grievant benefited monetarily from the transactions or came into any suspicious sums of money.

Basically the only evidence against the grievant is that during the course of his duties he "cashed in" a number of these vouchers for persons who, as was later determined, pres-
ented fake identification. Specifically a person would present a voucher to the grievant with some sort of false identification (such as a fake out of state driver's licence) which coincided with the name on the airline voucher. The grievant, pursuant to his normal authority as a ticket agent, then transformed the voucher into money or a negotiable check for that "customer."

It is this series of transactions upon which the Company relies in asserting the grievant's culpability. The Company argues that the fact that the grievant did not carefully check the identification of applicants for a refund together with the relatively large number of vouchers which passed over his desk, are evidence of his knowledge of and participation in the scheme. Obviously this is one logical conclusion. But it is not the only reasonable explanation. And absent other evidence implicating or linking the grievant to the plot, I am not satisfied that it establishes his guilt either clearly or convincingly. It is equally possible that the grievant was merely negligent, or unmindful or unresponsive to new Company procedures. The record indicates that for an extended period of time ticket agents transformed airline vouchers into cash or checks in a lax and casual manner. The standards for identification of the "customer" were unclear, varied and generally unenforced. Though prior to the incidents involved in this case the Company took steps to tighten up the procedures especially with regard to what would be required as identification, the record shows that ticket agents did not totally
change their casual practices. So, though I am persuaded that
the grievant failed to adhere to the newly tightened regula-
tions and thereby negligently "cashed in" vouchers without re-
quiring proper identification, I do not think that this is
enough, absent other evidence of proscribed or suspicious ac-
tivity, to establish his guilt of the charge of theft.

To my mind there remains the single question of why a
significant number of vouchers were cashed in at the grievant's
work location. Again one possible answer is that he was part
of the scheme. Another, however, and equally logical in my
view is that other employees who were in fact actively engaged
in the scheme knew that the grievant was lax or negligent or
overly casual in carrying out the procedures regarding the
cashing in of the vouchers, and that he, unlike other ticket
agents, would be less demanding of proper identification and
less suspicious of what was going on. In other words, and in
summary, what took place could have been as much because the
grievant was an unwitting and innocent dupe as it could have
been because of any knowing participation in the scheme.

Had the Company disciplined him for failure to comply
with its newly tightened rules or for inefficiency or for
neglect, I might well have agreed that some disciplinary pen-
alty would be in order. But where the charge is theft and
where, at least to my mind, there are other logical explana-
tions of what took place as well as the absence of other pro-
bate evidence implicating the grievant in other phases of the
larcenous scheme, I cannot find that the evidence establishes
his guilt by the clear and convincing standard required in such cases.

Accordingly the grievant shall be reinstated with back pay, excluding the period June 9 to July 7, 1971 and less any moneys he earned in gainful employment elsewhere during the period of his discharge.

Eric J. Schmertz
Chairman
In the Matter of the Arbitration
between
Triangle Laboratories, Inc.
and
Local 702, I.A.T.S.E.

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:

Because of the special circumstance in this case the Company's petition to discharge John Cella is denied.

However Mr. Cella and the Union are warned that resort to self help during the term of the contract is prohibited and that any such improper activity hereafter engaged in by Mr. Cella whether or not he was so instructed by the Union would subject him to discipline including discharge. The Union is warned that any such instructions to stewards and employees would subject the union to liability.

I direct that the Arbitrator's fee be shared equally.

Eric J. Schmertz
Permanent Arbitrator

DATED: June 9, 1972
STATE OF New York )ss.: 
COUNTY OF New York)

On this 9th day of June, 1972, 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. 72 Q1
In the Matter of the Arbitration between

Triangle Laboratories, Inc.

and

Local 702, I.A.T.S.E.

The stipulated issue is:

Whether or not the Company has cause to discharge John Cella?

A hearing was held on May 24, 1972 at which time Mr. Cella and representatives of the Company and Union 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 and the contractual time limit for rendition of the Award.

The Company advances two charges against Mr. Cella; that he improperly interfered with production by instructing certain machine operators to "put up leader" during break periods and that he initiated and led a work stoppage of about three hours duration, both during regular shift hours on May 23, 1972.

