AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between

American Federation of Television
and Radio Artists, Cleveland Local

and

National Broadcasting Company, Inc.,
Owner and Operator of Television
Station WKYC-TV

The Undersigned Arbitrator, having been designated in
accordance with the Arbitration Agreement entered into by the
above-named parties and dated 1972 - 1975 and having duly
heard the proofs and allegations of the parties, Awards as
follows:

The Company's hiring of David McCormick as Executive
Producer and his performance of the duties of
that position insofar as they include producing the
6 P.M. Monday through Friday News Program of Station
WKYC constitute a violation of the Collective Bargaining
Agreement between the parties. The grievance is sustained and Mr. McCormick is directed
either to become and remain a member of AFTRA, in
accordance with Article I of the contract within 30
days of the date of this Award or to forthwith cease
and desist from performing the duties of News Pro-
ducer of the 6 P.M. Monday through Friday Television
News Program of Station WKYC.

DATED: June 27, 1974
STATE OF New York )
COUNTY OF New York) SS:

On this 27th day of June, 1974, 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. 52 30 0105 73
In the Matter of the Arbitration between

American Federation of Television and Radio Artists, Cleveland Local

and

National Broadcasting Company, Inc. Owner and Operator of Television Station WKYC-TV

In accordance with Article X of the Collective Bargaining Agreement dated 1972 - 1975 between National Broadcasting Company, Inc., Owner and Operator of Television Station WKYC-TV, and American Federation of Television and Radio Artists, Cleveland Local, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company's hiring of David McCormick as Executive Producer and his performance of the duties of that position constitute a violation of the Collective Bargaining Agreement between the parties?

Hearings were held in Cleveland, Ohio on July 9, September 5 and 6, November 14, 1973 and January 2 and 3, 1974. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties filed post hearing briefs.

The American Federation of Television and Radio Artists, Cleveland Local (AFTRA or the Union), is the collective bargaining representative of certain employees of the National Broadcasting Company News Bureau in Cleveland, Ohio (NBC or the Company). At issue here is whether the duties and functions of the News Producer of the regular 6 P.M. Monday through Friday news program constitute work of the bargaining unit repre-
sented by AFTRA and, more specifically, whether Mr. David
McCormick, who was hired by NBC on April 16, 1973, as an Execu-
tive Producer and whose duties include producing the 6 P.M. news
program, should, by reason of that fact be required to join the
Union, or in the alternative be required to cease performing
that work.

The Collective Bargaining Agreement between the parties
for the period 1972 - 1975 includes a Recognition and Union
Shop clause (Article I) which reads, in pertinent part, as
follows:

"A. This Agreement applies to all staff performers,
including staff announcers, staff newsmen,
staff singers and staff actors employed by the
Company at the Station, all of the above named
persons being hereinafter referred to collect-
ively as artists ..."

The quoted language of Article IA is amplified in Section
1 of Schedule I of the Contract which reads, in pertinent part, as
follows:

"A. Artists employed by the Company under this Sched-
ule I shall be classified as follows:

1. Staff Announcers (hereinafter called Announcer)
2. Staff Newswriters, Editors, Reporters and News-
casters (hereinafter called Newsman)
3. Part-time Announcers, etc.
4. Trainees, etc.

***

"C. Announcers are those artists whose duties are
referred to in Section 2A. Newsmen are those
artists whose duties are referred to in Section 4."

Schedule I Section 4 of the contract provides as follows:
"Newsmen's duties - Newsmen may be required to render any or all of such services as newsmen have been in the practice of rendering and such other services as the program requirements of the Company may necessitate and as are consonant with their employment as newsmen."

Section 5 of Schedule I deals with Newsmen's Wages. Three paragraphs of Section 5, paragraphs D., E. and F., are of interest here; they read as follows:

"D. Newsmen may also be required to perform news programs and other programs for which their skills may properly qualify them. For the performances of such programs, they shall, in addition to salary, be paid the same fee to which announcers are entitled under this Agreement.

"E. At the discretion of the Company, a newsmen may be assigned permanent supervisory duties for which he would be compensated at a rate of $7.50 per week above his base salary.

"F. Newsmen assigned as TV Producers or Assignment Editors shall be paid a fee of not less than $5.00 per day for each day of assignment. Such fee shall not be credited against the guarantee."

To summarize, the contract applies to staff announcers, newsmen, singers and actors employed by NBC at Station WKYC-TV in Cleveland and these persons are sometimes referred to collectively as "artists."

The contract is so structured as to consist of a main body of eighteen articles having general application to all artists employed at Station WKYC-TV and separate schedules containing more specific provisions applicable to particular categories of artists.

Schedule I of the contract, according to Section I thereof, deals with those artists who fall within the categories of 1. Announcer, 2. Newsmen, 3. Part-time Announcers and Newsmen
4. Trainees-Announcer/Newsmen.

The rubric "Newsmen" as used in the contract includes artists employed as Newswriters, Editors, Reporters and News-casters. Section 1 of Schedule I, generally speaking, thus identifies the particular artists with which the Schedule deals.

The next six Sections of the Schedule (2 through 7), contain special provisions applicable to the four separate categories of artists covered by the Schedule. Sections 2 and 3 deal with Duties, Wages, etc., of Announcers; Sections 4 and 5 deal with Duties, Wages, etc., of Newsmen; Section 6 deals with Part-time Announcers and Newsmen; and Section 7 deals with Trainee Announcers and Newsmen. The balance of the seventeen Sections which make up Schedule I are of general application to all four categories of artists covered by the Schedule.

A. The Positions of the Parties

AFTRA alleges that insofar as Mr. David McCormick was hired as a managerial employee assigned to perform the work of a Producer the hiring was in violation of the contract between the parties. It is the Union's position that producing duties fall within the area of Newsmen's duties; that they are, consequently, covered by the contract and must be performed by unit members. The Union contends, therefore, that while management may create managerial titles and hire non-union members to fill them, it may not assign unit duties to such titles nor hire non-union employees to perform them. It concludes that as the Producer of the regularly scheduled daily 6:00 P.M. newscast, Mr. McCormick
should join the Union; or in the alternative that if because of his otherwise managerial status he cannot join the Union, his assignment to the duties of a news program Producer should be terminated.

NBC argues first, that the function of a local television news producer is supervisory in nature and is not covered by the contract; and, second, that even if local television news producing is covered by the contract, AFTRA members have no exclusive right to perform such duties.

AFTRA maintains that historically the production of news programs at Station WKYC and its predecessors, KYW and WTAM, including the news program which is broadcast at 6:00 P.M., Monday through Friday, and which is currently produced by Executive Producer McCormick, is and has been the work of AFTRA members. The history of the performance of producers' duties is traced by the Union "from time immemorial" through the period prior to 1956 when the Station was owned by NBC and operated under the call letters WTAM; through a nine-year period of ownership by Westinghouse Broadcasting Company when the station was known as KYW; and through the current period of resumed NBC ownership commencing in 1965, at which time the station assumed its present call letters. During all of this time, the Union contends, AFTRA members performed the duties of news program Producers although the term "Producer" was not always used. In this connection, the Union maintains that "the term 'Producer' evolved from that of 'news editor' and plain 'editor,'" and that the terms have been used interchangeably.
The history of the station, including the performance of producing duties by AFTRA members variously styled as Editors, News Editors or Producers, is supported, the Union points out, by the testimony not only of witnesses for the Union but by Company witnesses as well. The Union shows that among the latter category of witnesses was James Keelor who was hired as a Producer and who served in that capacity for more than three years, from April 1969 to July 1972, during all of which time he was an AFTRA member and a unit employee.

Considerable attention was given by the Union in the evidence presented in the hearings, and in the argument in its brief, to the contention that historically and at all times prior to the appointment of Mr. McCormick, the functions and duties of Producer were performed by persons who had none of the attributes of supervisory or managerial personnel. They could not discipline, hire or fire other newsroom employees; in fact, argues the Union, in the case of the witness Cole, who was also hired, not assigned, as a Producer, the attempt to exercise such authority earned him a reprimand. Although there was some dispute as to whether he was reprimanded in the full and formal sense of the word, it appears quite clear that management rejected and disapproved his attempted exercise of supervisory authority.

Finally, while conceding, as NBC claims, that there were instances in which non-union employees performed the duties of Producers, the Union explains however, that these were either isolated incidents of relatively short duration, of which the
Union was unaware, or special cases such as the production of election broadcasts; and that in the latter instances AFTRA employees actually worked on the production of the programs under close supervision of a specially assigned management employee, an arrangement attributable to the exceptional importance of election news coverage.

Thus, the Union's case rests on the contentions that:

1. AFTRA Newsmen have always performed producing duties at Station WKYC, including previously the news program in dispute.

2. The isolated instances in which such duties were performed by non-union employees were inconsistent with the well-established pattern and were therefore atypical; and

3. Producers are not supervisory jobs, but rather covered by the bargaining unit because they have not exercised supervisory authority or managerial powers such as those with which Mr. McCormick is vested.

NBC bases its defense in this matter on two main contentions which, in essence, must be viewed as alternatives. The Company maintains, in the first instance, that the function of "a television news Producer ... is supervisory in nature and is not covered by the contract." In the Company's second line of defense, it is maintained that even if the functions of television news Producers are covered by the contract, such work is not exclusively within the domain of AFTRA members.
In support of its first argument, NBC makes a number of points. It asserts that the testimony of numerous witnesses for both sides demonstrates that the work of a Producer is supervisory in nature, and that its Producers are vested with full supervisory authority, discretion and decision making powers.

NBC also shows, in connection with its first main argument, that in general usage in the broadcasting industry, Producers are considered to be supervisory and managerial employees; two NLRB decisions of similar effect are cited on this point.

Next, the NBC brief argues that because the contract makes separate and special provision for the payment to Newsmen assigned as Producers of a supervisory fee of $7.50 per week (Contract Schedule I, Section 5E) as well as a minimum of $5.00 per day (Schedule I, Section 5F), it demonstrates that when assigned as Producers, Newsmen are supervisory employees.

On its second point, NBC notes that although Schedule I Section 1A of the contract covers "Staff Newswriters, Editors, Reporters and Newscasters (hereinafter called Newsmen)," it makes no mention of Producers.

The Company concludes therefore that even if AFTRA members have performed the duties of Producers and even if the performance of such duties is covered by the contract, Producer duties are not exclusively the work of AFTRA unit members. In this connection, the Company contends that in the last contract negotiations AFTRA sought an exclusive duties
clause which would have identified Producer duties as unit work but failed to obtain such a clause. Pointing to the language of Section 4, Schedule I ("Newsmen's Duties") which reads in pertinent part:

"Newsmen may be required to render . . . such services as newsmen have been in the practice of rendering . . .";

the Company argues that:

". . . the word 'shall,' the traditional term of obligation, is conspicuous by its absence from this provision. The operative term in the 'Newsmen's Duties' provision is the permissive term 'may.' When used in contracts in (this) fashion . . . the term 'may' means that which can occur, not that which must occur. 'May' also obviously implies 'may not.'"

The Company brief goes on to say that "it is NBC's position that it has no contractual obligation to assign producing work to AFTRA members . . ." and that although "NBC does not deny that AFTRA-represented Newsmen have in the past been assigned . . . as local News Producers . . . this . . . is only the dead hand of history, not the living mandate of contractual obligation."

Discussion

There can be no question that the contract is unclear. This is demonstrated by the fact that five days of hearings, a record of 844 pages, the testimony of twelve witnesses and numerous exhibits were required to establish facts relevant to an
interpretation of the contract. AFTRA cannot point to clear contract language which prescribes that producing duties are the work of Newsmen. On the other hand, however, NBC cannot clearly demonstrate by contract language that producing duties are not covered by the contract. The contract says:

1. that it covers "Newsmen" (Article I);
2. that "Newsmen are those (Schedule I, Sec. 1.C) artists whose duties are referred to in (Schedule I) Section 4"; and
3. that "Newsmen's duties (Schedule I, Sec. 4) consist of "such services as Newsmen have been in the practice of rendering"... (Emphasis added)

Thus the contract by its express terms directs us to "practice," and the "dead hand of history" which the Company argues should be disregarded is therefore a vital factor in the interpretation of the contract and the only guide provided by the contract in determining what duties it covers. That guide is sufficient to establish that the contract covers Newsmen and Newsmen's Duties and that Newsmen's duties include all duties which "Newsmen have been in practice of rendering." Since the record establishes and NBC concedes that Newsmen have been in the practice of rendering Producer duties for many years, it follows that Producer duties are Newsmen's duties and that Producers' duties are, therefore, when assigned to newsmen covered by the contract.

NBC maintains, however, that even if such a finding is made it cannot be held that there is any exclusive right to have these duties performed by unit employees, because first, they are supervisory both in fact and as a matter of law and therefore
properly assignable as well and have been assigned to managerial employees. And second, that the history of bargaining shows that the Union sought, but failed to obtain exclusive jurisdiction over this type of work.

Examination of the record and particularly the specific testimony on the first point shows that much of that testimony is subjective in nature. The probative testimony in this area demonstrates that the Producer performs a vital function and one requiring high level expertise, diverse skills and considerable judgment. It does not show, however, that the employees who have regularly served in performing the bulk of television news producing duties over the years have regularly exercised the full spectrum of duties traditionally associated with supervisory rank. This is particularly significant in light of the sizable body of testimony showing that producers at WKYC have not had such supervisory powers and duties. Taken together, the testimony on this point persuades me that the function of News Producer as it has evolved at Station WKYC is analogous to that of a "group leader." (Indeed, Company witness Keelor likened the job to the "quarterback" of the team.)

This view is borne out by evidence of management's practice, in different circumstances, such as the production of special election coverage broadcasts, of assigning managerial employees such as News Managers Albert, Reid, and Keelor and News Director Wetzel to supervise the production of news specials dealing with elections and national political conventions.

Whatever the duties of Producers may be elsewhere in the broadcast industry and however supervisory those duties may be
generally and in the specific instances dealt with in the cited NLRB decisions, the question of the supervisory authority of Producers at WKYC is what is at issue here. The authorities cited say in substance, 1. that Producers generally have certain powers; and 2. that given such powers, Producers are supervisors. The evidence in this case shows that such powers are not exercised by the employees who have served as News Producers at Station WKYC. In short though the employees dealt with here have the same title as the employees discussed in NBC's excerpts from News From Nowhere, Epstein (Random House, 1973), perform some of the same duties; and bear some similarity to the employees covered by the cited NLRB decisions, I conclude they lack much of the essential authority attributed to producers generally in the Epstein book and crucial to the NLRB decisions. Therefore the quoted material from Mr. Epstein's book and the cited decisions, must be deemed inopposite and undeterminative.

