In the Matter of the Arbitration
between
Metal Trades Council of
New London County
and
Electric Boat Division,
General Dynamics Corporation

The Undersigned Arbitrator, having been duly designated in accordance with the contract between the above named Union and Company, and having duly heard the proofs and allegations of said parties, renders the following Opinion and Award:

The stipulated issue is:

Except for Section 6B(1) and (2), is an employee entitled to a remedy, if within the meaning of Section 6, overtime has not been distributed equally and the Company has not equalized overtime within 90 days after notice as provided for in Section 8 of Article X? If so, what shall the remedy be?

Hearings were held on April 24 and August 29, 1973 in Groton, Connecticut. 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. Post hearing briefs were filed.

As indicated by the stipulated issue this proceeding is in the nature of a request by the parties for a "declaratory judgment" on the question of remedy. What is not before this Arbitrator is whether the Company breached Section 6 of the contract or even what constitutes a breach of that Section. Rather there is a hypothetical assumption that the Company has not distributed or equalized overtime within the meaning
of Section 6, leaving for the Arbitrator herein, only the questions of whether an adversely affected employee is entitled to a remedy, and if so what that remedy should be.

The Arbitrator is careful to note that unless agreed to or stipulated otherwise by the parties, if an actual grievance is presented alleging the Company's failure to comply with Section 6, the threshold question would be as it is not in the instant case, whether Section 6 was breached, and if so, only then what the remedy should be if any.

I see no basic dispute between the parties over the fundamental principle that contracts, labor as well as commercial, may not be breached with impunity. In the event of a breach some remedy or relief is appropriate, from nominal to substantial, depending on the circumstances and damages.

In the instant case, if the Company has failed to comply with the provisions of Section 6 of the contract, and under the circumstances set forth in the stipulated issue, this Arbitrator would fashion some type of appropriate remedy for the aggrieved employee(s). Because there is no particular factual case presently before me, I am not now prepared to specifically pin-point what that remedy would be. But certain possibilities are obvious. Remedies could range from a cease-and-desist order to an order directing the Company to perform on the contract specifically by according the grievant a priority opportunity to prospective overtime work for a reasonable period of time until his overtime opportunities had been equalized.
While I agree generally with the Company's argument that an arbitrator should not grant in arbitration what the Union failed to achieve in collective bargaining, I do not rule out the possibility of awarding money damages as a remedy. There may well be circumstances under which an adequate or practicable redress of a breach of Section 6 may be achieved only by the payment of compensation to the grievant(s).

However, I choose to wait the presentation of a particular grievance before I will, or indeed can determine what type of remedy is proper and appropriate, if the contract has been breached.

As stipulated by the parties, I retain jurisdiction for purposes of further proceedings and/or for implementation of the foregoing.

Eric J. Schmertz
Arbitrator

DATED: November 28, 1973
STATE OF New York )ss.:
COUNTY OF New York)

On this 28th 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.
This is an expedited arbitration under the Expedited Labor Arbitration Rules of the American Arbitration Association.

The stipulated and submitted issue is:

Does the Employer have the right unilaterally to change the work week from that set forth in Article 3.1? If not what shall the remedy be?

A hearing was held at the offices of the American Arbitration Association on January 18, 1975 at which time representatives of the above named Union and Employer 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 Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD pursuant to Sections 19 and 20 of the Expedited Labor Arbitration Rules:

1. The Employer's action in shutting down for one week during the month of December, 1974 is not part of the issue submitted to this arbitration. I am not persuaded that the representatives of the parties who agreed to an Expedited Arbitration
and who jointly stipulated the issue mutually agreed that the issue would cover any more than the Employer's shut-down of the Micro-Electronic Division on January 6, 1975 and the Employer's plan to possibly shut-down that Division on subsequent Mondays during the month of January, 1975. Inasmuch as the issue was jointly submitted to expedited arbitration it cannot go beyond the scope of what was mutually agreed to.

2. The Employer's unilateral act of shutting down the Micro-Electronic Division on January 6, 1975 and its plan to possibly shut-down that Division on subsequent Mondays in January, constituted (on January 6th) and would constitute a lay-off of the bargaining unit employees of that Division not pursuant to the requirements of Article VIII of the contract and hence in violation of the lay-off and seniority provisions of that Article. Therefore, in that regard the Employer does not have the right unilaterally to change the work week from that set forth in Article 3.1.

As a remedy for January 6, 1975 each bargaining unit employee of that Division who did not work that day and who would not have been laid off had the lay-off provisions of Article VIII been followed, shall be made whole for the time lost.
Prospectively the Employer shall have the option to either cease and desist from implementing said Plan; or if it implements the Plan to pay as damages a days pay in each instance to any bargaining unit employee who does not work as a consequence of the shut-down and who would not have been laid off under Article VIII.

DATED: January 20, 1975
STATE OF New York )ss:
COUNTY OF New York )

On this twentieth day of January, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union of Electrical Radio and Machine Workers, AFL-CIO, Local 238 (Providence, R.I.) and General Electric Company

OPINION AND AWARD

Case #1330-0856-74

BACKGROUND

On or about January 26, 1970, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter the "Union") and General Electric Company (hereinafter the "Company") entered into a National Agreement to run until May 26, 1973. (Joint Ex. 1, Preamble, Art. XXX). This contract superseded a prior National Agreement between the parties which ran from October 3, 1966 until October 26, 1969. (Joint Ex. 2, Preamble, Art. XXIX). Formal negotiations prior to the 1970-1973 agreement began on August 12, 1969. (Joint Ex. 14). These had been preceded by the work of pre-negotiation sub-committees which had explored certain contract language proposals (Id., Tr. 17, 22; Joint Ex. 10). Negotiations continued until October 26, 1969, when in the absence of agreement, the Union went on strike. (Tr. 28). Thereafter, commencing on November 7, 1969, and continuing until sometime in January 1970, negotiations were conducted under the auspices of the Federal Mediation Service (Tr. 28-29; Joint Ex. 14).
The initial grievance which led to this special arbitration was filed by Local 238 of the union in Providence, Rhode Island on December 13, 1972 (Tr. 2; Joint Ex. 3). The matter was submitted to arbitration on April 12, 1974 after failure of resolution between the parties (Tr. 3, 4; Joint Ex.'s 4, 5, 6 and 7). The Undersigned was selected as the arbitrator and hearings were held on October 16 and November 4, 1974. The parties filed post hearing briefs.