By agreement between the parties the Company has retained Cella in its employ pending the outcome of this arbitration.

In my capacity as Permanent Arbitrator under the Industry contract, I have repeatedly ruled that Section 15 of the contract, which sets forth the exclusive method for redress and adjudication of disputes, implicitly proscribes strikes, slowdowns, work stoppages, interferences by employees with normal production, countermanding Company instructions and lock-outs. I have also held that employees and Union officials are re-
quired to use Section 15 of the contract to resolve contract disputes and that resort to self help is unlawful. I reiterate those rulings in this case.

Based on the evidence before me I find that Cella, as Shop Steward, violated that implicit obligation in one of the two circumstances charged by the Company - namely by initiating and leading a work stoppage. But because I am not satisfied that he fully understood his responsibilities under the special conditions involved, I have decided not to authorize his discharge this time. But he is warned that a repetition of this or a like offense, no matter who ordered it, would be grounds for discharge.

I do not find that Cella was culpable of an improper interference with production when he instructed the machine operators to put up leader during break or relief periods. The evidence is that he was instructed to do so by Mr. Voelpel, the Union's Vice President, and that he had reason to believe that Voelpel's instructions accurately reflected Voelpel's agreement with Mr. De Mercurio, the Company's President, as to how the machine would operate with a crew of one less than contractually required. In other words, whether accurate or not Voelpel did tell Cella that it was the agreement of the Union and Company that the machine could be operated with a crew of one less than required provided that leader was put up during breaks, relief periods and meal periods and that the operators were to be so informed. So though the Company may have interpreted Cella's instructions to the operators as violative of his duty not to interfere with production, or as inconsistent with
Company instructions, or as violative of the Company's version of the understanding between it and the Union regarding the temporary operation of the machine Cella merely did what he thought the Union and the Company agreed he should do, not what he or the Union unilaterally decided. Hence I cannot find that Cella's action in that circumstance was a contract violation.

Cella concedes that following the foregoing incident for which he was suspended, he returned to the production area of the plant, called "everybody out" and a work stoppage of approximately three hours duration resulted. His defense and that of the Union on his behalf, is that he was expressly told to do so by Voelpel. In his testimony Voelpel freely acknowledged that he so instructed Cella.

I take the opportunity of this case to admonish Voelpel as well as Cella. Union officials, whether employees or not of the Company have a special duty to uphold the integrity of the contract, including the grievance and arbitration provisions. Voelpel's instruction to Cella to commence a work stoppage was manifestly violative of the Union's obligation not to engage in proscribed self help and may well have subjected the Union to liability had the Company commenced an action against the Union. Also I want to make it clear that an employee or shop steward is not immune from discipline when he initiates, participates in, or is otherwise responsible for any proscribed self help activity even if he has been instructed to do so by a Union official. In the future I will not hesitate to
hold the Union liable for instructions to stewards or employees to engage in work stoppages, and I will uphold disciplinary penalties imposed on stewards and employees who engage in such activities even if their Union instructed them to do so. Anything less would be untenable, simply because work stoppages could be engaged in by a steward or employee with impunity on the excuse that they were instructed to do so by the Union or a Union official. That result would quickly destroy the stability of the Collective Agreement by subverting the intent and meaning of Section 15.

But it is this latter circumstance which I am not convinced Cella understood. I think he knew - indeed he concedes - that work stoppages and other proscribed activity which he might initiate or participated in on his own, would be grounds for disciplinary action including discharge. He was so instructed at a joint Company-Union meeting the latter part of October, 1971. But I don't think he understood that he ran the same risk and was similarly liable if he called a work stoppage merely as an agent of his Union. In the instant case I think he was unclear where his obligations and loyalties lay. There is no evidence that he was told or knew that he ran the same risks in calling a work stoppage on instructions of the Union as if he did it on his own.

Nor indeed have I had occasion in any prior case to make that clear. In this Industry I have not had a similar situation brought to my attention. Therefore I am prepared to give Cella some benefit of the doubt, and to use this case to advise
him and all others similarly situated that hereafter discipline imposed for activity of this type will be upheld.