The Union's contention that policy and decision making functions are performed by higher authority and that the Producer has no part in these matters except the implementation of the policies and decisions thus formulated, is supported by the evidence. The testimony shows not only that management is able to dictate how a Producer is to perform his duties in a routine broadcast such as the five day a week 6:00 P.M. newscast but that matters can be routinized to such an extent that in the relatively simple format of weekend newscasts the shows can be broadcast without a producer. It is consistent with this testimony and with the Union's contention that management has been able to order its affairs in this manner and has done so, to
conclude that precisely because this has been the pattern of WKYC, management finds it necessary only in the extraordinary circumstances attendant upon election newscasts or national convention coverage to specially assign a managerial employee.

It should be obvious therefore that so far as the instant case is concerned, I make a distinction between the work of a Producer on a regularly scheduled news program such as the one in dispute herein, and work as Producer of special programs such as national political conventions and election newscasts. The latter, because of unique and possibly unpredictable conditions, and because discretionary and non-routine decisions may be required both frequently and speedily, the assignment of a managerial employee as the Producer is both understandable and proper. But those unusual programs, which the Company has shown have been produced by managerial employees are, in my judgment and based on this record, so different from the news programs of the type in dispute here, as to not constitute a relevant exception to the otherwise unvaried practice of assigning bargaining unit members as producers of regular news programs. And in the absence of relevant contrary circumstances that practice stands traditionally as persuasive evidence of what the contract means, especially where, as here the contract language is imprecise.

The fact that in assigning a Newsman as a Producer NBC binds itself under the contract to pay, inter alia, a supervisory fee and that, as the evidence shows, Newsmen so assigned have received that fee does not mean that the duties are supervisory within the meaning of the labor law or as legally exclud-
ed from coverage by the National Labor Relations Act, as amended. Rather, considering the factual nature of the responsibilities performed as adduced in this record, the "supervisory" function covered by Section 5, Schedule I, and for which additional compensation is paid, means, just as logically the assumption of the supervision and direction of other bargaining unit employees, as a "group leader" (or "quarterback"). And though such includes some "supervisory" responsibilities, it is well within the frame of bargaining unit jurisdiction as determined by law, and not, in the absence of supervisory powers and authority raised to a supervisory/managerial level by the mere payment of a "supervisory" stipend.

AFTRA's unsuccessful attempt to negotiate an exclusive duties clause is not as neatly dispositive of the questions presented in this matter as NBC suggests. For, in effect, the NBC argument asks us to ignore what the contract does say because of what it does not say. The addition to the contract of any exclusive duties clause, covering any of the duties which Newsmen have been in the practice of rendering, would constitute no more than an explicit guarantee of what which is already there, albeit impliedly. And considering the entire record I cannot conclude that AFTRA's attempt to obtain an unequivocal guarantee that could not be misconstrued by the Company or an arbitrator, is an admission that it did not have interpretative exclusive jurisdiction over the work.

The recognition clause of the contract guarantees AFTRA's jurisdiction over the position of Newsmen. It does not explicitly list the duties of that job. But it defines the duties as...
"such services as newsmen have been in the practice of rendering." I conclude therefore that the duties of a newsman are within the Union's exclusive jurisdiction as is the job title. Since employees hired as Newsmen must join the Union within thirty days, it follows logically that an employee hired to perform such services must join the Union as well. Those services, as has been stated, include the performance of TV news producing duties.

I do not construe the contract's use of the work "may" as does NBC. As has been stated above, Producer duties are covered by the contract. The use of the word "may" in Schedule I, Section 4 (Newsmen's Duties) does not negate that fact. Nor, in my view, should it be read, as NBC suggests, to mean that any of the duties which Newsmen have been in the practice of rendering may or may not be assigned to AFTRA represented Newsmen but also may or may not be assigned to non-members of AFTRA. On the contrary, I find that such an interpretation would require reading into the contract, language which is not there. To do so would be in violation of Article X of the contract which provides, in pertinent part:

"... the Arbitrator shall not add to, subtract from, or vary the terms of this Agreement."

Mindful of that injunction, I read Section 4 of Schedule I of the contract to mean that any Newsman may be required to perform any of the duties which Newsmen have been in the practice of rendering. This does not mean that all Newsmen must perform, or must be assigned, to all duties that have ever been performed by Newsmen. But it does mean, read in the context of the entire contract, that when such duties are to be per-
formed they are to be performed by Newsmen. Management's discretion in this regard does not extend to the point, which it claims, of deciding whether a unit or non-unit employee shall be assigned to such duties. That discretion is confined to determining which Newsmen shall be so assigned.

Applying the above-stated conclusions as to the meaning of the contract to the circumstances of the instant case, I find that Newsmen, including but not limited to the witnesses Mosbrook, Smith and Keelor, have regularly performed the duties of Producers of television news programs at Station WKYC, including but not limited to the 6:00 P.M. Monday to Friday news program, in various titles, including the title "Producer," and that such duties as they pertain to news programs of the type in dispute here are covered by the contract. I find further that in the context of the entire contract, such duties may be assigned to any Newsman covered by the contract but may not be assigned to an employee who is not a member of the unit covered by the contract. I therefore find that the Company's assignment of producing the 6:00 P.M. Monday through Friday television news program to Executive Producer David McCormick a non-unit management employee, was in violation of the contract.

[Signature]
Eric J. Schmertz
Arbitrator
The stipulated issues are:

1. Were certain persons improperly denied an absentee ballot and as a result where they improperly denied an opportunity to vote?

2. Were certain absentee ballots cast, properly excluded from the count?

3. Were certain persons who attempted to vote, properly excluded from doing so?

The parties stipulated that the Arbitrator is authorized to fashion a remedy if and where appropriate.

Hearings were held in Manchester, New Hampshire on March 30 and June 18, 1974, at which time representatives of the Manchester Education Association (MEA) and the New Hampshire Education Association (NHEA) appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

From time to time an arbitration case comes along where the traditional rules of contract law are applicable, legally and equitably. This is such a case. An agreement was reached by persons who appeared to have authority; a material consideration of the agreement upon which the aggrieved party relied, failed; and the aggrieved party is entitled to a remedy as close to specific performance as is practicable.
Prior to the instant disputed NHEA president-elect election held on October 19, 1973, certain difficulties and disagreements existed between the MEA and the NHEA, which seriously jeopardized the continued affiliation or re-affiliation of the MEA and the NHEA.

I find that just prior to the election, in an effort to either resolve those difficulties or provide a basis to do so, representatives of both groups reached an oral agreement (on or about October 9, 1973), a material consideration of which was an assurance by the NHEA that MEA members who signed "three way cards" (thereby becoming or renewing their membership in the NHEA) would enjoy full voting rights in the up-coming NHEA president-elect election. And that included the right to cast absentee ballots regardless of any NHEA constitutional or by-law provision, which, because of restricted time limits, would otherwise have barred the casting of absentee ballots.

I find that the Executive Director of the NHEA gave such a direct assurance or made statements to the MEA from which the MEA reasonably and logically concluded that such assurance was a material condition of the agreement.

I conclude that the MEA as an entity, its Executive Committee, and its membership relied on that material condition. I consider it immaterial that the NHEA Executive Director may not have had the authority to give such an assurance or waive or extend the constitutional time limit beyond which an absentee ballot could not be cast. For in my judgment, based on the facts as presented in this case, and especially the details of the
negotiations leading to the October 9 agreement and the particular inquiry which the MEA Executive Committee made of the NHEA Executive Director on October 9, regarding the voting rights of the MEA members, before approving the agreement, the Executive Director acted with "apparent" authority to make the commitment and I cannot fault the MEA for relying thereon.

However, this material consideration, namely the right of the MEA members who signed three way cards to vote, either in person or by absentee ballot in the then up-coming NHEA president-elect election, and without which I am persuaded there would have been no agreement between the MEA and the NHEA, failed. Shortly before the election, on advice of counsel and following an objection from one of the president-elect candidates, the NHEA Executive Director informed the MEA that the constitutional time limit for casting absentee ballots could not be waived or extended and that therefore several hundred MEA member absentee ballots either then executed or thereafter delivered by the MEA to the NHEA office and to the polling place could not be included in the count, and no more applications for absentee ballots would be honored.

Though the Executive Director of the NHEA and his staff made a determined and good faith effort to notify MEA members that absentee ballots would not be accepted, but that they could travel to the polling place and vote in person, a considerable amount of confusion resulted. Because of the short period of time available that confusion could not be dispelled. As a consequence I am persuaded that MEA members who executed absentee
ballots and whose membership cards were punched, believed that they could no longer vote, even in person, and therefore did not vote. I am persuaded that many MEA members cast absentee ballots on the strength of the October 9 agreement because they could not travel to the polling place to vote in person, and were disenfranchised when their absentee ballots were invalidated. I am persuaded that some MEA members were denied absentee ballots and thus disenfranchised. And there is evidence that some eligible MEA members who appeared at the polling place were not able to vote. Generally it is my conclusion that the NHEA decision not to accept or include several hundred absentee ballots from MEA members was a material breach of, and a failure of a material condition of the agreement reached between the MEA and NHEA. And I am satisfied that the outcome of the president-elect election might well have been affected, had the absentee ballots been included in the count and had MEA members otherwise eligible to vote not been so disenfranchised.

Accordingly, in material degrees, certain persons were improperly denied an opportunity to vote; certain absentee ballots cast were improperly excluded from the count and certain persons who attempted to vote were improperly excluded from doing so. Therefore the stipulated issues are factually answered in favor of the MEA.
The MEA is entitled to a remedy. In my judgement the only meaningful remedy is to invalidate the instant disputed election and order a new, substitute election, which will accord all eligible voters full opportunity to vote either in person or by absentee ballot. I am mindful of some of the difficulties that the incumbent may be defeated and unable to return to his teaching job until his leave of absence is completed; that a different successful candidate may not be able to immediately assume the Presidency full time; that in any event within a matter of months (in March or April of 1975) another regular president-elect election will take place pursuant to the constitution and by-laws and that two such elections within that short span of time may be unsettling; and that a new election, which must be state-wide, will involve other local teacher groups affiliated with the NHEA, other than the MEA. But on balance these difficulties, as real as they may be, do not in my view outweigh the right of the MEA to get the election for which it bargained, for which it presumably gave a monetary consideration in the form of membership dues paid or payable to the NHEA, and for which an agreement of continued affiliation with the NHEA was primarily based. The only other possible remedy would be some form of money damages or monetary restitution. That form of remedy I deem neither sufficiently remedial nor economically practicable. Most important however I do not consider it in the furtherance of what I think is an objective essential to the interests of the organized teachers, namely the maintenance or re-establishment of an affiliated relationship between the MEA and the NHEA.
Accordingly it is my AWARD that

Provided the MEA becomes or remains affiliated with the NHEA,

1. The president-elect election of October 19, 1973 is set aside.

2. A new, substitute election shall be held under the election provisions of the NHEA constitution and by-laws as soon as practicable and agreeable, but not later than during October, 1974. The successful candidate in that election shall assume the office involved for the balance of the term, or until July 1, 1975.

3. The election ordered by this AWARD shall be administered in its entirety by the Election Department of the American Arbitration Association (as distinguished from asking the American Arbitration Association to merely certify the count of the ballots).

4. The Undersigned retains jurisdiction in this matter, for implementation of the AWARD and to resolve any disputes or questions which may arise therefrom.

Dated: July 31, 1974

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss:

On this thirty-first day of July, 1974, 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:  
Communication Workers of America: AFL-CIO  
-and-  
New York Telephone Company: 

OPINION  
and  
AWARD

The stipulated issue is:  

Was the discharge of Charles Heissenbuttel without proper reason under Article 10 of the contract?

Hearings were held at the offices of the American Arbitration Association on July 23rd and July 24th, 1974 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The arbitrator's oath was expressly waived.

Under the terms of Article 10 the authority of the Arbitrator is limited to either upholding the discharge or reversing it in its entirety. The Arbitrator is not authorized to reduce the discharge to any lesser penalty even if he concludes that some disciplinary penalty short of discharge is proper. Therefore unless the instant discharge was for proper reasons the grievant must be reinstated and reimbursed in accordance with Section 10.03 of the contract.

A careful review of the entire record persuades me that the Company's case falls just short of establishing proper reasons for the ultimate penalty of dismissal.
As an authoritative Company witness testified, the grievant was discharged for "altercation and falsification." More specifically the Company charges him with engaging in a fight, in which he was the aggressor, with a fellow employee. And thereafter refusing to disclose to the Company that a fight had taken place and falsely claiming an injury which he sustained in or as a consequence of the fight as an "on the job injury." The Company asserts that the grievant clung to his false story though given an opportunity to tell the truth, and only finally disclosed the fact that a fight took place subsequent to that opportunity.

The evidence in the record does not establish that the grievant was the aggressor in the fight. The grievant testified otherwise. He asserts that the other employee, Mel Scarpatti, first abused him verbally on an intercom system and thereafter without provocation assaulted him in the break room. His testimony was not significantly shaken on cross-examination. If there were witnesses to the fight none were called to testify. Most important, Scarpatti, though still in the Company's employ and available, was not called to refute the grievant's testimony. I do not consider the written report which Scarpatti gave to the Company as sufficiently probative to overturn the grievant's direct testimony, especially when he could have been called to testify. So the Company's burden to establish the principal charge against the grievant regarding the fight has not been
met by the requisite standard of proof.

There is no question that the grievant refused to disclose that a fight had taken place and persisted in that refusal despite the opportunities the Company gave him to disclose the truth. And there is no question that he falsified his injury as job-connected. In my judgement a failure or refusal of an employee to cooperate honestly with his employer in an investigation surrounding an injury and the making of a false report concerning how the injury occurred could be proper reasons for discharge unless the employee offered some believable mitigating explanation, and especially if the employee significantly benefited from his lack of candor. And even if he offered a mitigating explanation or if he in no way benefited therefrom a disciplinary penalty short of dismissal would be warranted under a different contractual relationship which permitted the Arbitrator to fashion that remedy.

I find a mitigating explanation which stands uncontroverted. The grievant testified that Scarpatti pleaded with him, in the interest of the latter's job security, not to disclose that a fight had taken place. Again Scarpatti was not called to testify in refutation, and again the grievant's testimony was not impeached in cross-examination. Indeed that testimony is consistent with a finding of fact that Scarpatti, rather than the grievant was the aggressor.