Pursuant to the submission (Joint Ex. 7), the issue to be resolved is:

"Did the Company and the Union, by agreeing to Article VI, Section 5, of the 1970-1973 GE-IUE National Agreement, eliminate the established practice of paying certain jobs on the basis of merit steps above 'Job Rate' in certain plants of the Company's Lamp Division represented by the IUE, so that hourly rated day work employees on such a job would automatically progress beyond the rate designated as the 'Job Rate' for that job to the top rate paid for the job on the basis of merit?"

The parties have agreed that the arbitrator is to decide only the issue set forth above and is not to fashion a remedy. It is stipulated that if the Union is successful, the parties will decide upon appropriate remedies (Tr. 5). Thus, the instant controversy involves the interpretation of Article VI, Section 5 of the 1970-1973 National Agreement (Joint Ex. 1, p.23).
The parties agree that prior to the execution of the 1970-1973 agreement, certain hourly rated and salaried employees were advanced in accordance with a progression schedule which provided for increases by steps according to the amount of time the employee was in his job, from the date of hiring until the top of the progression schedule was reached (Joint Ex. 2, Art. VI). Thereafter, the 1966-1969 contract provided in pertinent part:

"Any further increase in rate for any employee above the top of the progression schedule up to the job rate for his job, ...shall be based on the employee's performance on the job..." (Joint Ex. 2, Art VI, 5(c) (1) p.24).

Thus, when the employee had, by steps, reached the top of the progression schedule his further advancement was dependent on merit. (Id; Tr. 20).

The Union was dissatisfied with this procedure since it vested authority in a company foreman to subjectively select those who would receive merit increases (Tr. 22; Un. Ex. 1). At the prenegotiation state, the Union on August 5, 1969 proposed a revision of Article VI of the
contract, the effect of which would have abandoned merit increases in favor of automatic progression as a function of time beyond the top of the progression schedule until the employee reached the "job rate or top paid rate, whichever is higher..." (Joint Ex. 10, p. 22-23, Tr. 9).

Aside from the important face-to-face negotiations which will be discussed below, the Company filed a formal response to the Union proposal on October 7, 1969 (Joint Ex. 11, pp. 13, 14 and proposed Article VI, Section 5; Tr. 9). This Company proposal included an "automatic progression to job rate" and omitted any mention of merit increases for hourly rated employees. (Joint Ex. 11, p. 13, 14). Moreover, item 8 noted that revised Article VI was to "continue automatic progression for salaried employees as currently provided, but correct language to accommodate change in item 7 above," which dealt with hourly rated employees (Id.).

The effect of the Company's proposal is seen in the proposed contract language submitted to the Union on October 7 (Joint Ex. 11). There it was stated that "each hourly rated employee will progress on steps from his starting rate to the job rate of his job in accordance with the following progression schedules provided his performance progress is satisfactory" (Joint Ex. 11, Art. VI, 5 (a) (3) ). The proposed language made
the progression schedules "mandatory as long as the employee is retained on the job. In the event that an employee's performance progress is not satisfactory, such employee will be removed from the job." (Joint Ex. 11, Art. VI, 5 (a) (4)).

The Union officially responded with its own counter-proposal on October 21, 1969 (Joint Ex. 12). Under the heading "Hourly Rated Employees" in part (3) the Union proposed that employees who have progressed to the top of the applicable progression schedule... (set out in (2) to mean "job rate or top rate...or to the top of progression schedule whichever is less") but whose "rate of pay is below the job rate or top paid rate for his particular job, be given further" increases by step "until he reaches the job rate, or top paid rate, whichever is higher."

The Company formally responded on December 6, 1969 (Joint Ex. 13). In Attachment A thereto, the Company proposed an automatic progression schedule from starting rate to job rate (Id, Art. VI, 5 (a) (4) ). Moreover, it was proposed that the "progression schedules are mandatory as long as the employee is retained on the job." (Id. Art. VI, 5 (a) (5)).

The final 1970-1973 National Agreement states that each hourly rated employee will progress on steps from his starting rate to the job rate of his job..."pursuant to stated progression schedules (Joint Ex. 1 Art. VI, 5 (a) (4).) "The above progression schedules are mandatory for employees on the job" (Id. Art. VI, 5 (a) (5)).
The provision of the 1966-1969 agreement with regard to merit "progression above the top of the progression schedule up to job rate", quoted supra p. 3, which applied to both hourly rated and salaried employees is specifically limited in the 1970-1973 agreement to salaried employees only. (Contrast Joint Ex. 2, Art. VI, 5 (c) (1) with Joint Ex. 1, Art. VI, 5 (b) (4) ).

CONTENTIONS OF THE PARTIES

1. The Union contends that it set out to eliminate the system of merit increases to hourly rated employees and substituted therefore a system of automatic progression throughout the rate structure. It insists that it bargained for and received automatic progression and that the differences between the 1966-1969 agreement and the 1970-1973 contract clearly illustrate that merit increases for hourly rated employees were abandoned with the new agreement.

2. The Company urges that the 1970-1973 contract language be limiting automatic progression to "job rate" clearly contemplated that the pre-existing practice of merit increases above "job rate" would continue.