I state again as I have in the past that so long as I am Permanent Arbitrator under this contract I see no reason why the Union, its stewards or its members should order or engage in any self help over contract disputes. The grievance and arbitration provisions of the contract, and especially the "quickie arbitration" section are fully capable of redressing all grievances and can provide full remedies for contract breaches committed by an employer.

Accordingly, all concerned are on notice that stewards and employees will be subject to disciplinary penalties and the Union to organizational liability for improper resort to self help during the term of the contract.

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

between

WESTERN ELECTRIC COMPANY, INC.

and

COMMUNICATION WORKERS OF AMERICA

Appears:

Company

ROBERT A. LEVITT, ESQ. Labor Counsel

LAWRENCE M. JOSEPH, ESQ.

LEONARD LIPSCHUTZ, ESQ.

Western Electric Company

195 Broadway

New York, N. Y. 10007

Union

WILLIAM A. MCHUGH, JR., ESQ.

Adair, Goldthwaite, Stanford and Daniel

6th Floor, Rhodes-Haverty Building

Atlanta, Georgia 30303

J.D. TAYLOR, President, CWA Local 3790

234 Quartermaster Road

Spartanburg, South Carolina 29301

H.T. Wade, Vice President, CWA Local 3790

1905 Twain Road

Greensboro, North Carolina

The Stipulated Issue is:

"Did the Company violate the agreement by not paying the per diem pay to J.S. Dobbins and C.F. Lewis on Saturday and Sunday, March 6 and 7, 1971?"
A hearing was held in Charlotte, North Carolina on June 23, 1972 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The arbitrator's oath was expressly waived. Both sides filed post hearing briefs.

Joint Exhibit 3 herein, a Stipulation of the salient facts of the case signed by representatives of the parties on June 23, 1972 shows that the grievants, Dobbins and Lewis, are installers employed by the Company in Charlotte, North Carolina; that Dobbins had 20 years of service and Lewis 18; that both were rated as high skill level installers (Index 5 and 4, respectively), Index 5 being the highest skill level for an installer. Installers are subject to "temporary transfer" assignments under Article 13, Section 4 of the Contract; both Dobbins and Lewis had been on numerous "temporary transfer" assignments and were on such an assignment, in Raleigh, North Carolina, during February and March 1972. Installers are also subject to overtime work assignment at premium pay rates under Article 11 of the Contract. Both Dobbins and Lewis were subject to such an assignment of overtime work during the period when the events forming the basis of the instant grievance occurred. Representatives of the Company and the Union which represents the unit of which grievants are members, had theretofore reached agreement pursuant to Article 11, Section 1.31 on a temporary 45-hour
work schedule for the Raleigh location, consisting of five
nine-hour days (Monday through Friday), 7:30 A.M. to 11:45
A.M. and 12:30 P.M. to 5:15 P.M. with no work scheduled for
Saturdays and Sundays.

Although Dobbins and Lewis were given notice of the
overtime work schedule on or before February 16, 1971 and
were subject to its provisions on Friday, February 26, 1971,
they gave notice on that day that they would not work the
full nine hour day by entering only eight hours on their
time tickets stating that they intended to leave at 4:15 "to
beat the traffic home." They were informed by their super-
visors that they could not be excused from the overtime hour
of work because they had not given an adequate reason for
their absences as required by Article 11, Section 1.5 of the
Contract. They were further advised that they would be in
an unexcused absence status from the time they left until
they returned to work and therefore, pursuant to Article 13,
Section 4.32 of the Contract, would not be eligible for week-
end per diem payments and that they would be subject to
disciplinary action. It was thereafter decided that Dobbins
and Lewis would receive the weekend per diem for February 27
and 28 but they were warned that in the future if they left
work early without giving an adequate reason they would not
be excused and that the Company would take appropriate action.

On the following Friday, March 5, 1971, Dobbins and
Lewis again notified their supervisors that they refused to work the scheduled ninth hour that day by entering only eight hours on their time tickets, this time citing, "personal business" as the reason for their absences. On that day, testing, which is high skill level work, was in progress and high skill level installers were needed. Dobbins and Lewis were so advised by their supervisors; they were told that they were expected to work the time as scheduled and agreed to by their Union representative, that they were needed on the job, that the excuse which they had each given was not adequate and that if they did not work the ninth hour their absences would not be excused. Dobbins and Lewis nevertheless left work at 4:15 P.M. on Friday, March 5, 1971; they were not scheduled to work on Saturday and Sunday, March 6 and 7, 1971 and they returned to work on Monday, March 8, 1971. Their absences from work from 4:15 to 5:15 P.M. on March 5, 1971 were not excused and neither man was paid per diem for March 6 and 7, 1971.