Nor do I find that the grievant gained any significant benefit from his false assertion that the injury above his eye was an on-the-job injury. The Company suggests it might have been liable under a Workmen's Compensation claim. Yet the
grievant did not file for compensation and testified that he had no intention to do so. In view of my finding that the grievant was not the aggressor but rather was subject to a surprise and unprovoked assault by Scarpatti it is unlikely, under those facts, that the grievant would have been subject to discharge. And hence it cannot be argued that the benefit he sought by falsifying the events was his own job protection.

The only benefit which grievant obtained was two days pay for the days he was out, which he received on the assumption that the injury was job connected. I do not consider this to be the type of benefit which raises the grievant's offense to the level of misconduct warranting a discharge. And, considering the apparent concession that he would not have been entitled to that pay under the true circumstances of his injury, I do not consider it inconsistent with the arbitrator's authority under Article 10 to authorize the Company to recoup those two days pay from the grievant following his reinstatement. I shall so provide in my Award.

Again I wish to make clear that in this case, had I the authority, I would have imposed on the grievant a lengthy disciplinary suspension. But I am unable to conclude, based on the record before me, that the facts constitute proper reason for the extreme penalty of dismissal. In the absence of countervailing evidence and testimony I accept the grievant's statements regarding the fight and his explanation as to why he did not truthfully disclose what took place. This conclusion is not overturned by the fact that on cross-examination he did not
fully state the various employers for whom he had previously worked. The fact is that he listed all such employers on his employment application; that that application was not falsified, and that so far as the record before us is concerned there is nothing about his former employment history which he had any reason to hide.

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

There was not proper reason for the discharge of Charles Heissenbuttel. As mandated by Article 10 of the contract he must be reinstated and reimbursed in accordance with Section 10.03. However subsequent to his reinstatement the Company may recoup from Mr. Heissenbuttel an amount of money equivalent to the two days pay which he would have not received had the true facts concerning his injury been known.

Eric J. Schmertz
Arbitrator

DATED: September 20, 1974
STATE OF New York )ss.:
COUNTY OF New York )

On this 20 day of September, 1974, 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
Air Line Pilots Association
and
Overseas National Airways, Inc.

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties and dated February 5, 1971 and having duly heard the proofs and allegations of the parties, Award as follows:

1. The Company did not violate Sections 3, 16 and 27 of the Agreement or the side letter dated August 26, 1971 in paying Clifton B. Bannerman DC-9 Co-Pilot's pay from March 19, 1973 to July 21, 1973. The Union's grievance, as it relates to that period of time, is denied.

2. The Company violated Section 16(B) of the Agreement in paying the grievant DC-9 Co-Pilot's pay from July 21, 1973 to October 19, 1973. The Union's grievance as it relates to that period of time, is granted. During that period of time Mr. Bannerman was entitled to and should have been paid the Electra Captain's (L188) rate of pay pursuant to the pay schedule of Section 3 of the contract. The Company shall make an appropriate adjustment in his pay for that period of time.

Eric J. Schmertz
Chairman

Frank Foster
Concurring in #2 above
Dissenting from #1 above

Gerald Smallwood
Concurring in #2 above
Dissenting from #1 above
DATED: May 1974
STATE OF New York
COUNTY OF New York

On this day of May, 1974 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 1974
STATE OF New York
COUNTY OF New York

On this day of May, 1974, before me personally came and appeared Frank Foster to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 1974
STATE OF New York
COUNTY OF New York

On this day of May, 1974, before me personally came and appeared Gerald Smallwood to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 1974
STATE OF New York
COUNTY OF New York

On this day of May, 1974, before me personally came and appeared Richard Elten 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.

Richard Elten
Concurring in #1 above
Dissenting from #2 above

Melvin Sibulkin
Concurring in #1 above
Dissenting from #2 above
DATED: May 1974
STATE OF
COUNTY OF

On this day of May, 1974, before me personally came and appeared Melvin Sibulkin 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 # N Y-93-73
In the Matter of the Arbitration
between
Air Line Pilots Association
and
Overseas National Airways, Inc.

Opinion
of
Chairman

In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated February 5, 1971, between Overseas National Airways, Inc., hereinafter referred to as the "Company," and Air Line Pilots Association, International, hereinafter referred to as the "Union," the Undersigned was selected as the Chairman of a five member Board of Arbitration to hear and decide, together with the Union and Company designees to that Board, the following stipulated issue:

Was the Company in violation of Sections 3, 16 and 27 of the Agreement and the side letter dated August 26, 1971 in paying Clifton B. Bannerman DC-9 Co-Pilot's pay from March 19, 1973 to October 19, 1973? If so, what shall be the remedy?

Messrs. Frank Foster and Gerald Smallwood served as the Union Arbitrators on the Board of Arbitration, and Messrs. Richard Elten and Melvin Sibulkin served as the Company Arbitrators on the Board of Arbitration.

A hearing was held at the Company offices on April 11, 1974 at which time Mr. Bannerman, hereinafter referred to as the "grievant," and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived. The Board of Arbitration met in executive session on May 2, 1974.
I conclude that the grievant was properly paid for the period March 19, 1973 to July 21, 1973; but was not properly paid from July 21, 1973 to October 19, 1973.

The grievant successfully bid for a DC-9 Captain vacancy and commenced training in that position on November 18, 1972. There is no dispute over his rate of pay until March 19, 1973. On that date the Company determined that he "failed to qualify for promotion in equipment or status" (i.e. failed to qualify as a DC-9 Captain) within the meaning of Section 16(B) of the Agreement. The Company contends that the grievant was thereafter offered, and that he accepted, a position as a DC-9 Co-Pilot to afford him additional experience on the aircraft preliminary to a second effort to qualify as a DC-9 Captain. The Company asserts that his reduction in pay to that of a DC-9 Co-Pilot effective March 19, 1973 was proper and consistent with his reduced status.

The Union maintains that on March 19, 1973 the grievant had not failed to qualify within the meaning of Section 16(B), but rather that he had "failed to progress," and that the period of time thereafter while working primarily as a DC-9 Co-pilot was a continuation of his DC-9 Captain training, looking towards later qualification as a DC-9 Captain. Therefore the Union argues, his pay subsequent to March 19, 1973 should have been continued at the DC-9 Captain level.

Alternatively, the Union asserts that if the grievant was in fact reduced to DC-9 Co-Pilot status on March 19, 1973, that change in status constituted an "assign(ment)" under Paragraph
of the Letter Agreement of August 26, 1971, and an assign-
ment as defined by Section 27(A) of the Agreement. And that
therefore his pay from March 19, 1973 to July 21, 1973 should
have continued at the DC-9 Captain's rate.

It is undisputed that on July 21, 1973 following a second
"Line Check" the grievant failed to qualify within the meaning
of Section 16(B) of the Agreement. Thereafter, following a
period of medical leave, he returned to a Captaincy of an
Electra (L188), the job he held prior to his bid to the DC-9
Captain vacancy. From July 21, 1973 to October 1973, when the
grievant flew his first revenue flight as an Electra Captain,
the Company paid him at the DC-9 Co-Pilot's rate which is less
than the pay of an Electra Captain. The Company asserts it did
so consistent with Paragraph 1 Section f of the Letter of Agree-
ment dated August 26, 1971. The Union claims that the Company's
reliance thereon is misplaced and that under the Collective
Agreement the grievant was entitled to pay as an Electra Cap-
tain as of July 21, 1973, when undisputedly, he failed to qual-
ify as a DC-9 Captain.

There is no serious quarrel with the Company's determina-
tion that as of March 19, 1973, the grievant had not acquired
the requisite proficiency of a DC-9 Captain. Consequently I
find no fault with the Company's substantive determination that
as of that date the grievant was not qualified to pilot a DC-9
as its captain. The question is whether the Company adequately
invoked Section 16(B) of the Agreement by clear notice to the
grievant that he had failed to qualify in accordance with that
contractual provision. I find that the Company did. Any equivocal statements which the DC-9 Chief Pilot may have expressed to the grievant orally concerning his status, must be considered in conjunction with the express written statements of the Chief Pilot in letters dated March 6 and March 29, 1973 to the grievant. Those letters, in my judgment, make clear what the Chief Pilot thought the grievant's status was, and I am satisfied that those letters, together with oral statements to the grievant, adequately and clearly notified him that he had failed to qualify as a DC-9 Captain within the meaning of Section 16(B) of the Agreement.

Chief Pilot Rowland's letter of March 6, 1973 not only states that the grievant had not "reached the level of proficiency required to operate as a DC-9 Line Captain" but went on to expressly state that "Section 16(B) of the ONA-ALPA Agreement spells out the procedure to be followed in this case ..." Clearly, the grievant was being notified that Section 16(B) was being invoked and that he had failed to meet the proficiency standards within the context of that contract section. Again in Rowland's letter to the grievant of March 29, 1973, it is stated in pertinent part:

"You have failed to qualify for promotion to DC-9 Captain in that you did not achieve a satisfactory grade on your pilot line check. Section 16(B) states that you shall be given one additional opportunity to qualify and you must qualify on the second attempt."

I find no frailty in the Company's position by the delay between March 19 and Rowland's letter of March 29. During that period the Company was properly awaiting word from the grievant
as to whether he would return to an Electra Captaincy or accept additional experience as a DC-9 Co-Pilot. Therefore it is manifest that the Company both invoked Section 16(B) and unequivocally informed the grievant that he had failed to qualify under that Section of the Agreement.

That the grievant in his letter of March 19, 1973 to Chief Pilot Rowland stated that he "did not concur that this falls under Section 16(B) of the ONA-ALPA working Agreement" is not enough to disturb this conclusion. I believe, based on the grievant's testimony herein that his statement was intended to dispute the qualitative determination which the Company made at that time, or in other words, his quarrel with the Company was not that Section 16(B) was not or could not be invoked, but rather that he disagreed with the Company's decision that he had not achieved the requisite proficiency as a DC-9 Captain.

Nor is the foregoing conclusion overturned by the Company's treatment of Captain E. Kirschenbaum. The Union argues that the grievant and Kirschenbaum were factually similarly situated; that Kirschenbaum's failure of an FAA flight check and a subsequent line check as a DC-9 Captain was comparable (if not more serious) than the grievant's status on March 19, 1973 (especially since the grievant had passed his FAA check;) but that unlike the grievant the Company accorded Kirschenbaum a second line check one month after his earlier line check failure and then qualified him as a DC-9 Captain.

In short it is the Union's claim that the grievant should have been accorded the same additional opportunity and train-
ing as a DC-9 Captain subsequent to March 19, 1973 as was accorded Kirschenbaum subsequent to his first line check failure, and that not to do so discriminated against the grievant.

I reject the Union's contention in this regard simply because I view the facts of the Kirschenbaum case differently, and because the Kirschenbaum case cannot be construed as precedential.

The record discloses a significant difference between Kirschenbaum and the grievant. On March 19, 1973 the grievant's proficiency and the prospect for his relatively quick acquisition of the skills required of a DC-9 Captain were seriously questioned by the Company. At best, the Company felt that he might qualify as a DC-9 Captain only after a considerable number of additional hours of experience (specifically 100 additional hours experience as a DC-9 Co-Pilot.) But the Company's judgment of Kirschenbaum's ability was different. It determined that he was virtually at the point of qualifying when he failed his first line check in August, 1971, and that with a short additional period of training and experience he would qualify as he did one month later.

There is nothing in the record before me which rebuts these differing qualitative evaluations by the Company of these two pilots. And hence I am unable to conclude that the Kirschenbaum case and the instant dispute are substantively similar. Moreover, even if the two situations were comparable, the single Kirschenbaum case can hardly be deemed a practice to which the Company is thereafter bound, especially in view of
the testimony and other cited cases where other pilots were handled in the same way that the Company treated the grievant.

We turn then to what the grievant's rate of pay should have been from March 19, 1973 to July 21, 1973 when, uncontestedly, he failed to qualify as a DC-9 Captain. Neither the Agreement nor the side letter of August 26, 1972, provide a definitive answer. Section 16(B) of the contract indicates what the pilot's status shall be only in the events that he does not seek the opportunity to again qualify in six months, and if, having elected to try again within six months, he fails that second time. It does not cover the facts of the instant case, where, under any theory advanced, the grievant had either elected or had been accorded the opportunity to attempt to qualify within six months after March 19. So, as to the grievant, he neither declined the opportunity to qualify within six months, nor, between the period March 19 and July 21, 1973, had he yet failed in a second attempt. Section 27 also does not help in determining the grievant's rate of pay during the disputed period. It merely defines an assignment as "a position held by a pilot, not as a result of bidding procedure." It neither tells us the circumstances under which Section 3 of the Letter Agreement is applicable, nor does it deal at all with the question of pay.

I am not persuaded that Section 3 of the Letter Agreement of August 26, 1973 is applicable. I construe that Section to apply to the circumstance where an employee has successfully bid for a promotion, but his bid cannot be implemented, either
for training or permanent status because of, for example the unavailability of the equipment, cancellation of routes, diminution of work, etc. and instead he is placed in some other job. In that event, Section 3 entitled him to the higher rate of pay of the job into which he has successfully bid because, through no fault of his, the Company has assigned him elsewhere, when pursuant to the seniority and promotion provisions of the Agreement he should be working or training in the higher classification.

But those are not the facts here. The grievant was not assigned to the position of DC-9 Co-Pilot during any period when he should have been working as a DC-9 Captain pursuant to his bid. His demotion to DC-9 Co-Pilot was not in lieu of the period of training and experience as a DC-9 Captain to which he was entitled. On the contrary he was afforded a full opportunity over the requisite period of time to train as a DC-9 Captain at DC-9 Captain’s pay in complete compliance with his bidding rights and the contract. It was not until he failed to qualify as a DC-9 Captain that his status changed to that of a DC-9 Co-Pilot. And therefore his service in the latter capacity neither conflicted with, nor was a substitute for any period of time during which he should have been working and paid at the DC-9 Captain’s level. Put another way, his successful bid had run its course from November 1972 to March 21, 1973. Aside from the right to try again within six months he no longer was entitled to the status of the job to which he had bid. With this change of status to a DC-9 Co-Pilot, he no longer met either the conditions or the intent of Section 3, nor was he
any longer entitled to its protection.

Under these circumstances it is both logical and appropriate that the grievant be paid at the rate of the job in which he was actually working -- DC-9 Co-Pilot. I find that the Company expressly offered that position to him; that he accepted it; and that in the absence of a contract provision to the contrary, and I found none, he is bound to the pay rate of that job.