OPINION

The nub of the present controversy is the ambiguous use of term "job rate" both in the negotiations and the contract. The Union's view is that as finally adopted in the contract, the term refers to the top pay in the job while the Company views the term as being synonymous with top of the progression
schedule as those terms were used in Article VI, 5 (c) (1) of the 1966-1969 agreement between the parties. Although the matter is not without its difficulties, I am satisfied, from the minutes of the negotiations and from a fair reading of the contract, that the Union's view must prevail.

THE MINUTES

Following delivery of the Union's August 5th proposals, the matter of automatic progression was first discussed at the collective bargaining session held on August 13, 1969 (Joint Ex.'s 14, 15). The minutes of that session taken by the Company demonstrate that the Union proposed and the Company understood that automatic progression was to cover the entire rate structure whether it was called "job rate" or "top rate" (Joint Ex. 14, pp. 45-50); (see also Joint Ex. 15, Aug. 13, 1969, pp. 9, 10).

Thereafter, on August 26, 1969, the negotiators again discussed the matter. The minutes show that both parties understood the proposal on automatic progression to include the top rated paid in a classification excluding individual considerations of red circle or transition (Joint Ex. 14, pp. 54-59; Joint Ex. 15, Aug. 26, 1969, p. 9, 10). Indeed on August 26, the Company negotiators recognized that "job rate" and "top rate" were the same. (Joint Ex. 15, Aug. 26, 1969, p. 11).

On October 1, Company negotiators indicated that the Union proposal on automatic progression was receiving careful and serious consideration. They were "impressed" with the Union arguments. (Joint Ex. 14, pp. 707-708).
As noted previously, the Company filed its proposals on October 7, 1969 (Joint Ex. 11). In it, the Company adopted automatic progression to job rate and dropped its insistence on merit increases for hourly rated employees (Joint Ex. 11, pp. 13, 14).

On October 10, 1969, the negotiators met to discuss the proposal. At that meeting Company negotiators Baldwin and Sorenson stated in essence that the Company had agreed to the Union proposal on automatic progression. The sticking point related not to merit increases but instead to some vehicle for insuring satisfactory performance. (Joint Ex. 14, pp. 872-876; Joint Ex. 15, Oct. 10, 1969, p.9).

The Union was concerned that the Company's October 7 proposal somehow brought merit back into the picture. Baldwin assured the Union that "for the record, it is automatic and mandatory". The problem was not merit as described by Sorenson but rather that under the old merit system the Company could retain a man on the job without an increase in the hopes that he would develop. Under the automatic progression system "we might have to take people off the job". (Id.) The vehicle the Company sought was the language in its October 7 proposal regarding "satisfactory performance". From the Company's viewpoint, it had accepted automatic progression but reserved the right to remove an employee from a job where the work performed was unsatisfactory. (Compare Joint Ex. 11, Art. VI, pp. 1-3 with
Joint Ex. 14, 872-876). This analysis is borne out by the Company's description of the October 10 discussion (Un. Ex. 2). The Union insisted that the language concerning satisfactory performance be deleted on the ground that the Company had the right to demand such performance in any case and the language confused the issue of whether merit had been removed (Joint Ex. 14, p. 874; Joint Ex. 15, Oct. 10, 1969, p. 10). Baldwin explained:

"The intent is automatic progression and I don't anticipate more problems with this than we had before ...."

"It is out intent that the progression schedule is mandatory." (Id.)

The Union's proposals of October 21, 1969, though scaled down in other respects remained insistent on automatic progression (Joint Ex. 12). The parties continued to debate the problem of language regarding satisfactory performance. There was, however, continued agreement that automatic progression was to apply throughout the rate structure. Thus, Company negotiator Hilbert stated on October 22:

"Our proposal seeks to meet the request of the Union for giving full unlimited automatic progression." (Joint Ex. 14, p. 1049; Joint Ex. 15, Oct. 22, 1969, p. 14).

On December 16, 1969, the intent of the Company seems manifestly clear. Sorenson said:
"Essentially we have proposed a willingness to go to automatic progression for all hourly which is a major change from our present system." (Joint Ex. 14, p. 1491).

Statements by Baldwin and Hilbert also dramatically recognize that automatic progression is in and the merit system out (Joint Ex. 14, pp. 1491-1495; Joint Ex. 15, Dec. 16, 1969, pp. 3, 4). Only resolution of the language concerning mandatory for employees on the job" remained (Joint Ex. 14, pp. 1494-1495; Joint Ex. 15 pp. 3, 4).

Finally, on December 17, Sorenson in the course of rejecting automatic progression for salaried employees stated:

"There was, admittedly, a request for automatic progression for hourly and salaried employees. We looked at it and acceded to the Union demand in hourly..." (Joint Ex. 14, pp. 1533-1534).

There is little doubt then, that the intent of the parties as manifested in the negotiating sessions and position papers was to accept automatic progression to the top of the rate structure for hourly rated employees.

THE CONTRACT

This understanding is seen in the terms of the agreement itself. The provision of the 1966-1969 agreement regarding merit increases for both hourly and salaried employees was limited in the 1970-1973 contract to salaried employees alone (Contrast Joint Ex. 2, Art. VI, 5 (c) (1) with Joint Ex. 1, Art. VI, 5 (b) (4)).
The Company's contention that merit increases above job rate were not negotiated out of the contract simply does not square with the plain language of the agreement. If they were not negotiated out in the process of accepting the Union's position on automatic progression, it is illogical that the 1970-1973 contract would delete hourly employees from merit increases while continuing them for salaried workers. I do not believe that such an obvious change would have been negotiated for no reason whatsoever. I deem it meaningful, not meaningless. Also, under the Company's interpretation, the Union achieved no more than it had in the predecessor contract, namely automatic progression to a point below the top rate paid for the job. Indeed under that interpretation it could be construed that the Union settled for a less favorable clause than before, because the prior provision for further progression on merit was eliminated. I doubt that that was the bargain.

The Union's view of automatic progression is the only one which renders the agreement reasonable and logical. It comports with the wording of the contract and with the intent of the parties as I have gleaned them from the negotiations.