The Union maintains that the withholding of weekend per diem payments to the grievants was a disciplinary action by the employer. In support of this contention the Union shows that in the course of the discussions of the February 26, 1971 absence grievants were warned that a future such unexcused absence might lead to disciplinary action; that this warning of February 26 was cited to the grievants by a Company representative in an interview on March 8, 1971 and that in the same interview mention was made of the fact that per diem
for the March 6-7 weekend had not been paid. This "interview" actually consisted of the reading to grievants of a written statement summarizing the events of February 26 and March 5 and warning the grievants that future unexcused absences from work might lead to further disciplinary action, including suspension. Thus, the union shows that before the March 5 absence and in connection with the first (February 26) absence the grievants were warned orally that disciplinary action would be taken in the event of a second unexcused absence; that in connection with the second (March 5) absence per diem payments were withheld; that on March 9 the grievants were warned that in the event of a third unexcused absence further disciplinary action would be taken. From all of this the union infers that the disciplinary action warned of on February 26, referred to in the March 9 interview and antecedent to the further disciplinary action which would be taken in connection with a third unexcused absence was the withholding of per diem payments for the March 6-7 weekend. This is a possible inference but certainly not a necessary one and it collapses in the light of one additional fact, i.e., that it does not take into account the significance of the March 9 "interview". The latter was, in fact, not an interview at all, in the usual sense, but the occasion for reading to the grievants an adverse report of their actions on February 26 and March 5 and for notifying them that the report was being entered in their personnel files. Thus the facts alleged by the Union, when fully examined, suggest an inference quite different from the one offered by the Union, namely, that on the first occasion (February 26) the Company gave only an oral warning; on the second occasion it gave an adverse
personnel report and written warning of further disciplinary action including possible suspension in the event of a third such incident, and that the disciplinary action in connection with the March 5 absence was the March 8 interview, written warning and insertion in the grievants' personnel files of adverse personnel reports. This latter inference assumes conclusive proportions when consideration is given to the unrefuted testimony of the witness Garvey that it is the established policy and practice of the Company to employ progressive discipline methods and, in response to a question by the attorney for the Union, that in cases of refusal of overtime work the usual practice would be to give a warning in the first instance and in the event of a second refusal to give another warning or possibly a suspension. I therefore find and conclude that the Company did discipline the grievants in connection with their March 5 absence but that the disciplinary action consisted of the insertion of adverse personnel reports in the grievants' personnel files coupled with written warning of further disciplinary action including possible suspension in the event of future unexcused absences and that the withholding of the March 6-7 weekend per diem payments was not disciplinary in nature.

Article 13, Section 4.31 of the contract between the parties provides for the payment of per diem allowances to employees on temporary transfer assignments; Section 4.32
provides that when an employee is absent from work the per
diem allowance will be paid only if the absence is excused.
Company policy and practice in implementing these provisions
is to deny holiday or weekend per diem allowances where an
unexcused absence immediately precedes a weekend or holiday
and to resume the payment of per diem allowances only on
the first day that an employee returns to work. These contract
provisions, identical in every respect, except for renumber-
ing have been included in all contracts between the parties
since 1952; the implementing Company policy described above
has been the same throughout that period. This policy has
been published by the Company in its written Supervisor's
Labor Relations Guide, copies of which are furnished to the
Union. There is ample evidence that the Union is aware of the
combined effect of Section 4.32 and of the Company's implement-
ing policy. The Union has attempted to effect a change in
this condition numerous contract negotiations. It has advised
its members, in writing of the Company's policy and practice,
and cautioned them of the circumstances which would cause
implementation. In 1958 the matter was the subject of an
unfair labor practice charge before the NLRB which was with-
drawn by the Union after the Company's answer was filed. In
an arbitration testing the validity of the Company's implement-
ing policy where it was applied to deny holiday per diem
allowances to employees who were absent and unexcused on the
day preceding a holiday, Arbitrator Milton Rubin, in his award of January 3, 1964, said:

"... the Company policy is acceptable as an established, tried, tested and mutually acknowledged implementing practice giving practical effect to the evident meaning and purpose of the provisions (of Article 13, Section 4.31 and 4.32)."