On March 19, 1973 the grievant could have returned to an Electra Captaincy. Thereafter within six months he could have attempted again to qualify as a DC-9 Captain. He did not choose to do that. Instead, following the Company's clear determination that he failed to qualify as a DC-9 Captain, and after a full opportunity to so qualify pursuant to his bidding rights, he was offered the opportunity to gain an additional 100 hours experience on the DC-9 aircraft as a Co-Pilot. He accepted that offer, and despite his protest over the applicability of Section 16(B) in his letter of March 19, 1973, he did not file a grievance during the entire period of time he served as a DC-9 Co-Pilot. I consider this as an unconditional acceptance of the Company's offer, and the consequent establishment of his status as a DC-9 Co-Pilot from March 19, 1973 to July 21, 1973.

It is well settled that an employer and an individual employee covered by a Collective Bargaining Agreement may not reach a private understanding contrary to the terms of the Collective Agreement. But where as here, there is an absence
of express, contrary or even applicable contract language covering this circumstance, the understanding between the Company and the grievant is not only binding, but the best evidence of what was intended.

Accordingly I find that between March 19, 1973 and July 21, 1973, the grievant was in status of a DC-9 Co-Pilot and was properly paid at the DC-9 Co-Pilot rate.

On July 21, 1973 when the grievant failed his line check he failed to qualify for promotion to DC-9 Captain under all the provisions of Section 16(B) of the Agreement. Under that circumstance Section 16(B) provides the answer to what the grievant's rate of pay should have been from July 21, 1973. It states:

"In the event the pilot fails to qualify in a second attempt for such promotion, he shall remain in his highest status and available equipment in accordance with system seniority, provided that eligibility for such pilot to bid for future promotions will be at the Company's discretion."

To my mind only one interpretation is possible, and that is that the grievant's highest status and available equipment in accordance with system seniority following his failure to achieve DC-9 Captain status was as an Electra Captain.

Clearly his highest status could not have been as a DC-9 Captain because he failed to qualify for that job after his second attempt. Also the reference to system seniority must mean a pilot's seniority throughout the Company's operations, and hence obviously relates to the highest job for which the pilot is qualified. In the instant case that was as an Electra Captain.
For two reasons I conclude that the grievant was entitled to the Electra Captain's rate of pay on July 21, 1973 or immediately after failing to qualify as a DC-9 Captain. First, Section 16(B), which accords him his highest status and available equipment based on system seniority, provides for no time lag between the failure to qualify and that status. Also, the proviso "that eligibility for such pilot to bid future promotions would be at Company discretion" appears to me to be the quid pro quo (i.e. an effective bar to future bids) for the pilot's immediate restoration to the highest job to which his seniority entitles him.

Secondly I reject the Company's assertion that it was not required to restore the grievant to the Electra Captain's pay rate until 90 days after his change in status from DC-9 Co-Pilot to Electra Captain, or until he flew his first revenue trip as an Electra Captain, whichever occurred first. (Here the grievant flew his first revenue trip on October 19, 1973.) I am not persuaded by that position simply because the Company relies on Section 1 of the Letter Agreement of August 26, 1971, and I do not find the Letter Agreement applicable. By its very terms the Letter Agreement in its entirety was negotiated to clarify the pay a pilot shall receive when he has been given an award to equipment or status different than that which he currently holds. (Emphasis added.) Though the grievant initially received an award from the Electra Captaincy to the promotional opportunity of DC-9 Captain, I hardly think that following his failure to qualify as a DC-9 Captain, his return to an Electra Captaincy can reasonably be
construed as an "award" within the meaning and purpose of the entire Letter of Agreement.

Accordingly from July 21, 1973 to October 19, 1973 the Company violated the contract when it paid the grievant at the DC-9 Co-Pilot's rate. During that period he should have been paid as an Electra Captain. The Company shall make him whole for the difference.

Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the matter of the Arbitration between

Unity Lodge Local 405 UAW

and

Pratt & Whitney Small Tool Division of Colt Industries Operating Corp.

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated October 5, 1975 and having duly heard the proofs and allegations of the parties, Awards, as follows:

Pursuant to the Supplemental Agreement, Peter Bleeker shall be paid average earnings on the job of Thread Miller level 11 retroactive to on or about January 2, 1973 when he returned to work.

Eric J. Schmertz
Arbitrator

DATED: January 14, 1974
STATE OF New York )
COUNTY OF New York) ss.

On this 14th day of January, 1974, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 12 30 0072 73
In the Matter of the Arbitration
between
Unity Lodge Local 405 UAW

and

Pratt & Whitney Small Tool
Division of Colt Industries
Operating Corp.

The stipulated issue is

What shall be the disposition of the Union's demand for arbitration to the American Arbitration Association dated April 20, 1973?

The Union's demand for arbitration reads:

**NATURE OF DISPUTE**: Company is in violation of the contract of October 5, 1970, letter of Agreement of October 21, 1970 and Special Agreement of April 5, 1972 with respect of Peter Bleeker, 9-1160, as set forth in Grievance CT-73-1, for the following reasons: Since he was on lay-off with recall rights, Employee Bleeker was entitled when he returned to work on or about January 2, 1973 to payment of his average earnings as specified in said Special Agreement.

**REMEDY SOUGHT**: Payment of said average earnings henceforth with retroactive wage adjustment from January 2, 1973.

A hearing was held at the Company offices in West Hartford, Connecticut on August 21, 1973. The Arbitrator's oath was waived and the parties filed post hearing briefs.
The collective bargaining relationship between the parties was basically defined, at all times relevant to this dispute, by an agreement ("the basic contract") entered into by the parties on October 5, 1970, and to continue in effect until January 7, 1974. Pursuant to a request of the employer, the parties entered into discussions subsequent to October 5, 1970, as a result of which a Special Agreement ("the supplemental agreement") affecting the employer's compensation plan was entered into by the parties on April 5, 1972, effective May 1, 1972.

The portion of the basic contract relevant to the instant dispute, Article VII, Seniority, reads, in pertinent part, as follows:

"Article VII, SECTION 1, (c) In all cases of increase or decrease of the working force seniority by occupations within departments shall be observed, but at such times the Company shall not be required, on the basis of an employee's seniority, to assign such employee to a work classification or occupation in a higher job level, except as provided under Section 10 of this article.

"When employees are so laid off or recalled in any occupation within a department they shall be laid off or recalled according to the following procedure, except as it is hereinafter modified:

"The employee with the least seniority shall be the first laid off; the employee with the next to the least seniority shall be the second laid off, and so on, the employee in each occupation in each department with the greatest uninterrupted seniority with the Company being the last laid off in each occupation in each department."

"In recalling employees to work after layoff they shall be recalled in each occupation in each department in reverse of the order in which they were laid off.

* * *
"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."

* * *

"SECTION 6. Seniority for the purposes of this article shall be deemed to date from the date of original hiring by the Company of each employee and shall be considered to have been interrupted only by reason of:

* * *

(c) Being hereafter laid off for lack of work for a period of more than one year and at such time has, in accordance with the terms of this agreement, up to five years' seniority; being hereafter laid off for lack of work for a period of more than two years and at such time has, in accordance with the terms of this agreement, seniority up to ten years; being hereafter laid off for lack of work for a period of three years or more and at such time has, in accordance with the terms of this agreement, ten years or more seniority."

* * *

"SECTION 10. (a) Should any employee about to be laid off in one occupation be able, on the basis of previous satisfactory performance in the Companies, of performing satisfactorily the work being done by another employee of less seniority (whether or not in the same occupation or department but within the Company), the Company will, at the employee's request, transfer such senior employee to such other job, provided, however, that the senior employee so transferred shall replace the employee who would be next laid off in the occupation in the department to which such senior employee is so transferred and the employee so displaced shall then be subject to layoff."
"(b) While any employee is on layoff from the Company, in addition to his other rights in this article, he shall have recall rights to either or both of the following job openings, should they become available, before less senior employees:

(i) Any lower level job in the occupation from which he is on layoff;

(ii) Any one job in which he has been formally classified, has demonstrated his ability to do the work, and which he has selected by written notice to the Personnel Department at time of layoff; provided that his recall opportunity will be limited in either category to the first opening to which his seniority entitles him and, provided further, that the election of recall to either opportunity exhausts his rights under this subsection."

* * *

"SECTION 14. When an opening exists within the bargaining unit to which no employee has claim by virtue of prior sections of this Article VII, the Company Personnel Department will post such opening on the shop bulletin boards for not less than five (5) working days.

"Employees to whom such openings are an opportunity for promotion or advancement, and who are interested, may make application during this five-day period, in writing, to the Personnel Department on forms supplied by it. Those who make such application shall be advised of the outcome by the Personnel Department."
"The Company will fill such vacancies from among those applicants who have the ability to do the work required, if any such apply, on the basis of seniority first within the department, then within the Company. (Ability to perform the work required shall be construed to mean that the employee has the ability and skills to meet the job requirements when assigned to them.)

"A successful applicant under this procedure shall not be eligible to apply for another opening hereunder for a period of six (6) months from the date of his new assignment."

***

"SECTION 15. Production Machinists will be utilized to break bottlenecks, reduce overtime and to meet production requirements in any particular work center or department. They will not be assigned to a particular work center or department to the extent that it would cause the layoff or prevent the normal recall of a more senior employee.

"The application of Production Machinists in the Pratt & Whitney Cutting Tool & Gage Division will continue in accordance with past practice in that Company."

***
The supplemental agreement reads as follows:

"In accordance with the Contract, Letter of Agreement dated October 21, 1970, the Pratt & Whitney Small Tool Division and the Union Local 405 have held discussions relative to the compensation plan in Said Division. As a result of these discussions a proposal for a trial elimination of the present incentive system in Small Tool Division was agreed upon.

"The details of this proposal are as follows:

1 a. Employees who have 100% or over on either the April-May 1971 average efficiency listing or the November-December 1971 listing will be paid at the higher of the two efficiency ratings for the life of this Agreement.

Employees who have 90% or over on either the April-May 1971 efficiency listing or the November-December 1971 listing will be paid at the higher of the two efficiency ratings until July 31, 1972.

Employees who are under 90% on both of the aforementioned listings will be brought up to 90% until July 31, 1972.

b. Employees who have an average efficiency of 95% or over but do not have 100% on the aforementioned listings will be brought up to 100% on July 31, 1972.

Employees who on July 31, 1972 are under 95% will be brought up to 95% until January 1, 1973.

c. Employees who on January 1, 1973 are under 100% will be brought up to 100% for the duration of this Agreement.

d. Any employee who name does not appear on the April-May 1971 or the November-December 1971 average efficiency listings and who is not specifically covered elsewhere in this Agreement will be paid at the April-May 1970 average efficiency or earlier if necessary."
"2. Employees who have recall rights either from lay-off or within the Company during the life of this Agreement and who exercise said recall rights shall receive maximum benefits under la, b, c and d herein above.

"3. Employees who are promoted either in their own occupation or to another occupation will carry the average in effect at the time of this promotion, payable at the higher level.

"4. One employee in Cut-off, P. Deschense, five employees in Precision Tools, F. Marques, N. Jiminez, D. Rabb, M. Santos and N. Bedard will be put on bonus rates and compensated the same as those employees whose average is under 90%. If we return to the present incentive system these employees will revert back to their pay status prior to this Agreement.

"5. All wage increases as set forth in the Contract of October 5, 1970 shall be paid to all employees covered by this Agreement and shall be included in averaging their wages on and after the applicable dates.

"6. Seniority regarding jobs and assignments will remain the same as in the past.

"7. No employee will come into the bargaining unit from a non-bargaining unit position during this trial period without approval of the Union.

"8. It is understood and agreed by the parties that this Agreement affects only the Small Tool and Gage Divisions for the duration of the trial period (May 1, 1972-January 7, 1973) and in no way affects or changes the systems within the Machine Tool Division and/or Chandler Evans Inc in accordance with the Contract dated October 5, 1970.

"The effective date of this Agreement is May 1, 1972 and said Agreement will continue in effect until January 7, 1973 unless cancelled by either party on or after July 31, 1972 upon 60-days notice of such intention. Continuation of this Agreement will require mutual consent by both parties. In the event the Agreement is cancelled by either party the Company will revert back to the present incentive system as soon as possible but not later than March 31, 1973.
The grievant was first employed by the company in January 1957. He served continuously thereafter progressing steadily through various occupations and job levels, the high point of his employment being his service as a Production Machinist from June 1963 to April 1969, during which period he reached job level 12 in a system in which 14 was the highest job level.

Because of decreases in the amount of available work, grievant was assigned and classified as a Cylindrical Grinder at job level 9 in April 1969; continuing decreases forced his layoff in April 1972 while still in the latter occupation. He returned to work in the occupation of Thread Miller, job level 11 in January 1973, and has continued in that occupation to date.

The title Production Machinist is, in reality, a category created to enable management to fill in at any point in the shop where additional skilled manpower is needed to prevent a bottleneck or other interruption of the steady flow of production. The need for and the uses of this category would naturally tend to shift and change in response to various circumstances such as the quantity of work in hand, the general state of the work force, etc. Thus, a Production Machinist might find himself during one period doing different types of work every few days and in other circumstances
might be assigned to a single occupation for extended periods of time. In order to protect incumbents in the various occupations in which Production Machinists might serve in their "trouble-shooting" capacity, the Union had demanded and obtained agreement that Production Machinists earn neither formal classification nor seniority in any of the occupations whose work they perform as Production Machinists and that all seniority earned in the latter category is attributed to their last formal classification prior to Production Machinist. Thus, according to the Union witness who provided all of the testimony on the nature and status of the Production Machinist, an employee in that category at time of lay-off would have no right of recall to the occupation of Production Machinist; but rather with certain additional but irrelevant features, his recall rights relate to the last occupation to which he had been formally classified. The right to recall is defined in Article VII, Section 10 (b) of the basic contract and entitles the laid-off employee to recall to:

"(i) any lower level job in the occupation from which he is laid off;

"(ii) any job in which he has been formally classified, has demonstrated his ability to do the work and which he has selected by written notice to the Personnel Department at time of layoff..."
Section 1 of the Supplemental Agreement defines the various dates and range of incentive efficiency ratings which would apply to such employees. Sections 2 and 3 of the agreement prescribes the conditions for application of the agreement's provisions to employees recalled from layoff (Section 2), and to employees promoted within their own or to other occupations (Section 3). Those sections read as follows:

"2. Employees who have recall rights either from layoff or within the Company during the life of this Agreement and who exercise such recall rights shall receive maximum benefits under la, b, c and d herein above.