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

The Company and the Union by agreeing to Article VI, Section 5 of the 1970-1973 National Agreement did eliminate the
established practice of paying certain jobs on the basis of merit steps and did substitute therefore automatic progression to the top rate paid for the job.

Eric J. Schmertz
Arbitrator

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

On this day of March, 1975, 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 instruments and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO

and

General Electric Company
Louisville, Kentucky

AWARD

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated April 9, 1968 and having duly heard the proofs and allegations of the Parties, Awards as follows:

The warning and two week suspension without pay imposed on James E. Sweat was not for just cause. The warning shall be expunged from his record and he shall be paid for the time lost resulting from the suspension.

DATED: February 2, 1972
STATE OF New York )ss.: COUNTY OF New York)

On this 2nd day of February, 1972 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 52 30 0255 71
In the Matter of the Arbitration between

Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO

and

General Electric Company
Louisville, Kentucky

The stipulated issue is:

Whether the discipline given to James R. Sweat was imposed for just cause.

A hearing was held in Louisville, Kentucky on November 15, 1971 at which time Mr. Sweat, hereinafter referred to as the "grievant," and representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath. Post hearing briefs were filed.

The grievant was issued a warning and suspended for two weeks without pay for "striking and threatening a fellow employee" in violation of Section IV-4 of the Company's Rules of conduct.

As is well settled in disciplinary cases, the burden is on the Company to establish its case in support of that disciplinary action by clear and convincing evidence. The evidence advanced by the Company in this case falls short of that standard.

This is not to say that the grievant did not assault a fellow employee; but rather that in my judgment the evidence fails to establish his guilt up to the standard required.
The employee allegedly assaulted and the accuser, one Roger Ramey, did not testify. Though both the Company and Union made an effort to locate him for this hearing, he was not to be found. The Company's case is based solely on the testimony of Company officials to whom Ramey reported the alleged assault. None of them saw the incident and therefore could not testify of its occurrence from their own direct knowledge. There were no other witnesses to the event, or at least none testified in this proceeding. On the other hand, the grievant appeared, testified, and categorically denied the charge.

In the absence of an opportunity to cross examine Ramey, and in view of the well settled proposition that an accused and his accuser should confront each other in the course of the adjudicatory process, especially where there are no witnesses to this kind of an incident and where the accuser complains it was he who was physically assaulted, secondary evidence of the type presented herein is not adequate. Therefore I cannot conclude that Ramey's bare written statement of the incident (Company Exhibit #2) or Foreman Ferguson's testimony regarding the demeanor of Ramey and the grievant in his office following the latter's report of the alleged assault, are enough to cure the fundamental evidentiary defects in the Company's case.

Why would Ramey complain to Company representatives that he had been assaulted by the grievant? Obviously one answer is that the complaint was true. Yet, absent Ramey's own testimony, or direct supportive evidence of the assault, I am unable to reach that conclusion definitively. For there are other possibilities as well. How can we be even reasonably certain that
due to some possible instability, as evidenced for example by his "disappearance" and/or refusal to make himself available to testify, Ramey did not imagine, exaggerate or even fabricate the charge. It should be clear that I make no determination on the possibilities one way or the other, because as the Company argues, Ramey's absence could well be due to fear. Rather I refer to alternate possibilities merely to point up the fact that the Company's evidence, in the absence of Ramey's own testimony of what happened or that of witnesses who saw or heard the "assault", is not enough to establish the grievant's culpability to my satisfaction, and hence too frail to sustain the discipline imposed in this case. Accordingly on that basis alone, namely that the Company's case fails to come up to the standard of proof traditionally required in disciplinary cases, the warning and suspension imposed on the grievant is reversed. The warning shall be expunged from his record and he shall be paid for the time lost.

Eric J/ Schmertz
Arbitrator
The stipulated issue is:

Was there just cause for the discharge of Manuel DeJesus? If not what shall be the remedy?

A hearing was held at the offices of the New York State Board of Mediation on June 26, 1973 at which time Mr. DeJesus, hereinafter referred to as the grievant and representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived.

The Company charges the grievant with a cumulative unsatisfactory work record, culminating on January 9, 1973 with his negligent failure to properly set or check the operation of an automatic water pump essential to the maintenance of the water facilities and air conditioning in the store during the night.

The Company asserts that the grievant's prior record includes failures or refusals to properly perform work assignments, insubordination and a generally "deteriorating work performance". It points out that it was his specific assignment at the conclusion of business on January 9, 1973 to be certain that
the automatic water pump was set and operating properly; that if this is not done the air conditioning system within the store will shut down during the course of the night causing serious damage to perishable and refrigerated inventory and to the sensitive computer machinery as well as to disrupt other facilities requiring water.

Though in the instant case the inoperative nature of the pump was discovered during the night by the security force, thereby preventing serious damage, the Company argues that the grievant's negligence in failing to either set or properly check out the operation of the pump, together with his prior record, about which he had been previously warned, warrants his discharge.

Despite the grievant's denial of the charge concerning the pump on January 9, 1973 (he asserts he checked it out and that it was operating properly), I conclude that he either did not set the two requisite switches in the correct position or did not make an adequate observation of whether or how the pump was running. I cannot find that someone else mis-set the pump, or "sabotaged" its operation after the grievant made his check and left for the day. Also there is not dispute over the potentially serious consequences if the pump fails to operate during the night. The Company's computers and the computer room, which operate 24 hours a day, must be kept cool by air conditioning, and the latter facility is dependent on an adequate supply of water generated by the automatic water pump. The same
is true for the candy department, the refrigeration systems of the store restaurants, and other departments storing perishable goods under refrigeration. Additionally the pump generates water for the stores' sprinkler system, steam pipes, drinking fountains and sanitary facilities.