The fact that the grievants were absent for only part of the day preceding the weekend is of no material significance. The above-mentioned 1958 unfair labor practice proceeding related to an instance in which the Company withheld weekend per diem payments to a group of workers who had engaged in a Friday afternoon walk-off. The fact that the absence in the instant case involved a refusal and failure to work overtime rather than straight time is equally immaterial. Article 11 of the Contract requires that overtime schedules be negotiated. In this case the temporary nine-hour day, forty-five hour week schedule was duly negotiated and was agreed to by the grievants' representatives; the grievants knew of the temporary overtime work schedule and chose not to comply with it despite the fact that the Contract (Article 11), Section 1.5) bound them to work the ninth hour unless they had an adequate reason for not doing so. Consideration need not be given to the adequacy of grievant's excuse - "personal business" - for their absence since, for the purpose of this arbitration, the Union accepts the Company's finding that it was not adequate.
Based upon the transcript of testimony and the evidence forming the record herein including stipulations of the parties, and having considered their respective post-hearing briefs and having examined the January 1964 Award of Arbitrator Milton Rubin in an arbitration dealing with the same parties, the identical contract provisions and Company policy and similar facts to those involved herein, I find that:

1. pursuant to duly negotiated temporary overtime work schedules, the grievants Dobbins and Lewis were properly scheduled and obligated to work until 5:15 P.M. on Friday, March 5, 1971;

2. grievants failed and refused to work the last hour of the duly scheduled work day without providing an adequate excuse for doing so and despite a warning that their absence from work would not be excused, absented themselves from work from and after 4:15 P.M. on March 5, 1971 and were consequently in a status of unexcused absence from that hour and for the remainder of that day;

3. under the applicable provisions of the Contract between the parties and the "established, tried, tested and mutually acknowledged implementing practice" of the Company relating to the said Contract provisions, the grievants' unexcused absence during the work period immediately preceding a weekend when no work was scheduled disqualified them for the receipt of weekend per diem allowances.
Accordingly the Undersigned Arbitrator, having been duly designated in accordance with the collective bargaining agreement between the above named Union and Company, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The Company did not violate the agreement by not paying the per diem pay to J.S. Dobbins and C.F. Lewis on Saturday and Sunday, March 6 and 7, 1971.

Eric J. Schmertz
Arbitrator

DATED: August 23, 1972
STATE OF New York )ss:.
COUNTY OF New York)

On this 23rd day of August, 1972, 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 the applicable Arbitration provisions of the contract covering the above named parties, the Under-signed was designated as the Arbitrator to hear and decide a dispute relating to the appearance and singing performance on the David Frost TV show of the Hui Le Nani Singers, a high school group from Punahua Academy, Honolulu, Hawaii without payment to them of any fee.

AFTRA seeks payment by W-F Productions, the producer of the David Frost Television Show and a signatory to the AFTRA National Code of Fair Practice For Network Television Broadcasting, of the Code's minimum fee of $134.50 for each member of the Hui Le Nani Singers, hereinafter referred to as "The Group" plus 6-1/2 percent thereof to the AFTRA Pension & Welfare Fund.

A hearing was held at the offices of the American Arbitra-tion Association on November 12, 1971 at which time representa-tives of the W-F Productions, hereinafter referred to as the "Company," and AFTRA, hereinafter referred to as the "Union," appeared, and were afforded full opportunity to offer evidence
and argument and to examine and cross examine witnesses. The Company and the Union expressly waived the contractual tri-partite Board of Arbitration and agreed to the Undersigned as the sole Arbitrator.

I find the Union's refusal to grant the Company a waiver of the Code fee schedule for the appearance and singing performance of the Group to be unreasonable, inconsistent with past practice in similar situations, and unsupported by a bona fide economic reason or Union objective.