"3. Employees who are promoted either in their own occupation or to another occupation will carry the average in effect at the time of this promotion, payable at the higher level."

In the instant case, as I see it, the issue is whether the grievant was recalled within the meaning of either of the applicable foregoing provisions of the Basic Agreement or Supplemental Agreement, or whether he was promoted so as to be entitled to incentive pay as provided by Section 3 of the Supplemental Agreement.

I am satisfied that the grievant was not recalled from layoff within the meaning of the applicable provisions of the Basic or Supplemental Agreements. He did not return to "any lower level job in the occupation from which he was laid off;" he
was not returned to employment as a Cylindrical Grinder, his last occupation prior to layoff; nor was he re-employed in "any job in which he has been formally classified ...and which he has selected by written notice to the Personnel Department at the time of layoff ...." To accept the Union's assertion that the grievant was recalled within the meaning of the Basic and Supplemental Agreements would require findings which would expand the seniority rights of employees in the Production Machinist category, and would be inconsistent with the Union's long standing position in that regard. For to hold, as the Union argues, that the grievant's performance of Thread Miller work during his tenure as a Production Machinist entitled him to recall as a Thread Miller would be to hold that he had prior tenure as a Thread Miller. This would be entirely inconsistent with the Union's clearly established position that service as a Production Machinist in any occupation does not constitute classification in that occupation, involves no tenure in that occupation, and therefore cannot result in acquisition of any seniority in that classification.

However, I see no such impediment to identifying the grievant's return to work as what I am persuaded it in fact
was - a negotiated promotion from layoff. And in that circumstance I am satisfied that both equitably and contractually, the grievant is entitled to average earnings as provided in Section 3 of the Supplemental Agreement.

I recognize that the grievant had no unilateral right while on layoff, to demand the job to which he was assigned upon his re-employment. Additionally there is no question that he did not bid on that job nor was he assigned to it by the Company pursuant to the bidding procedures of the contract. In other words, he did not have a unilateral right which on his own initiative he could have exercised under the contract to obtain the job of Thread Miller level 11. But this does not mean that the Company could not extend and expand his promotional rights by actions which constituted an offer of promotion, provided the Union did not object. I believe that is precisely what happened in the instant case. The Company reached out to the grievant while he was on layoff, asked him if he would return to work as a Thread Miller, and then negotiated with him the grade level as a condition of his return. The bilateral discussions between the Company and the grievant resulted in an agreement that he would return to work at level 11, a higher job level than the level 9 Cylindrical
Grinder job he held when laid off. In short the Company was not required to give him the Thread Miller job, level 11, but having initiated the effort to restore him to active employment, and having negotiated and agreed with him on a job higher than that which he occupied at the time of layoff, and there being no objection from the Union, I am constrained to conclude that a promotion was indeed effectuated. And under that circumstance, together with the fact that as part of the negotiations with the Company and as a condition of his return to work the grievant reserved his right to grieve for average pay, I see no reason why both logically and contractually he does not fall squarely within the provisions of Section 3 of the Supplemental Agreement.

Accordingly the grievant shall be paid average earnings as specified in the Supplemental Agreement, retroactive to on or about January 2, 1973, the date he returned to work.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the matter of the Arbitration between

Unity Lodge Local 405 UAW

and

Pratt & Whitney Small Tool
Division of Colt Industries
Operating Corp.

The Undersigned Arbitrator, having been designated in accord-
and with the Arbitration Agreement entered into by the above-
named parties, and dated October 5, 1975 and having duly heard
the proofs and allegations of the parties, Awards, as follows:

Pursuant to the Supplemental Agreement, Peter
Bleeker shall be paid average earnings on the
job of Thread Miller level 11 retroactive to on
or about January 2, 1973 when he returned to
work.

Eric J. Schmertz
Arbitrator

DATED: January 14, 1974
STATE OF New York 
COUNTY OF New York)

On this 14th day of January, 1974, before me personally
came and appeared Eric J. Schmertz to me known and known to me
to be the individual described in and who executed the fore-
going instrument and he acknowledged to me that he executed
the same.

Case No. 12 30 0072 73
In the Matter of the Arbitration between
Unity Lodge Local 405 UAW
and
Pratt & Whitney Small Tool Division of Colt Industries Operating Corp.

The stipulated issue is

What shall be the disposition of the Union's demand for arbitration to the American Arbitration Association dated April 20, 1973?

The Union's demand for arbitration reads:

NATURE OF DISPUTE: Company is in violation of the contract of October 5, 1970, letter of Agreement of October 21, 1970 and Special Agreement of April 5, 1972 with respect of Peter Bleeker, 9-1160, as set forth in Grievance CT-73-1, for the following reasons: Since he was on lay-off with recall rights, Employee Bleeker was entitled when he returned to work on or about January 2, 1973 to payment of his average earnings as specified in said Special Agreement.

REMEDY SOUGHT: Payment of said average earnings henceforth with retroactive wage adjustment from January 2, 1973.

A hearing was held at the Company offices in West Hartford, Connecticut on August 21, 1973. The Arbitrator's oath was waived and the parties filed post hearing briefs.
The collective bargaining relationship between the parties was basically defined, at all times relevant to this dispute, by an agreement ("the basic contract") entered into by the parties on October 5, 1970, and to continue in effect until January 7, 1974. Pursuant to a request of the employer, the parties entered into discussions subsequent to October 5, 1970, as a result of which a Special Agreement ("the supplemental agreement") affecting the employer's compensation plan was entered into by the parties on April 5, 1972, effective May 1, 1972.

The portion of the basic contract relevant to the instant dispute, Article VII, 'Seniority, reads, in pertinent part, as follows:

"Article VII, SECTION 1, (c) In all cases of increase or decrease of the working force seniority by occupations within departments shall be observed, but at such times the Company shall not be required, on the basis of an employee's seniority, to assign such employee to a work classification or occupation in a higher job level, except as provided under Section 10 of this article.

"When employees are so laid off or recalled in any occupation within a department they shall be laid off or recalled according to the following procedure, except as it is hereinafter modified:

"The employee with the least seniority shall be the first laid off; the employee with the next to the least seniority shall be the second laid off, and so on, the employee in each occupation in each department with the greatest uninterrupted seniority with the Company being the last laid off in each occupation in each department."

"In recalling employees to work after layoff they shall be recalled in each occupation in each department in reverse of the order in which they were laid off.

* * *
"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."

***

"SECTION 6. Seniority for the purposes of this article shall be deemed to date from the date of original hiring by the Company of each employee and shall be considered to have been interrupted only by reason of:

* * *

(c) Being hereafter laid off for lack of work for a period of more than one year and at such time has, in accordance with the terms of this agreement, up to five years' seniority; being hereafter laid off for lack of work for a period of more than two years and at such time has, in accordance with the terms of this agreement, seniority up to ten years; being hereafter laid off for lack of work for a period of three years or more and at such time has, in accordance with the terms of this agreement, ten years or more seniority."

***

"SECTION 10. (a) Should any employee about to be laid off in one occupation be able, on the basis of previous satisfactory performance in the Companies, of performing satisfactorily the work being done by another employee of less seniority (whether or not in the same occupation or department but within the Company), the Company will, at the employee's request, transfer such senior employee to such other job, provided, however, that the senior employee so transferred shall replace the employee who would be next laid off in the occupation in the department to which such senior employee is so transferred and the employee so displaced shall then be subject to layoff.
"(b) While any employee is on layoff from the Company, in addition to his other rights in this article, he shall have recall rights to either or both of the following job openings, should they become available, before less senior employees:

(i) Any lower level job in the occupation from which he is on layoff;

(ii) Any one job in which he has been formally classified, has demonstrated his ability to do the work, and which he has selected by written notice to the Personnel Department at time of layoff; provided that his recall opportunity will be limited in either category to the first opening to which his seniority entitles him and, provided further, that the election of recall to either opportunity exhausts his rights under this subsection."

* * *

"SECTION 14. When an opening exists within the bargaining unit to which no employee has claim by virtue of prior sections of this Article VII, the Company Personnel Department will post such opening on the shop bulletin boards for not less than five (5) working days.

"Employees to whom such openings are an opportunity for promotion or advancement, and who are interested, may make application during this five-day period, in writing, to the Personnel Department on forms supplied by it. Those who make such application shall be advised of the outcome by the Personnel Department."
"The Company will fill such vacancies from among those applicants who have the ability to do the work required, if any such apply, on the basis of seniority first within the department, then within the Company. (Ability to perform the work required shall be construed to mean that the employee has the ability and skills to meet the job requirements when assigned to them.)

"A successful applicant under this procedure shall not be eligible to apply for another opening hereunder for a period of six (6) months from the date of his new assignment."

***

"SECTION 15. Production Machinists will be utilized to break bottlenecks, reduce overtime and to meet production requirements in any particular work center or department. They will not be assigned to a particular work center or department to the extent that it would cause the layoff or prevent the normal recall of a more senior employee.

"The application of Production Machinists in the Pratt & Whitney Cutting Tool & Gage Division will continue in accordance with past practice in that Company."

***
The supplemental agreement reads as follows:

"In accordance with the Contract, Letter of Agreement dated October 21, 1970, the Pratt & Whitney Small Tool Division and the Union Local 405 have held discussions relative to the compensation plan in Said Division. As a result of these discussions a proposal for a trial elimination of the present incentive system in Small Tool Division was agreed upon.

"The details of this proposal are as follows:

1 a. Employees who have 100% or over on either the April-May 1971 average efficiency listing or the November-December 1971 listing will be paid at the higher of the two efficiency ratings for the life of this Agreement.

Employees who have 90% or over on either the April-May 1971 efficiency listing or the November-December 1971 listing will be paid at the higher of the two efficiency ratings until July 31, 1972.

Employees who are under 90% on both of the aforementioned listings will be brought up to 90% until July 31, 1972.

b. Employees who have an average efficiency of 95% or over but do not have 100% on the aforementioned listings will be brought up to 100% on July 31, 1972.

Employees who on July 31, 1972 are under 95% will be brought up to 95% until January 1, 1973.

c. Employees who on January 1, 1973 are under 100% will be brought up to 100% for the duration of this Agreement.

d. Any employee who name does not appear on the April-May 1971 or the November-December 1971 average efficiency listings and who is not specifically covered elsewhere in this Agreement will be paid at the April-May 1970 average efficiency or earlier if necessary."
"2. Employees who have recall rights either
from lay-off or within the Company dur-
ing the life of this Agreement and who
exercise said recall rights shall re-
ceive maximum benefits under la, b, c
and d herein above.

"3. Employees who are promoted either in
their own occupation or to another
occupation will carry the average in
effect at the time of this promotion,
payable at the higher level.

"4. One employee in Cut-off, P. Deschense,
five employees in Precision Tools,
F. Marques, N. Jiminez, D. Rabb, M.
Santos and N. Bedard will be put on
bonus rates and compensated the same
as those employees whose average is
under 90%. If we return to the present
incentive system these employees will
revert back to their pay status prior
to this Agreement.

"5. All wage increases as set forth in the
Contract of October 5, 1970 shall be
paid to all employees covered by this
Agreement and shall be included in
averaging their wages on and after the
applicable dates.

"6. Seniority regarding jobs and assign-
ments will remain the same as in the
past.

"7. No employee will come into the bargain-
ing unit from a non-bargaining unit posi-
tion during this trial period without
approval of the Union.

"8. It is understood and agreed by the parties
that this Agreement affects only the Small
Tool and Gage Divisions for the duration
of the trial period (May 1, 1972-January 7,
1973) and in no way affects or changes the
systems within the Machine Tool Division
and/or Chandler Evans Inc in accordance
with the Contract dated October 5, 1970.

"The effective date of this Agreement is May 1,
1972 and said Agreement will continue in effect
until January 7, 1973 unless canceled by either
party on or after July 31, 1972 upon 60-days
notice of such intention. Continuation of this
Agreement will require mutual consent by both
parties. In the event the Agreement is cancelled
by either party the Company will revert back to
the present incentive system as soon as possible
but not later than March 31, 1973.
The grievant was first employed by the company in January 1957. He served continuously thereafter progressing steadily through various occupations and job levels, the high point of his employment being his service as a Production Machinist from June 1963 to April 1969, during which period he reached job level 12 in a system in which 14 was the highest job level.

Because of decreases in the amount of available work, grievant was assigned and classified as a Cylindrical Grinder at job level 9 in April 1969; continuing decreases forced his layoff in April 1972 while still in the latter occupation. He returned to work in the occupation of Thread Miller, job level 11 in January 1973, and has continued in that occupation to date.

The title Production Machinist is, in reality, a category created to enable management to fill in at any point in the shop where additional skilled manpower is needed to prevent a bottleneck or other interruption of the steady flow of production. The need for and the uses of this category would naturally tend to shift and change in response to various circumstances such as the quantity of work in hand, the general state of the work force, etc. Thus, a Production Machinist might find himself during one period doing different types of work every few days and in other circumstances
might be assigned to a single occupation for extended periods of time. In order to protect incumbents in the various occupations in which Production Machinists might serve in their "trouble-shooting" capacity, the Union had demanded and obtained agreement that Production Machinists earn neither formal classification nor seniority in any of the occupations whose work they perform as Production Machinists and that all seniority earned in the latter category is attributed to their last formal classification prior to Production Machinist. Thus, according to the Union witness who provided all of the testimony on the nature and status of the Production Machinist, an employee in that category at time of lay-off would have no right of recall to the occupation of Production Machinist; but rather with certain additional but irrelevant features, his recall rights relate to the last occupation to which he had been formally classified. The right to recall is defined in Article VII, Section 10 (b) of the basic contract and entitles the laid-off employee to recall to:

"(i) any lower level job in the occupation from which he is laid off;

"(ii) any job in which he has been formally classified, has demonstrated his ability to do the work and which he has selected by written notice to the Personnel Department at time of layoff..."
Section 1 of the Supplemental Agreement defines the various dates and range of incentive efficiency ratings which would apply to such employees. Sections 2 and 3 of the agreement prescribes the conditions for application of the agreement's provisions to employees recalled from layoff (Section 2), and to employees promoted within their own or to other occupations (Section 3). Those sections read as follows:

"2. Employees who have recall rights either from layoff or within the Company during the life of this Agreement and who exercise such recall rights shall receive maximum benefits under la, b, c and d herein above.

"3. Employees who are promoted either in their own occupation or to another occupation will carry the average in effect at the time of this promotion, payable at the higher level."