Despite the foregoing, the instant circumstances do not warrant the extreme penalty of discharge. As I see it the Company is contending first that prior to January 9, 1973 the grievant had been put on notice, through the imposition of classical "progressive discipline", that his work performance was not satisfactory, and second that he was solely responsible for the failure to set the automatic water pump on January 9, 1973.

The facts do not fully support these basic contentions, and hence I am constrained to conclude that a lesser penalty than discharge is proper.

The grievant neither speaks nor understands English to any significant extent. His testimony, through an interpreter, revealed to me that he did not understand how the automatic water pump operated, more specifically that he was unaware the pump contained two switches that had to be set. I am satisfied that his testimony in this regard was not contrived. There is no evidence that the Company accorded him any instruction, even rudimentary, in the operation of this particular pump. That he may have been seen by supervisory personnel operating both
switches on the pump is simply not enough to show that he knew what was involved, nor, more importantly can it excuse the Company from its fundamental duty to be certain, through appropriate instruction if necessary, that an employee assigned a responsibility of such obvious importance, knows what that responsibility entails. This is especially true where as here, the employee is burdened by a language barrier and where the Company relies on the written instruction on the machine. In short though I conclude that grievant failed to properly perform his duties the night of January 9, 1973, I must attribute part of the blame for the consequences to the Company because it did not take ordinary and expected steps to instruct the grievant or see that he understood what he was to do. This is not to say the the grievant is blameless, after all he is a plumber. He should have sought instruction or expressed his lack of knowledge. Rather it is to say the the Company also should have acted more prudently and carefully.

The Company's reliance on the grievant's prior work performance and its warnings to him about it, do not meet the test of "progressive discipline". Company witnesses testified to only two instances in which the grievant failed or refused to properly perform work as assigned. Both times he was spoken to, or warned, but only orally. There is no evidence in the record that he was previously warned in writing or suspended. It is well settled that "progressive discipline" involves at least written warnings if not a suspension, prior to the final penalty of discharge, in order to clearly and unmistakably place an offending employee on notice that unless his record improves
his job is in jeopardy, and to afford him an opportunity to rehabilitate himself. Unless the warnings are written and/or unless a suspension is imposed the notice and rehabilitative purposes of the progressive discipline system are not brought to bear with the necessary impact and impressiveness. So, the Company's reliance on what actions it took prior to January 9, 1973, in support of its discharge of the grievant for his "cumulative record", falls short of what is traditionally required in such cases.

Based on all the foregoing I conclude that the penalty of discharge was both premature and too severe. I conclude that a two week suspension is adequate.

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 just cause for the discharge of Manuel DeJesus. A disciplinary suspension of two weeks is adequate. His discharge is therefore reduced to a two week disciplinary suspension. He shall be reinstated and made whole for the balance of the time lost.

DATED: July 20, 1973
STATE OF New York )
COUNTY OF New York )

On this twentieth day of July, 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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration

between

OIL, CHEMICAL AND ATOMIC WORKERS,
LOCAL 8-718

-and-

THE GULF UNITED NUCLEAR CORPORATION

AWARD

Case #12300013-72

The Undersigned Arbitrator, having been duly designated in accordance with the Arbitration Agreement between the above named parties, and dated March 5, 1970, and having duly heard the proofs and allegations of said parties, makes the following AWARD.

The grievance of Blase A. Sanzone is arbitrable.

The Company did not violate the contract when it denied Blase A. Sanzone promotion to Lead Man, Commercial Fuel Quality Control Inspector.

Eric J. Schmertz
Arbitrator

DATED: August 25, 1972
STATE OF New York )ss.: 
COUNTY OF New York)

On this 25th day of August, 1972, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company violate the contract when it denied Blase A. Sanzone a promotion to Lead Man, Commercial Fuel Quality Control Inspector? If so, what should the remedy be? (At the hearing I ruled the grievance was arbitrable).

A hearing was held on April 24th, 1972 in New Haven, Connecticut. The parties expressly waived the Arbitrator’s Oath.

Background

The Company posted the job of "Lead Man - Commercial Fuel Inspector, Department 8802, Labor Grade 11." Five employees in Group 10 submitted bids, including the grievant Blase A. Sanzone, a Commercial Alloy-Element Machine Operator. The other four bidders were employed in the Quality Control Department. The grievant worked in the Production Department.

The position was awarded to a bidder with less seniority than the grievant.
Union Position

The grievant claims that in the course of his duties as a machinist he performed the same duties required of an inspector, using the same prints and most of the same equipment. Furthermore, he had previously been promoted to a leadman's job (in Production) which demonstrated a recognition of his leadership abilities.

He stated he was qualified for the disputed job as the experience or knowledge of a machinist and inspector are almost parallel, since "basically all types of measurements and groups and calculations are similar, and there is no dissimilarity". He asserted that the job description of the posted job was similar to the functions he performs as a machinist.

Grievant also claims that he had inspection experience (apart from that in connection with the performance of his machinist duties) both with the Company and outside. He testified that "there have been many instances in the past when the Quality Control Department has been in somewhat of a jam and they have pulled out personnel from the Machining Area to go over there and Quality Control parts so that they could unwind this jam."

Furthermore, he was once a partner in a machine shop (one of whose customers was the Company), and he inspected all the work in that machine shop.
The Union's other witness, Mario Proscino, a Leadman in the Machining Area, testified that he was of the opinion that there wasn't "too much" difference between a Quality Control Leadman and a Machine Leadman. He testified that Machinists and Inspectors use about the same equipment and the same blueprints, and that "a Machinist checks the parts before submitting them to the Inspector to make sure it is pretty accurate."

Company's Position

The Company contends that grievant was not qualified as an Inspector since there was nothing in the record to show he had the ability or required experience in Quality Control work. Also, because of anticipated retirements from the Quality Control Department, the Company doubts that the grievant would be capable of instructing and training "green inspectors". Additionally, the Company asserts that the Leadman would have to cope with Quality Control Systems, procedures, form control, specifications, equipment techniques, and allocate assignments of Inspectors to the various jobs based on their capabilities and experience; functions which the grievant had not previously performed or shown ability to perform. The Company points out that the only reason the grievant was in a position to submit a bid for an inspector's job was because the Commercial Products Division was unique. All of its departments (i.e. production, engineering and
quality control) are assigned to one Occupational Group, No. 10, whereas in the other division of the Company there are exclusive Occupational Groups for employees performing Quality Control assignments.