The reason advanced by the Union in explanation of its denial of the Company's request for a waiver of the fee, was that employment opportunities for Union member singing groups had substantially diminished; that many were underemployed; and that a performance of non-members - the Group in the instant case - would further erode the job opportunities of Union member singing groups. On this same basis the Union distinguishes the instant case from prior situations in which it granted fee waivers for comparable groups of school singers.

This reason and distinction are not supported by the facts. It is undisputed that the David Frost television show rarely employs singing groups. Uncontradicted is the Company's testimony that had the Group not appeared and performed, no other singing groups would have been employed as a replacement. Indeed, I am persuaded that the Group was invited on the show, not solely or even primarily to sing, but rather principally because of their multi-racial make-up, representing both Hawaiian society and the personal philosophy of Actor Richard
Boone, a resident of that State. The facts are that the Group was not auditioned prior to the show; its singing ability was not investigated by the Company and less than 1/2 of its total time on the show was devoted to singing. The balance was consumed by a discussion of its unique racial and ethnic make-up with Messrs. Frost and Boone.

I am satisfied that its invitation to appear was more as a result of the strong urging of Boone because of his interest in its multi-racial character than because of any entertainment qualities as singers. In short I find that the Group, made up of students of a Honolulu high school was both amateur and not-for-profit; that but for its multi-racial make-up it would not have been invited on the show; and that had it not appeared and performed no Union member or group would have been employed in its place.

Accordingly, because I find no factual support for the Union's reason and objective and because I find no significant differences between the instant case and prior situations where the waiver was granted, I must conclude that in the instant case the Union unreasonably withheld its approval of a legitimate waiver request.

The Undersigned, having been designated as the Arbitrator, and having been duly sworn and having duly heard the allegations and proofs of the parties makes the following AWARD:

The Union's claim is denied.

Eric J. Schmertz
Arbitrator
DATED: March 1972
STATE OF New York )ss.: 
COUNTY OF New York)

On this day of March, 1972, 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 0937 71
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration between

Local 1199, Drug and Hospital Union, AFL-CIO

and

Woodland Nursing Home

AWARD
Case No. 13330 1119 71

The Undersigned Arbitrator, having been duly designated in accordance with the Arbitration Agreement dated June 7, 1971 between the above named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, makes the following AWARD:

There was just cause for the discharge of Mattie B. Shaw.

DATED: June 28, 1972
STATE OF New York ) ss.
COUNTY OF New York)

On this Twenty eighth day of June, 1972, 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 the arbitration provisions of the collective bargaining agreement dated June 7, 1971 between Woodland Nursing Home, hereinafter referred to as "the Home" and Local 1199 Drug and Hospital Union, AFL-CIO, hereinafter referred to as "the Union" the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was there just cause for the discharge of Mattie B. Shaw? If not what shall be the remedy?

Hearings were held at the offices of the American Arbitration Association on March 1 and May 15, 1972 at which time Mrs. Shaw, hereinafter referred to as the grievant and representatives of the Union and Home appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Home filed a post hearing brief.

The grievant was a nurses-aide from October, 1965 to September 15, 1971, the date of her discharge. Over the last three years of employment she received a series of "incident reports", interviews, and disciplinary warnings for a variety
of offenses. It is undisputed that she had difficulty working with most of the charge nurses, and recently for that reason, and at her request she was transferred to the night shift where she was employed at the time of her termination. Also, prior to her transfer to the night shift she was a union steward, and she and the Union contend that she continued in that position on the night shift as well.

The Home charges that on the night of September 14, and the morning of September 15, 1971 the grievant was insubordinate, in refusing to wash wheelchairs and by refusing to return to her work station when so instructed; caused an unauthorized work stoppage of nurses aides during the regular working hours of that shift; used abusive and disrespectful language to a managerial employee; and refused to leave the Home when instructed to do so. The Home contends that these offenses, when viewed in the light of her prior record constitute just cause for discharge.

The Home's contention is supported by the record before me. During the course of the hearings the Union conceded that the grievant "was asked to wash wheelchairs and she didn't do it". The Union's defense is that the order to perform that work originated with a managerial employee (Mr. May) who was not authorized to give directions to nurses aides; that such work was not among the duties of a nurses aide, and to single out
the grievant for disciplinary action when other nurses aides also failed to perform the work but were not penalized, is discriminatory.