In the instant case, as I see it, the issue is whether the grievant was recalled within the meaning of either of the applicable foregoing provisions of the Basic Agreement or Supplemental Agreement, or whether he was promoted so as to be entitled to incentive pay as provided by Section 3 of the Supplemental Agreement.

I am satisfied that the grievant was not recalled from layoff within the meaning of the applicable provisions of the Basic or Supplemental Agreements. He did not return to "any lower level job in the occupation from which he was laid off;" he
was not returned to employment as a Cylindrical Grinder, his last occupation prior to layoff; nor was he re-employed in "any job in which he has been formally classified ... and which he has selected by written notice to the Personnel Department at the time of layoff ..." To accept the Union's assertion that the grievant was recalled within the meaning of the Basic and Supplemental Agreements would require findings which would expand the seniority rights of employees in the Production Machinist category, and would be inconsistent with the Union's long standing position in that regard. For to hold, as the Union argues, that the grievant's performance of Thread Miller work during his tenure as a Production Machinist entitled him to recall as a Thread Miller would be to hold that he had prior tenure as a Thread Miller. This would be entirely inconsistent with the Union's clearly established position that service as a Production Machinist in any occupation does not constitute classification in that occupation, involves no tenure in that occupation, and therefore cannot result in acquisition of any seniority in that classification.

However, I see no such impediment to identifying the grievant's return to work as what I am persuaded it in fact
was — a negotiated promotion from layoff. And in that circumstance I am satisfied that both equitably and contractually, the grievant is entitled to average earnings as provided in Section 3 of the Supplemental Agreement.

I recognize that the grievant had no unilateral right while on layoff, to demand the job to which he was assigned upon his re-employment. Additionally there is no question that he did not bid on that job nor was he assigned to it by the Company pursuant to the bidding procedures of the contract. In other words, he did not have a unilateral right which on his own initiative he could have exercised under the contract to obtain the job of Thread Miller level 11. But this does not mean that the Company could not extend and expand his promotional rights by actions which constituted an offer of promotion, provided the Union did not object. I believe that is precisely what happened in the instant case. The Company reached out to the grievant while he was on layoff, asked him if he would return to work as a Thread Miller, and then negotiated with him the grade level as a condition of his return. The bilateral discussions between the Company and the grievant resulted in an agreement that he would return to work at level 11, a higher job level than the level 9 Cylindrical
Grinder job he held when laid off. In short the Company was not required to give him the Thread Miller job, level 11, but having initiated the effort to restore him to active employment, and having negotiated and agreed with him on a job higher than that which he occupied at the time of layoff, and there being no objection from the Union, I am constrained to conclude that a promotion was indeed effectuated. And under that circumstance, together with the fact that as part of the negotiations with the Company and as a condition of his return to work the grievant reserved his right to grieve for average pay, I see no reason why both logically and contractually he does not fall squarely within the provisions of Section 3 of the Supplemental Agreement.

Accordingly the grievant shall be paid average earnings specified in the Supplemental Agreement, retroactive to about January 2, 1973, the date he returned to work.

Eric J. Schmertz
Arbitrator
His return to work was thus not a recall as of right under Article VII, SECTION 10, (b) (i and ii) of the basic contract. It was therefore not a return to work in the exercise of recall rights which, under Section 2 of the supplemental agreement, would entitle an employee returning from layoff to the benefits of SECTION 1 of the agreement.

Among these are provisions for posting of job openings, bidding by employees, designation by management of employees from among those bidding, standards to be applied and procedures to be followed by management in making such designations, etc. The management right to make promotions as it sees fit and on a unilateral basis has thus been limited or reduced to the extent set forth in Article VII, SECTION 14, of the basic contract. Once all of the provisions and conditions of Article VII, SECTION 14, have been complied with, the employer is free to fill the job opening as it sees fit, whether by transfer, promotion or by hiring a new employee. There is nothing in Article VII or in any other article of the contract which prohibits management from appointing an employee on lay-off status to an occupation other than that in which he was engaged at time of layoff; nor is there any provision which states that such appointment shall not constitute a transfer or, if to a job level higher than the job level at layoff, a promotion.
There is a continuing relationship between the employer and the employee on layoff with seniority. Upon return to work, whether by recall to his former occupation or by assignment to a new one, the employee retains his seniority. If the return to work is to a new assignment, seniority is allocated, after one year, to the new occupation just as in the case of an employee on the job who is transferred or promoted. Based upon all of these considerations, I find that when management exercises its prerogative to assign an employee on layoff with seniority rather than hiring a new employee to fill a job opening after the requirements of Article VII, SECTION 14, have been satisfied, the assignment constitutes a transfer or, if to a job level higher than the job level occupied by the employee prior to layoff, a promotion. This finding does not imply that an employee on layoff with seniority has any right under the contract to transfer or promotion comparable to his right of recall. No such question is presented here. In the instant case, management took the initial action, after satisfying the requirements of Article VII, SECTION 14, of approaching grievant and inquiring whether he would be interested in being appointed to the Thread Miller occupation at job level 10. Even this appointment would have constituted a promotion from his prior occupation as Cylindrical Grinder.
at job level 9. But after discussion it was agreed that the appointment would be at job level 11. The mere fact that the appointment was not made pursuant to any specific provision of the contract does not mean it was not a promotion. Even an appointment to a new and higher occupation and job level, made in violation of a term of the contract is a promotion albeit an illegal promotion. An appointment, such as the appointment of grievant, to a new and higher occupation, which is not made pursuant to any provision of the contract but which does not violate any term of the contract is a promotion, a legal promotion and a promotion as contemplated by Section 3 of the supplemental agreement.

I find that grievant's return to work was not an exercise of his right of recall as contemplated by Section 2 of the supplemental agreement and consequently did not entitle him, pursuant to said Section 2, to benefits under Section 1 of the supplemental agreement. I find, further, that grievant's return to work was a promotion as contemplated by Section 3 of the supplemental agreement and that pursuant to said Section 3 he is entitled to the benefits provided for in Section 1 of the supplemental agreement. My award will accord with the foregoing findings.
The Company violated the contract of October 5, 1970, the Letter of Agreement of October 21, 1970, and the Special Agreement of April 5, 1972, by its failure and refusal to afford to Peter Bleeker, upon his return to work on January 2, 1973, following lay-off with recall rights, payment of his average earnings as specified in Section 1 of said Special Agreement. The grievance is accordingly upheld and the Company is directed to pay to said Employee his average earnings as specified in Section 1 of said Special Agreement as from his return to work on January 2, 1973.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Utility Co. Workers' Association and

Public Service Electric & Gas Company

Award of Arbitrators

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:

Union Grievance U-104 dated December 21, 1972 is denied.

Eric J. Schmertz
Chairman

G. H. Barnstorff
Concurring

Charles W. Cornforth
Concurring

Benjamin W. Pecario
Dissenting

Daniel McNeice
Dissenting
DATED: June 1974
STATE OF New York )
COUNTY OF New York )ss.: 

On this day of June, 1974, 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: June 1974
STATE OF New York )
COUNTY OF New York )

On this day of June, 1974, before me personally came and appeared G. H. Barnstorf 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: June 1974
STATE OF New York )
COUNTY OF New York )

On this day of June, 1974, before me personally came and appeared Charles W. Cornforth 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: June 1974
STATE OF New York )
COUNTY OF New York )

On this day of June, 1974, before me personally came and appeared Benjamin W. Percario 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: June 1974
STATE OF New York )
COUNTY OF New York )

On this day of June, 1974, before me personally came and appeared Daniel McNeice 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. 1830 0346 73 D
In the Matter of the Arbitration
between
Utility Co. Workers' Association
and
Public Service Electric & Gas Company

In accordance with the arbitration provisions of the Collective Bargaining Agreement between Public Service Electric & Gas Company, hereinafter referred to as the "Company," and Utility Co. Workers' Association, hereinafter referred to as the "Union," the Undersigned was designated as the Chairman of a five man Board of Arbitration to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

What shall be the disposition of the Union's grievance U-104 dated December 21, 1972?

Messrs. Benjamin W. Percario and Daniel McNeice served as the Union Arbitrators on the Board of Arbitration and Messrs. G. H. Barnstorf and Charles W. Cornforth served as the Company Arbitrators on the Board of Arbitration.

Hearings were held in Newark, New Jersey on January 30 and March 4, 1974 at which time representatives of the Union and Company, hereinafter referred to collectively as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the oath of the Arbitrators. The Board of Arbitration met in executive session in Newark, New Jersey on June 3, 1974 following which the hearings were declared closed.
The Union's grievance U-104 reads:

U-104 - BERGEN DISTRIBUTION DIVISION
SUPERVISORS DOING BARGAINING UNIT WORK.

The grievance arose over the fact that Mr. Zengel and Mr. Alvarez are doing Bargaining Unit Work. Since the retirement of Mr. Gage a "Senior Engineering Plant Assistant" we have lost a promotional opportunity, because of the work done by Mr. Zengel and Mr. Alvarez.

As an Award the Union seeks the Posting for a Senior Engineering Plant Assistant.

During the course of the hearing the Union expanded the remedy it seeks to include a claim for retroactive back pay.

Certain facts are not in dispute. When Mr. Gage, a bargaining unit employee retired from his job as Senior Engineering Plant Assistant, his job was filled by the lateral transfer of a Mr. Rymaniak, also a bargaining unit Senior Engineering Plant Assistant. What is disputed initially is what if anything was done with the work which Rymaniak performed prior to his transfer to the Gage vacancy. It is the contention of the Union that Rymaniak's assignments were assumed by Zengel and Alvarez, both supervisory and non-bargaining unit employees. And that this violated Personnel Instruction No. 27.

The Company disputes the Union's contention that Rymaniak's work was picked up by Zengel and Alvarez. It explains that because of a sharp diminution in available work for Senior Engineering Plant Assistants there was little if any work remaining to be assumed by anyone following Rymaniak's transfer to the position vacated by Gage, and what little work there was if any, was assigned to a Mr. Vogel, a bargaining unit Senior Engineering Plant Assistant.
In any event it is the Company's contention that neither Personnel Instruction No. 27 nor any other provision of the contract prohibits the Company from assigning to supervisory or non-bargaining unit personnel, work which may be or has been performed by the bargaining unit, and that it has been a long standing practice of the Company to make such assignments to supervisory personnel.

The grievance fails on the threshold issue. The Union has not established to my satisfaction, the essential facts upon which the grievance is based, namely that Zengel and Alvarez assumed the work previously performed by Rymaniak. The Union's assertion in this regard is based solely on the testimony of Mr. Matulewicz, its First Vice President, who investigated the grievance, but who was not involved in performing any aspect of the disputed work and who did not work in the particular Division involved. His testimony, concededly, was based upon what others told him about what happened to Rymaniak's work assignments after Rymaniak's transfer to the Gage vacancy.

I deem the better evidence to be the testimony of Mr. Ela, the Superintendent of the Division involved, who was responsible for determining how many and which employees performed the work in question and who testified not only that the quantity of available work for Senior Engineering Plant Assistants had markedly fallen, making unnecessary the filling of the job left open by Rymaniak's transfer, but that any remaining duties previously performed by Rymaniak were picked up not be Zengel and Alvarez, but by Vogel.
It is the Union's burden to establish the factual basis upon which its grievance is based. Weighing the conflicting testimony of Ela and Matulewicz, I am constrained to conclude that the Union has not met that burden especially where, as here, Ela is more directly knowledgeable about the facts and circumstances of this dispute. Additionally, it is noted that the Union did not call Vogel as a witness though he is one of its members. This is not to say that Zengel and Alvarez did not pick up significant bargaining unit work left by Rymaniak but rather that the Union has not established that fact by the quantum of evidence necessary, and consequently has not shown, so far as the instant record is concerned, the factual existence of the allegation upon which its grievance is based.

Accordingly we do not reach the question of whether the assignment to supervisory employees Zengel, Alvarez or others, of work also assigned to bargaining unit employees, is violative of Personnel Instruction No. 27.

For the foregoing reasons the Union Grievance U-104 dated December 21, 1972 is denied.

Eric J. Schmertz
Chairman
In the Matter of the Arbitration between
Simmons Elizabeth Employees' Union
Local 420 of the Upholsterers International Union of North America
AFL-CIO

and

Simmons Company

The Undersigned Arbitrators, having been duly designated in accordance with the applicable provisions of the Collective Bargaining Agreement between the above named Union and Company, and having heard the proofs and allegations of the parties, make the following Award:

The critical evidence adduced by the Company from its principal witness was credible, unimpeached, persuasive and therefore determinative. As a disciplinary case, the Company has met its burden of establishing its case by the quantum and standard of proof required in such matters. Accordingly there was just cause for the discharge of Jesse Knight and James Gissendaner.

Eric J. Schmertz
Chairman

D.J. Applegate
Concurring

Walter Zlicesky
Dissenting

DATED: May 28, 1974
STATE OF New York
COUNTY OF New York

On this 28th day of May, 1974, 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:
STATE OF
COUNTY OF

On this day of 1974, before me personally came and appeared D. J. Applegate 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:
STATE OF
COUNTY OF

On this day of 1974, before me personally came and appeared Walter Zlicesky 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 365 Cemetery Workers & Green Attendants Union
- and -
Springfield Island Cemetery (Montefiore Cemetery)

OPINION

The stipulated issue is:

Whether seasonal employees who worked the two previous seasons (of at least six months each season) are eligible for Blue Cross coverage for worker and family during the period of non-active work between seasons? If so what shall be the remedy?

A hearing was held at the American Arbitration Association on September 9, 1974 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The grievants are seasonal employees who have met the threshold requirement of having worked the two previous seasons of at least six months each season. What is in dispute is whether they are entitled to worker and family Blue Cross coverage during the period after their active seasonal work ends and prior to their recall to active work the next season.

The pertinent language of Section 4 Paragraph (b) reads:

seasonal employees who have worked a period of six months in each of the two successive years shall be entitled to receive basic individual and family Blue Cross hospital coverage during the period of their employment, the same to be provided by the Employer. (Emphasis added.)
The dispute centers on the underlined language "during the period of their employment." The Union contends that the period of employment, as that phrase is construed traditionally, includes not only the time that the seasonal employee is actively at work but also his layoff while he retains seniority and the right to recall for the next season. The Union acknowledges that if such employee fails or refuses to respond to a recall for the succeeding season he would at that point lose his employment status and his Blue Cross coverage would then be terminated. The Employer asserts that the disputed phrase covers only a seasonal employee's period of active employment each season, and that his Blue Cross coverage may be terminated as soon as his active work ceases. The Employer concedes however that the affected seasonal employees (the grievants herein) retain seniority between seasons during the layoff period, and retain recall rights for active work in the succeeding season before the Employer may hire new men.