The Company's Quality Control Superintendent, Nicholas C. Kanzanas testified that the inspectors' duties consisted of Received and Stores Inspection, In-Process Inspection, First Piece Inspection, On-Line Inspection, Fuel Assignments, Parts Inspection, Completed Parts and Final Assembly Inspection, and than an Inspector would also have to know the equipment and have a good knowledge of co-workers since the assignment and allocation was a key aspect of the job. He contended that the grievant was familiar, at most, only with First Piece Inspection.

Philip Pizzutti, the foreman in the Quality Control Department, testified that certain equipment and operations are strictly quality control and not found or used by the Production Department. Among the more complicated equipment used only by Quality Control were electronic strain gauge, alpha-beta counting, and liquid penetrant inspection. He also testified as to the type of operations only performed in Quality Control, with which a production machinist such as grievant would not have experience, including dye penetrant, gamma scintillation counter, alpha-beta counters, gamma counters, and ultrasonic control.
He stated he had a long, amiable association with the grievant but never knew him to have acquired qualifications for quality control work either in his prior employment or with the Company, nor did the bid filed by the grievant indicate any such qualification. He further stated that the grievant had no experience in that type of work and that experience was a necessary qualification for the job in question, since the Leadman would be required to instruct and assist new inspectors.

Relevant Contractual Provisions

Section 23.42 in pertinent part reads:

The employee's bid will outline his work experience and other factors which he may feel are pertinent to the qualification determination. Upon completion of the posting period, the Company will look first to candidates who have filed bids with the Employee Relations Department from within the job classification group where the job opening exists and will select the employee with the greatest seniority bidding for jobs in labor grades 5 or higher, providing he or she is qualified to perform the work. (Emphasis added).

Discussion

In cases of this type I require the employer to show that its by-passing of the more senior bidder was not arbitrary, capricious or unreasonable.

At the hearing there was considerable confusion as to
the job that was bid upon. The contract does not contain any position as listed in the bidding. The entire classification for Group 10 consisted of the following jobs:

<table>
<thead>
<tr>
<th>Group #10</th>
<th>Labor &amp; Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Fuel Quality Control Inspection</td>
<td>4</td>
</tr>
<tr>
<td>Senior Commercial Fuel Operator</td>
<td>4</td>
</tr>
<tr>
<td>Commercial Alloy/Element Machine Operator</td>
<td>4</td>
</tr>
<tr>
<td>Lead Man-Senior Commercial Fuel Operator</td>
<td>4</td>
</tr>
<tr>
<td>Lead Man-Commercial A/E Machine Operator</td>
<td>4</td>
</tr>
<tr>
<td>Commercial Alloy/Element Senior Hand Finisher</td>
<td>5</td>
</tr>
<tr>
<td>Commercial Fuel Operator</td>
<td>5</td>
</tr>
<tr>
<td>Commercial Fuel Quality Control Inspector-Ltd.</td>
<td>6</td>
</tr>
<tr>
<td>Commercial Assembly/Element Machine Operator -Repetitive</td>
<td>6</td>
</tr>
<tr>
<td>Commercial Fuel Q.C. Helper</td>
<td>8</td>
</tr>
</tbody>
</table>

The Company asserted that the job posted was a recognized one, that a deceased employee filled such a position, and that the job requirements consisted of a blend of a Leadman and a Quality Control Fuel Inspector, both of which are specified in the contract and both of which had specific job descriptions.

The grievant first testified that when he bid, he was bidding on the position of "Leadman, Senior Commercial Fuel Operator". However, during the course of the hearing, the grievant asserted that he was bidding on an Inspector's job and that he had the qualifications to be a Leadman Inspector.

The grievant was employed as a Commercial Assembly/Element Machine Operator and there is no dispute over his qualifications and ability in that capacity. It is also true that the grievant had been selected by the Company to be a Leadman -
Commercial Alloy/Element Operator and occupied that job satisfactorily until reversed by an arbitration decision.

But the job in question is that of a Leadman over all the inspectors in the Commercial Products Division. I conclude that the grievant's prior experience and demonstrated capabilities in Production, including his Leadman assignment fall short of establishing his ability to perform the specific duties of Leadman Inspector.

The record discloses that the disputed position requires a broad range of important inspection activities, many of which are unique to Quality Control, and that the new Leadman would have to spend a significant portion of his time instructing and training a substantial number of new inspectors in those procedures.

Although the grievant testified he was familiar with the general duties of an inspector; that he had used the same equipment used by quality control people; and that on occasion he had performed quality control duties, I conclude his experience concerning the quality control function is limited to observations and to experiences indigenous only to the work of a machinist and Leadman in production, and perhaps an occasional "first piece inspection" to help quality control dispose of a backlog. However it is undisputed that certain equipment and operations, important to the inspection function, are found and performed only in the quality control department.
I am persuaded that as to those the grievant simply would be unfamiliar with them.

Grievant conceded that if he were given the position, he would have to spend "time learning the various jobs" and also admitted that someone would have to spend some time with him "breaking him in on the various jobs".

The foreman who was consulted with respect to the decision knew the grievant and was aware of his background. I accept his testimony that the grievant was not qualified since he had not done any quality control work, and that the grievant's lack of experience would be an even greater impediment in view of the training and allocation of work which the Leadman would be required to perform.