I cannot accept these defenses, especially in view of the grievant's actual or self styled position as the union steward. In that capacity and considering her record of warnings and other admonitions she should have known of the fundamental rule that an employee does not challenge the propriety of a work order by refusing to carry it out. Instead he is required to perform the assignment and then test its propriety through the grievance procedures of the contract. That the order may have been given by a person without actual or apparent authority, as the grievant and the Union contend herein, is not one of the exceptions to this rule. The limited exceptions, such as safety and illegality are not conditions present in the instant case.

Nor can I accept the contention of unequal treatment. Again because of her actual or alleged status as a steward, the grievant had a special duty to set an orderly example; to perform the contested work, subject to her right to grieve. It is well settled that a steward's duty to uphold the orderly procedure of the contract is greater than that of other employees. And where that duty is breached the penalty imposed on a
steward may be properly more severe than for other offending employees. Also there is nothing before me to show that any of the other nurses aides had a prior record of incident reports, interviews and disciplinary warnings, and difficulties with charge-nurses as extensive as that of the grievant.

I must also conclude that the grievant unjustifiably and unnecessarily, berated May with abusive and disrespectful language both when he instructed her to wash wheelchairs and when he asked her to return to her work station. I find no reason in the record why May, who at the time of the hearing was no longer in the Home's employ, would falsify this testimony, which vividly and unequivocally set forth the loud, argumentative and abusive manner in which he was treated by the grievant on the night in question. Indeed May's testimony in this regard is not significantly refuted.

I find it immaterial whether or not May had actual authority to issue orders to or oversee the work of nurses aides. Clearly he was a managerial employee, and the grievant knew it. Prior to that night he was introduced to the work force, including the grievant, by Mr. Ware, the Administrator of the Home, as Ware's "eyes and ears". The staff, including the grievant, was told by Ware that May represented him at the
First, without notice to or permission of her supervisor, she left her work station and went to another floor to meet with other nurses aides. The evidence shows that this was not the first time she left her work place without permission. Indeed one of her prior warnings involves this offense, and she had been clearly cautioned that she would be subject to further discipline if she did it again. Considering the work of a nursing home, the care of the aged and infirm, a rule restricting the leaving of a work station is reasonable both for stewards and ordinary employees. And there is no evidence that the Home has invoked the rule in a manner to unfairly or arbitrarily impede the proper administration of the contract or the processing of grievances.

Additionally, the evidence supports the charge that the grievant disregarded a directive to return to her work station not just from May but also from nurse Totten, who concededly had supervisory authority over her.

Second, I find that though she may not have led or initiated the concerted protest by the nurses aides, her informational remarks to those who asked her about the work order to wash wheel chairs, either encouraged it or led other nurses aides to believe that a demonstration was appropriate. Specifically
she admits that when asked by other nurses aides if they have to wash wheelchairs she replied "we never did it before". Though subject to various interpretations I think it logical if other nurses aides, looking to the grievant as their present or former steward, interpreted that to mean they could resist the assignment. Again her clear duty in that circumstance was to instruct the aides to perform the work even if outside their job classifications; and that the order would be grieved. It was her duty, in the steward role with which she cloaked herself, to make clear to the aides that self help in the form of a temporary cessation of work was wrong, and that the grievance and arbitration procedures of the contract were fully capable of redressing all breaches of the contract committed by the Home.

In short these failings or omissions of the grievant, in the role which she and the Union ascribed to her, are just incompatible with her assertion that she was only attempting to "cool the situation". Rather, I must conclude that her actions in supporting the protest against the order to clean wheelchairs were designed to encourage and support this proscribed type of protest, and that she acted as its spokes-man, if not its leader.

Standing alone these foregoing offenses, without deciding
the remaining issue of whether the grievant improperly refused to leave the Home when told to do so, are generally considered grounds for discharge irrespective of a prior record. Here, additionally, the grievant has a record of prior difficulties, including relevant warnings. Accordingly I cannot find that the Home's decision to discharge her lacked just cause.

Eric J. Schmertz
Arbitrator

June 28, 1972