The disputed language is ambiguous. As the Union asserts it may be interpreted to cover any period of time during which the employee retains "employee status." And classically, that includes periods of layoffs as well as active employment, so long as an employee retains his seniority. Contrary wise, because the language refers not to regular or full time employees but rather to seasonal employees, it could apply with equal logic to only that period during which the seasonal employee is
"employed," meaning actively at work. It could be argued in support of the Employer's position (though the Employer did not do so in this case) that if the disputed phrase was intended to cover the layoff period the language would have been unnecessary and superfluous. For without it, seasonal employees would have continued to be covered until such time as they lost their seniority or employee status by refusing or failing to respond to a notice of recall. However on the other hand, it may be argued with equal force that the disputed and unrestricted language was meant to make unequivocal the fact that the contract benefit was intended to extend throughout a seasonal employees employment relationship with the employer, namely through his inactive as well as active "periods of employment," even though he was only a seasonal employee. So, a bare reading of the contract language does not provide an interpretation dispositive of the instant dispute.

Where contract language is ambiguous, arbitrators resort to "past practice" for clarification. But here past practice is not helpful because it has not been of long duration, or consistent or uniform. In the prior year under the disputed language, the Employer continued Blue Cross coverage during the non-active working time of the seasonal employees but did so with an express reservation of his position that he was not required to do so, and that he would not do so in this, the subsequent year. The practice in the rest of the Industry has been varied and inconsistent. Some other employers have continued the coverage
but then discontinued it. And it appears that this uneven Industry-wide experience resulted both from the initiatives of the employers separately and/or following advice to them from their counsel. Hence, there is not enough evidence of a consistent and uniform practice one way or the other to be supportive of either the Union's or the Employer's contract position herein.

In the absence of clarifying past practice, an arbitrator looks to the "legislative history" of the disputed language in an effort to glean its meaning and intent. But the evidence as to what happened during contract negotiations leading to the disputed language is sharply conflicting. The Union asserts that in the course of the negotiations and during mediation conferences, the mediator assured the Union that his proposal meant that seasonal workers and their families would be covered by Blue Cross during the offseason as well as while actively at work, after they had met the threshold requirement of completing two seasons of at least six months each season. And that this benefit which had been previously granted by some of the cemeteries, was to be extended to all, including this Employer. The Union believed or was led to believe that this proposal which in important part ended the strike was acceptable to the cemeteries involved, including this Employer. Additionally the Union asserts that following the mediated settlement, when the Employer's counsel submitted draft contract language, he and the Union
President had a telephone conversation in which counsel was only concerned with and sought assurances that Blue Cross coverage would end when the seasonal employee refused or failed to respond to a recall for the subsequent season but that there was no discussion about ending it after each period of active work. The Union admits that when thereafter it received the final draft language containing the disputed language it was worried that the language might be interpreted differently than what was agreed to. But it explains that following discussions with its own counsel and considering what took place in the negotiations, the mediation and the telephone conversation, it decided that the disputed language "would not hurt the Union's position."

The Employer's testimony is contrary. He denies that the mediator's proposal extended the Blue Cross coverage to the layoff or non-active period. He asserts that if the mediator made any statements to the Union to that effect he made no such similar statements to this Employer or the other cemeteries. The Employer's counsel flatly denied the substance of his telephone conversation with the Union's president as recited and testified to by the latter. He stated that throughout it was his understanding and intent that the Blue Cross benefit would obtain only during the seasonal employee's period of active work and that he so advised this Employer and other cemeteries.

In my view the foregoing sharply contradictory and divergent testimony represents, unfortunately, an evidentiary standoff, and
leaves the "legislative history" of the disputed language still clouded and undetermined. (Quite correctly, and in accordance with the law, the mediator involved could not testify. Resort to his opinion would be improper and hence was not sought.)

All of this leaves one final, yet fundamental rule as the basis for an appropriate determination of the dispute. That fundamental contract rule is that ambiguous and otherwise unclear contract language, which cannot be clarified by past practice or by evidence of what took place when it was negotiated, should be construed against the part who wrote it. In the instant case it is undisputed that the phrase "during the period of their employment," as set forth in Section 4(b), was first introduced into the draft contract and was written in its original and final form by counsel for the Employer. Obviously, if he was so clear in his own mind that the purpose and intent of that language was to limit Blue Cross coverage to a seasonal employee's period of active work each season (following the threshold requirement of having worked the two previous seasons) he could and indeed should have included the word "active" in that critical language. By not doing so, especially when the phrase "period of employment" is construed traditionally in the employment relationship to encompass any period of time during which an employee retains his seniority, including layoffs, with a right of recall, counsel for the Employer created the very ambiguity with which we presently deal. And in view of the fact that there
is no evidence in the record either from past practice or the negotiations which fully or substantially support the Employer's position and interpretation herein, and because there is evidence, albeit not fully determinative, supportive of the Union's allegations, the disputed language for which the Employer is responsible, must be interpreted against him.

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

The Union's grievance on behalf of the seasonal employees is granted. The affected seasonal employees who are otherwise qualified under Section 4(b) are entitled to Blue Cross coverage during the off season or period of non-active work between seasons, so long as they retain their seniority and until they fail or refuse to respond to a recall for active work in the subsequent season. The Employer shall make appropriate payments to Blue Cross to ensure this continued coverage.

Eric J. Schmertz
Arbitrator

DATED: October 7, 1974
STATE OF New York )
COUNTY OF New York )

On this 7th day of October, 1974, 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. 1330-0572-74
In accordance with the Arbitration provisions of the Collective Bargaining Agreement between the above named parties, the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

To what vacation benefits was George Lear entitled under Article IX of the Collective Bargaining Agreement upon his retirement on February 29, 1972?

A hearing was held in Edison, New Jersey on May 6, 1974 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 waived by the parties. Subsequently the parties waived the time limit for rendition of the Award.

Mr. Lear, hereinafter referred to as the "grievant," retired on February 29, 1972, after approximately 35 years of service. The Company paid him 6 days vacation pay pursuant to Article IX Section 4(c) of the contract. The grievant's anniversary date was December. As an employee with more than 20 years service the grievant's full vacation entitlement each year was 5 weeks pay. The 6 days pay he received represented 1/12 of that vacation allowance for each month of service or a major fraction thereof from December to the date of his re-
tirement. That part of the instant case is undisputed. What is in dispute is whether the grievant is entitled to additional vacation pay, specifically 5 additional weeks for his service during the twelve month period from December 1970 through December 1971.

Though the Union's argument varied somewhat during the course of the arbitration hearing, its ultimate position, as I understand it, is that the grievant earned a 5 week vacation benefit when he completed the preceding year of service, and that therefore, as of his anniversary date of December 1971, he had earned 5 weeks of vacation for the twelve months of service from December 1970. And that upon his retirement at the end of February, 1972, he was entitled to those 5 weeks of pay, plus the pro rata vacation which he had accrued thereafter and was paid.

It is the Company's contention that 6 days pay, or in other words 1/12 of his vacation allowance for the months of service between December 1971 and the date of his retirement is all that the grievant is entitled to. The Company's case is based on an alleged practice, and on its interpretation of Section 6 of Article IX which forecloses the accumulation of vacation time and provides that vacations must be taken in the year they are due. Specifically the Company asserts that by practice employees have been permitted and indeed have regularly taken their full vacation entitlement in the very twelve month period in which that vacation entitlement is earned or being accrued, even if, as a consequence, an employee receives or takes a full
vacation before he fully earns it. In the instant case the Company argues that based on this practice the 5 week vacation which the grievant took during the period December 1970 through December 1971 was the very vacation which he was earning and/or accumulating by virtue of his service during that period of time, and not, as the Union contends, an entitlement earned as a consequence of his service during the preceding twelve month period December 1969 through December 1970. The Company buttresses its argument in support of this practice by interpreting Section 6 as meaning that vacations must be taken during the twelve month period in which they are earned and/or accumulated.

As I see it the issue before me is simply whether the 5 weeks vacation which undisputedly the grievant received during the year 1971 (the weeks of July 18, July 25, August 1, December 19 and December 26) constituted 5 weeks vacation for his twelve months service from December 1970 through December 1971 or whether it was vacation earned as a consequence of his service from December 1969 through December 1970.

If the former, he is not entitled to vacation pay other than the 6 days which he received when he retired on February 29, 1972. If the latter, then the Company owes him 5 additional weeks vacation.

I interpret Section 2 of Article IX to mean that an employee must complete specific periods of service before he becomes eligible for a vacation benefit. It is clear that an employee is entitled to no vacation until he has completed at least 6 months service. Moreover Section 2 provides that employees must pass
their anniversary dates before they receive any new or additional vacation benefit, pursuant to the schedule in Section 2(a). So, in the case of the grievant his 5 weeks vacation entitlement did not become a vested right until he had completed his 20th year of service.

In other words he had not earned nor could he contractually assert a right to take 5 weeks vacation or receive 5 weeks vacation pay until he had completed the twelve months of service which constituted the completion of his 20th year of employment with the Company. And thereafter in each succeeding year, his right to 5 weeks vacation vested only following completion of each twelve month period from and to each of his December anniversary dates.

Accordingly based on the contract the 5 weeks which the grievant took as vacation in the year 1971 were weeks and pay which he had earned by virtue of completing twelve months of service previous thereto. As I see it, the contract language, requiring completion of service before a full vacation entitlement is earned and may be taken supports the Union's contention in this proceeding. Section 6 does not disturb that conclusion. Section 6 merely provides that vacations must be taken in the year due and may not be accumulated thereafter. The year due, to my mind, means the year following the completion of the period which the employee must serve in order to earn and accumulate the full vacation entitlement.

In the instant case, the full 5 week vacation which the grievant earned by virtue of his service from December 1969
to December 1970 became due subsequent to December 1970, or in other words, in 1971. For the grievant to take a 5 week vacation in 1971 which he earned as a result of his service from December 1969 to December 1970 is fully consistent with Section 6 and is not an "accumulation" as alleged by the Company. I cannot accept the Company's rationale that to permit employees to take their full vacation entitlement during the year in which it is being earned, even at the risk of permitting them to enjoy a full vacation before they have fully earned it, is to accord them a vacation when "due" within the meaning of Section 6. Rather, the Company's practice accords them a full vacation prematurely, before it becomes due. Hence the Company's interpretation of Section 6 cannot be relied on as proof of the practice which it asserts has been followed with regard to the grievant and others similarly situated.

By relying upon a practice at variance from the contract as I have interpreted it, the burden shifts to the Company to prove that the practice was followed in the grievant's case. Based on the record before me the Company has not met that burden. It merely alleged the practice but did not offer or adduce adequate evidence or testimony to show the application of that practice to the grievant or to other employees. It has not shown in this case, though it may be able to do so in other pending or subsequent matters, that employees take their vacations in full during the very twelve month period in which those vacations are still being earned and accrued.

Accordingly I find that the grievant is entitled to 5
weeks additional vacation pay. It should be understood however, that that determination is confined to the particular facts and circumstances of this case and is based in part at least on the evidentiary frailty of the Company's reliance on an alleged practice. Therefore the decision in this case cannot be construed as a precedent for any pending or subsequent cases. On the contrary, in any other pending or subsequent matter involving a similar dispute, the rights of the parties are expressively reserved and the Company may attempt to prove the practice which it has failed to prove in this case.

Accordingly, the Undersigned, having been designated as the Arbitrator in the above matter and having duly heard the proofs and allegations of the parties makes the following Award:

Upon his retirement on February 29, 1972, George Lear was entitled to five weeks vacation pay in addition to the 6 days vacation pay which he received. The Company shall pay him the additional five weeks pay.

Eric J. Schmertz
Arbitrator

DATED: June 1974
STATE OF New York ) ss. :
COUNTY OF New York)

On this day of June, 1974, 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

BARBARA A. YOUNG

and

TRANS WORLD AIRLINES, INC.

DECISION

GRIEVANCE #8583

At the conclusion of the hearings in the above matter Barbara A. Young, hereinafter referred to as the "grievant," and Trans World Airlines, Inc., hereinafter referred to as the "Company," with the assistance of the Undersigned Arbitrators, reached a settlement of the instant dispute. That settlement is made our Decision as follows:

1. The grievant stated that she did not wish to return to her last position with the Company even if the Arbitrators directed her reinstatement with full back pay.

2. Without adjudicating the merits of the respective positions of the grievant and the Company as advanced by each at the hearings, the grievant's discharge shall be expunged from her employment record, and changed to a voluntary resignation. She shall be paid two weeks severance pay and her accrued vacation.

3. This is in full settlement of all claims and contentions of the grievant and the Company against each other as presented in the instant proceeding.

Eric J. Schmertz
Chairman

R. L. Mushkin

G. O. Rodes
DATED: May 23, 1974
STATE OF: New York )ss:.
COUNTY OF: New York)

On this twenty third day of May, 1974, before me personally came and appeared Eric J. Schmertz to be known and known to be to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 1974
STATE OF: New York )ss:.
COUNTY OF: New York)

On this day of May, 1974, before me personally came and appeared R. L. Mushkin to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 1974
STATE OF: New York )ss:.
COUNTY OF: New York)

On this day of May, 1974, before me personally came and appeared G. O. Rodes 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
BARBARA A. YOUNG
and
TRANS WORLD AIRLINES, INC.

DECISION
GRIEVANCE #8583

At the conclusion of the hearings in the above matter Barbara A. Young, hereinafter referred to as the "grievant," and Trans World Airlines, Inc., hereinafter referred to as the "Company," with the assistance of the Undersigned Arbitrators, reached a settlement of the instant dispute. That settlement is made our Decision as follows:

1. The grievant stated that she did not wish to return to her last position with the Company even if the Arbitrators directed her re-instatement with full back pay.

2. Without adjudicating the merits of the respective positions of the grievant and the Company as advanced by each at the hearings, the grievant's discharge shall be expunged from her employment record, and changed to a voluntary resignation. She shall be paid two weeks severance pay and her accrued vacation.

3. This is in full settlement of all claims and contentions of the grievant and the Company against each other as presented in the instant proceeding.