Finally, there is the pertinent contract clause. The contract makes a distinction in the selection of employees dependent upon the grade of the job. For the job in question, the contract requires that a senior employee should be selected provided that "he is qualified to perform the job" (emphasis supplied). It is well settled that this phraseology means that a bidder must be able to assume the duties of the job bid without training and without an unusual period of break-in. Based on the record, including the grievant's own testimony, I cannot fault the Company's determination that a significant
period of training and/or break in would be necessary before the grievant was qualified to perform quality control inspection work as a Leadman.

Consequently, at least at the time of his bid, the grievant did not meet the contract requirements for the upgrading, and the Company's refusal to accept his bid cannot therefore be deemed arbitrary, capricious, unreasonable. Hence it was not violative of the contract.
The above named Union failed to appear at the duly scheduled hearing on April 7, 1975. This was the Union's second non-appearance at a scheduled hearing in this matter. The grievant, Mr. Robert Shannon failed to appear as well.

The Undersigned granted the motion by the above named Employer to dismiss the grievance of and on behalf of Mr. Shannon, on the record thus far presented, and with prejudice, because of the Union's failure to proceed.

April 7 1975

Eric J Schmertz
Arbitrator
In accordance with Section 11 of the collective bargaining agreement dated June 3, 1971 between Local 1034, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, hereinafter referred to as the "Union", and The Hertz Corporation, hereinafter referred to as the "Company", the Under-signed was designated as the Arbitrator to hear and decide a dispute relating to the Union's grievance that bargaining unit work has been removed from the bargaining unit and assigned to non-unit personnel.

Hearings were held at the offices of the New York State Board of Mediation on June 10 and 11, and November 25, 1974, and April 14 and May 14, 1975 at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Post-hearing briefs were filed. The Arbitrator's Oath was express-ly waived.

The Union's grievance is that at about the time the Company closed its offices at 645 First Avenue, New York City, with consequent layoffs of certain Union reservationists, the Company
hired three non-Union employees to handle so-called "road calls", a function which the Union asserts could have been, and by contract and custom should have been assigned to three of the laid-off bargaining unit reservationists. By this arbitration the Union seeks reinstatement of the three reservationists with appropriate back pay.

A decision in this matter involves consideration and resolution of the following questions:

1. What is road call work?
2. Was the handling of road calls by contract or custom, exclusive work of the bargaining unit?
3. Did the Company have the right to assign road call work to non-union personnel?
4. Were the reservationists qualified to perform the work performed by the road call managers?
5. What was the intent of the parties with regard to their agreement of April 19, 1973 (Joint Exhibit 2)?

Throughout this proceeding there has been substantial disagreement over what the term "road call" means. For some witnesses, the term denotes any call from a customer complaining about the operation of a leased vehicle. (Tr. 216, 219, 224, 319). For others the term seems to be narrower, e.g. calls about the cars which can be handled with a minimum of advice from the Company.
These include cases where the Company is able to resolve the problem over the telephone with the customer (Tr. 132). A third category of road call includes only situations where the Company must make arrangements to have the car towed, repaired or retrieved (Tr. 65-69, 230, 326-348, 351). A fourth and most expansive definition would include any customer complaint whatsoever (Tr. 216, 224).

The number of all such calls in any category; the Company policy with regard to who shall handle such problems and the degree of expertise required to do so are all vigorously debated issues in this arbitration.

There are some matters, however, as to which the record appears to be clear.

(A). The Company maintained a road service department to handle road calls which required that a vehicle be towed, repaired or retrieved (Tr. 79, 144, 157-8, 230, 274, 308, 327-342). This type of operation was maintained by the Company prior to the collective bargaining agreement with the Union (Tr. 77, 234-5); during the period of the agreement, except for a brief period when the work was contracted to an independent contractor called Fleet Aid (Tr. 86-87, 236, 298, 343), and since the close of the First Avenue Office (Tr. 131-2, 138, 299, 327 et seq., 347, 390). Persons working in this operation received road calls from the customer directly (Tr. 275, 282-285) and those routed to them from
telephone operators (Tr. 129-130), supervisors (Tr. 211, 235, 501), reservationists (Tr. 229, 284, 501) rental representatives (Tr. 501) and even station managers (Tr. 277).

(B). Reservationists regularly received road calls in the ordinary course of their duties (Tr. 38-45, 173, 224, 503).

(C). Reservationists were instructed to and did refer road calls to supervisors and/or the road service department when necessary and when such supervisory personnel were available. (Tr. 39, 58-60, 65-66, 68, 69, 129, 185, 200, 233, 235, 244, 285, 295, 297, 322, 360-368, 501-403).

(D). The primary responsibility of reservationists was to handle reservation and cancellation orders and not road calls. (Tr. 47, 50-58, 182, 194, 240, 260, 287, 310).

There is no evidence from which one could conclude that road calls were assigned to union reservationists in the collective bargaining agreement. The agreement itself is silent on the issue (Joint Exhibit 1). Nor is there any evidence that the

1. Appendix B-45 to the agreement (Joint Exhibit 1) relating to Rental Representatives notes that these employees shall report "thefts, serious accidents (and) serious customer complaints" to the management. It is doubtful at best that this relates to road calls as such. In any event no similar provision relating to Reservationists is contained in the agreement (Joint Exhibit 1).
Union ever bargained for inclusion of road call work in the job description of reservationists. Indeed, the evidence of record indicates that the Union submitted no proposal to the Company in connection with the collective bargaining agreement as to placing road calls in the job description of reservationists (Tr. 74-75, 345). Nor was any grievance filed when the Company transferred its road service operation to Fleet Aid (Tr. 301-302, 345).

Thus, there is no evidence of any contractual obligation to place road call work within the bargaining unit for reservationists. At the same time, it is clear that non-union road managers also performed road call work throughout the period herein complained of (Tr. 327-343).

As previously indicated, however, the record is clear that reservationists by custom, did handle some types of road calls (Tr. 35-48, 352, 364, 381, 386). Company policy, not surprisingly was to see to it that the customer was able to get about his or her business with a minimum of problems (e.g. Tr. 474). To this end, it was apparently the job of everyone in the Company regardless of job description, to assist the customer in any way he or she could (Id.).