Eric J. Schmertz
Chairman

R. L. Mushkin

G. O. Rodes
DATED: May 28, 1974
STATE OF: New York )ss:.
COUNTY OF: New York)

On this twenty third day of May, 1974, before me personally came and appeared Eric J. Schmertz to be known and known to be to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 6, 1974
STATE OF: New York )ss:.
COUNTY OF: New York)

On this 6 day of May, 1974, before me personally came and appeared R. L. Mushkin to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: May 4, 1974
STATE OF: New York )ss:.
COUNTY OF: New York)

On this 4 day of May, 1974, before me personally came and appeared G. O. Rodes 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:

Transport of New Jersey

and

Amalgamated Transit Union

AWARD OF

We the Undersigned Arbitrators having been duly designated in accordance with the arbitration agreement dated March 1, 1974 between the above named parties and having duly heard the proofs and allegations of said parties make the following AWARD:

The grievance of Thomas J. Slane is denied.

Eric J. Schmertz
Chairman

A. Vern Kuehn
Concurring

Michael Siano
Dissenting

DATED: November 22, 1974
STATE OF: New York )
COUNTY OF New York )

On this 22nd day of November, 1974, 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 # 1830 0195 74 S
DATED:
STATE OF: New Jersey }ss.:
COUNTY OF: 

On this day of November, 1974, before me personally came and appeared A. Vern Kuehn 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:
STATE OF: New Jersey }ss.:
COUNTY OF: 

On this day of November, 1974, before me personally came and appeared Michael Siano 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

In The Matter of The Arbitration:
between:

Transport Of New Jersey

and:

Amalgamated Transit Union

OPINION OF CHAIRMAN

In accordance with Section 1A of the Collective Bargaining Agreement dated March 1, 1974 between the above named Union and Company, the Undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide, together with the Union and Company representatives on said Board, the following stipulated issue:

What shall be the disposition of the grievance of Thomas J. Slane?

Messrs. Michael Siano and A. Vern Kuehn served respectively as the Union and Company designees on the Board of Arbitration.

Hearings were held in Irvington, New Jersey on September 5 and 16, 1974, at which time Mr. Slane, hereinafter referred to as the grievant, and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and to cross-examine witnesses. The parties expressly waived the oath of the arbitrators. At the conclusion of the hearing on September 16, 1974 the Board of Arbitration met in executive session.
The grievant, and the Union on his behalf, contend that he is a pensioner within the meaning of those provisions of the collective bargaining agreement and the welfare plan which entitle pensioners to certain specific benefits, namely, a continuation of employer contributions to Blue Cross, Blue Shield, Major Medical and Rider J health insurance benefits, continued coverage under the life insurance benefit and a free transportation pass for himself and spouse.

It is stipulated by the parties that if we find the grievant to be a pensioner within the meaning of the foregoing sections of the contract and welfare plan, he would be entitled to those benefits.

The Company asserts that the grievant's status is not as a pensioner for those purposes because he was discharged for cause. And that he has received a pension only because under the pension plan, recently amended to provide for vesting, his pension was vested, and he was eligible for it irrespective of the reason for his termination. The Company points out that before the pension plan was so amended employees discharged for cause received neither a pension nor benefits which the grievant seeks in this proceeding. It asserts that his newly acquired entitlement to a vested pension under the amended pension plan did not give him as a discharged employee any additional rights to any of the other benefits.
The Union contends that the grievant is a pensioner entitled to the benefits he claims because he is receiving a retirement pension, and because that is all that the contract requires. Inasmuch as the contract refers only to "pensioners" without any other definition or limitation, the Union argues that the grievant qualifies because he is "on pension." And any other reason for his termination of employment, including arguendo, discharge for cause, are immaterial. In the alternative the Union contends that even if the grievant was so discharged, it is not binding herein because, as a result of discussions between a representative of the Union and the Company, the discharge was withdrawn in exchange for the grievant's retirement. Hence the Union concludes the only status which the grievant occupied upon leaving the Company's employ was that of a retiree or pensioner within the meaning of the contract and welfare plan, even as interpreted by the Company. Based on either alternative argument the Union contends that the grievant is eligible for the health insurance and life insurance coverage and, the transportation pass he seeks.

I am not persuaded that a "pensioner" as referred to in the contract and the welfare plan includes an employee who was discharged for cause and who thereafter draws a retirement pension because his entitlement to it was vested. Rather I conclude that the pensioner referred to in the contract and the
welfare plan, and for whom the disputed benefits continue, is one who leaves the Company's employ for no reason other than retirement. In my view it would be a gross incongruity for an employee who has been discharged for cause to continue to enjoy certain benefits which are accorded retirees in part at least, for faithful and satisfactory service and which therefore would not be available to an employee discharged for cause before he became eligible for a vested pension. As I see it the incongruity persists just as strongly where an employee has become eligible for a pension but is discharged for cause. I hardly think that those contract clauses and the welfare plan which accord to a retiree the benefits of continued employer contributions to health insurance and life insurance plans and a free transportation pass were intended or should be construed to guarantee those benefits to one who draws a vested pension but who left the Company's employ because he was discharged for cause. Accordingly the Union's first argument, which deems as immaterial an unrevoked discharge, preliminary to drawing a vested pension, cannot be sustained.

As to the Union's second argument the evidence falls short of establishing that the grievant's discharge was either withdrawn or transferred into a retirement. There was a passing discussion between a representative of the Union and the Company, after and outside of a grievance meeting, at which the Company
representative stated that the grievant had rights to a vested pension. I can understand how the Union may have interpreted this as an offer to settle the grievance over the grievant's discharge by permitting him to retire in lieu of that discharge. But in the face of the Company's vigorous denial of that intent, and its explanation that its purpose was to merely inform the Union that though the discharge remained the grievant was nonetheless entitled to draw a pension under the newly amended vested pension plan, I cannot find that enough was done to effectuate the settlement which the Union alleges. It seems to me that in the case of a discharge, where subsequent agreement has been reached which vitiates or mitigates that penalty, the settlement agreement should be clear, preferably in writing. The traditional approach in settling grievances is for the parties to either enter into a written settlement stipulation or to adjust the employees' records accordingly, or to express to each other clearly and unconditionally in the course of a grievance meeting what the settlement is to be so that there is no reasonable room for later misunderstanding. I cannot find the casual remark of the Company representative, made outside of the grievance meeting setting, and not thereafter formalized either in writing or in the records of the grievants, or in a more formal meeting between representatives of the parties, to meet the evidentiary test of a settlement. Accordingly I must reject the Union's contention that the Company agreed to withdraw the grievant's discharge and permit him instead to retire. Rather I find that the discharge was neither
revoked nor modified, but that in addition thereto the Company informed the Union that the grievant was entitled to certain vested rights under the pension plan even though he was discharged for cause.

The Union also charges that the grievant was unfairly treated because other employees, who at one time were discharged for cause, were permitted to retire instead and received benefits accorded normal retirees. For whatever reason those cases are distinguishable from the instant matter. In each, either because of the unilateral action by the Company, or perhaps as a result of the Union's influence, the employee was permitted to return to the Company's employ before retiring. By returning to the Company's employ, and as indicated in their employment records, those discharges were revoked. Each employee became again, for a short period of time or otherwise, employees in good standing, and hence eligible for retirement with the benefits available to retirees under the contract and the welfare plan. Though the Union raises the suggestion, there is no evidence in the record to support a finding that those other cases involved fictitious, or "bookkeeping" revocations of the discharges for the sole purpose of permitting the affected employee to retire with full benefits. As indicated, I do not know why those employees were so treated. But, in the absence of probative evidence one way or the other bona fide reasons are as much a possibility as otherwise. Moreover, at least
in those cases there is some formal indication in the records showing the transformation of the employee's status from discharge, to reinstatement, to retirement. In the case of the grievant, despite the casual discussion previously mentioned regarding the grievant's retirement rights, there is no formal record or any other persuasive evidence that the Company had agreed to or did reinstate him prior to his retirement. Accordingly I do not find the cited cases of other employees who were first discharged and then permitted to retire to be either precedential or a practice determinative of the instant dispute.

For all the foregoing reasons the grievance of Thomas J. Slane is denied.

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

Trustees, New York City Taxicab Industry Local 3036, AFL-CIO Benefit Fund

and

Utrecht Service Corporation

The Undersigned, as Impartial Chairman under the contract between the above named parties, and having duly considered the evidence presented at the duly noticed hearing of September 2nd, 1973 makes the following AWARD:

As of June 30, 1973 Utrecht Service Corporation is delinquent in payment to and owes the New York City Taxicab Industry, Local 3036, AFL-CIO Benefit Fund the sum of EIGHTEEN THOUSAND TWO HUNDRED SIXTEEN DOLLARS AND SIX CENTS ($18,216.06).

Accordingly said Employer is directed to pay said amount to the Fund forthwith.

Dated: Nov 12, 1973
STATE OF New York ss:
COUNTY OF New York)

On this 12th day of November, 1973, 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
In the Matter of the Arbitration
between

Federation of University Employees
Local No. 35, AFL-CIO

and

Yale University

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

The work performed by Elizabeth Godlewski falls substantively within the job classification Pantry Worker Labor Grade 1. Effective the date of this Award the job may be so classified and so paid.

However, from October 2, 1972 to the date of this Award Elizabeth Godlewski is entitled to the classification Head Pantry Worker and shall be paid at the labor grade 6 rate for that period of time.

Eric J. Schmertz
Arbitrator

DATED: January 28, 1974
STATE OF New York ) ss.: COUNTY OF New York)

On this 28th day of January, 1974, 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
Federation of University Employees
Local No. 35, AFL-CIO
and
Yale University

Opinion

The stipulated issue is:

Has the University violated Sections 2.1, 2.10, 10.1, 10.5 and 21.3 of the contract in connection with the job title and rate of pay of Elizabeth Godlewski? If so, what shall be the remedy?

More simply the issue is twofold. First, whether the job being performed by Mrs. Godlewski is properly classified as Pantry Worker Grade 1, or whether, as the Union contends, it should be Head Pantry Worker Labor Grade 6. And second, based on that determination or otherwise, whether she has been properly paid since she assumed the job.

Hearings were held in New Haven, Connecticut on August 2 and October 3, 1973 at which time Mrs. Godlewski, hereinafter referred to as the "grievant," and representatives of the above named Union and University appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's oath was expressly waived. The Union and the University filed post hearing briefs.

I conclude that the duties which the grievant performs are not at the Head Pantry Worker level. I agree with the University's assertion that the nature of the work changed prior to the grievant's appointment to the job, and that the
duties and responsibilities do not now exceed the level of Pantry Worker Labor Grade 1.

My conclusions are based on a comparison of the job descriptions of Head Pantry Worker and Pantry Worker, the testimony regarding the actual performance of work within those classifications and my observations of employees at work in those classifications during my visit to various job locations as part of the hearing.

The level of any job classification involves, of course, the actual work being performed. But that is not all. It also includes, especially where there are job descriptions, duties which employees may be required to perform. It is not uncommon to find labor grade and wage differentials based in part at least on differences between required duties, even if all such duties are not actually performed at any given time. That is the situation here. There may not be major differences between the routine work performed by the grievant in the Labor Grade 1 Pantry Worker classification and what Head Pantry Workers routinely do at the different and singly placed locations which the Arbitrator visited. By her own testimony the grievant does not perform or is not responsible for some of the specific items which differentiate the Head Pantry Worker classification from the Pantry Worker. And though the Head Pantry Workers observed may not routinely perform all the additional duties delineated in their job descriptions, they are responsible for doing so when and if assigned. And that is one reason they enjoy a higher classification and are paid more.
Specifically, by example, a Head Pantry Worker may be required to "direct all employees assigned to his/her section; plan, lay out and assign work schedule and duties; assist in production, menu planning, quality control, safety, sanitation, preventive maintenance, and employee performance; maintain records and perform other clerical duties ...; and train lower labor grade employees..." While those classified as Head Pantry Workers may not routinely perform all of these duties, which by job description distinguish the Head Pantry worker from Pantry Worker, I cannot conclude that the grievant, in her present capacity, performs these duties within the meaning of the Head Pantry Worker classification. I agree with Arbitrator Roberts that a test of the level of a job classification is the work performed, but clearly that is not the only test. Another significant factor is that a Head Pantry Worker may be required to assume and perform these additional duties whereas the Pantry Worker can not. In the instant case, in the absence of evidence that the grievant performs particular duties unique to the Head Pantry Worker classification within the meaning of that classification, she is not entitled to the higher Labor Grade 6 status, merely because those classified at Labor Grade 6 are not routinely performing all or some of those special duties. That is the frailty of the Union's case. It has demonstrated in part at least that employees classified as Head Pantry Workers are not presently performing all or some of the duties which separate the two job classifications, but it has not shown to my satisfaction that the griev-
The grievant is performing those duties or would be expected to do so under present procedures and at her present location on or near the cafeteria line of the Commons main dining hall.

However, I deem that the University's unilateral action in changing the job level from Labor Grade 6 when held by Margaret Harty to Labor Grade 1 when the job was assumed by the grievant, to be a change in labor grade and a revision of the job within the meaning of Section 2.10 Paragraph (b) of the contract.

Accordingly the new and lower labor grade assignment must be held in abeyance until sustained by arbitration if challenged by the Union unless agreed otherwise by the University and the Union. The instant grievance constitutes such a challenge and therefore the University had no right to change the labor grade level from 6 to 1 until the instant arbitration was completed and an Award favorable to the University's substantive position rendered.

Therefore, effective the date of this Award the grievant's classification and rate of pay may be changed respectively to Pantry Worker and Labor Grade 1. But from October 2, 1972 to the date of the instant Award she is entitled to the classification Head Pantry Worker and to the Labor Grade 6 rate of pay.

That entitlement is based on an additional circumstance. The grievant had every reasonable ground to believe that the job was and would remain at the higher level. She did not seek the job on her own initiative. She was asked to take it by the University. Her immediate predecessor in the job was classified as Head Pantry Worker and was paid at the Labor Grade 6.
rate. The University did not tell her that it considered the job duties to have changed, nor did it tell her that the rate of pay would be reduced to Labor Grade 1. Only after she was on the job (following transfer from another labor grade 1 position) was its classification and rate of pay reduced. The instant grievance was filed as a consequence. Manifestly if the University asks an employee to assume a job vacancy which was previously occupied at the Labor Grade 6 level and it fails to expressly inform the new appointee of any significant change in the job duties which would reduce the Labor Grade and the rate of pay, and where as a consequence the appointee reasonably believes that the classification and pay rate will continue as it existed previously, the University is estopped from making a downward adjustment the way it did in the instant case.

In short the University had the duty to inform the grievant, before she accepted the job, that it would be at a lower labor grade; for certainly that would have been a material consideration in her decision to accept or reject it.

Eric J. Schmertz
Arbitrator