As to customer complaints concerning mechanical malfunctions, the record indicates that both Union and non-union personnel had some responsibilities in the area. Whenever such complaints came in -- and to whomever, the recipient was to see to it that
the proper authorities were notified and/or the customer assisted in getting on his or her way (Id.).

By the nature of their positions, employees whose jobs entailed dealing with the public by telephone inevitably received road calls. Thus, phone operators, reservationists, rental representatives and others would in the ordinary course receive customer complaints about cars.

Reservationists were instructed to assign such calls to their supervisors (Tr. 185, 211, 235, 285, 295, 322, 364-368), and all employees were to contact the road call or road service department as to calls that required special attention -- such as towing or repairs (Tr. 59, 79, 327-48). The record indicates that supervisors were not always available to handle road calls (e.g. Tr. 39, 297). Nor was it always possible to contact the road service people (Tr. 59, 60). In such a situation, which occurred with some frequency, reservationists attempted to handle minor road call problems themselves (Tr. 38-45, 60, 297, 322, 364). Some reservationists contacted supervisors or management personnel only when necessary (Tr. 65-69, 230, 326-348, 351, 364-368), reporting aggregations of minor complaints in batches on sheets supplied by the Company. (Tr. 155, 169, 198, 200, 229, 230, 374).

These customer calls routinely consume some of the reservationists time, although precisely how much time depends upon
whether a road call is defined as a specific mechanical problem or relates to any conceivable customer complaint (see e.g., Company Exhibit 3, Tr. 224). Thus, depending on definition, a reservationist could expect to spend up to an hour or two a day on general customer complaints or as little as a few minutes per day on specific mechanical malfunctions (Compare Tr. 86, 182 with Company Exhibit 3).

It is apparent that road calls of whatever definition were by custom an incidental part of a reservationist's job. It also is apparent, that they were an incidental part of the job of every employee of the Company (Tr. 474, passim).

Given the record, therefore, it is not possible to conclude that road calls were an exclusive domain of the bargaining unit either by contract or by custom.

Except for a brief period during which the Company contracted out its road service function to an independent contractor, Fleet Aid, the Company has maintained and continues to maintain a road service operation staffed with non-union personnel.

Such operations and assignments pre-date the collective bargaining agreement by many years, continued during the existence of the agreement and are maintained to the present day.

The Union made no grievance either prior to or during the Fleet Aid contract and apparently raises the question now only as a result of the closing of the First Avenue Office and the
consequent lay-offs of its members. Thus, although it could not contend that the Company had no right to assign road call work to non-union personnel, it apparently contends that in this special instance, the work had to be offered to the senior reservationists laid off. This contention rests on the assertion that the collective bargaining agreement requires that the reservationists be offered the work since they are "qualified to perform the work of such classification" (Schedule B-(5) Joint Exhibit 1).

The road call work previously performed by the reservationists involved aiding customers in situations which must be described as relatively minor. These included complaints of dead batteries, malfunction in wipers, ignition lock problems with Ford Pintos, flat tires and the like.

The road manager function includes handling of such matters but goes well beyond them (e.g., Tr. 327-348). The road manager is considered to be an administrative managerial post. He or she is required to be able to diagnose mechanical failure, dispatch proper help, negotiate with contractors for towing, repairs or retrieval of cars and to operate his or her station in the absence of higher authority (Id.). Such functions, in the main, transcend the functions performed by reservationists in their road call work.

Thus, although the reservationists as a group could
presumably handle some of the road manager functions, there is no evidence of record demonstrating that they either did or could handle the balance of the road managers' job.

On this record, the reservationists were not qualified for the post of road manager.

As of April 19, 1973, the Company had shifted its road service operations to Fleet Aid (Tr. 343). The parties could not have contemplated that at or about the time the First Avenue Office closed, job positions would open up in road service due to the cancellation of the Fleet Aid contract in September, 1973 (Id.).

The Union's contention apparently is that since the April agreement (Joint Exhibit 2) outlined a procedure whereby senior reservationists would either receive severance pay or be offered vacant positions, if any, as rental representatives, these same reservationists would be entitled to positions as road managers as well. This last is based upon an alleged oral agreement by the Company to place the displaced reservationists "in any available position that they qualified for" (Union Brief, p.2).

Union counsel's argument in his brief is essentially this:

2. The Union has suggested that the Company's refusal to hire the reservationists as road managers is based upon sex discrimination. There is no probative evidence in this record to support such a charge.
the displaced reservationists were entitled by the April agreement to any openings in the rental representative classification or to any opening for which a rental representative might be qualified provided the reservationist was qualified for the post.

I have previously held that the reservationists were not qualified per se to perform the function of road manager. Nor is there any evidence of record that a rental representative might be so qualified save for the portion of job description previously noted. Moreover, I find no probative evidence in the record that a company representative entered into the oral agreement alleged.

AWARD

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

The Union's grievance is denied.

DATED: October 13, 1975
STATE OF New York )
COUNTY OF New York )

On this the thirteenth day of October, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Tribunal
-----------------------------
In The Matter of The Arbitration : AWARD
Between : Case No. 1330 0498 75
Local 584, I.B.T. : 
and :
Honeywell Farms, Inc. :
-----------------------------

In accordance with the arbitration provisions of the Milk Industry contract between the above named parties, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the company since January 21, 1975 violate Section 4 of the contract in connection with personnel on layoff status who were not employees of this company? If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on May 5, 1975 at which time representatives of the union and company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

On the basis of all the credible testimony and evidence submitted to me and having duly heard the proofs and allegations of the union and company, I make the following Award:
The overall unit recall list provided for in Section 4(c) of the Milk Industry contract is clear on its face and must be complied with. However, due to the extraordinary and extenuating circumstances involving this company, specifically the fact that the company undertook a commitment to the City of New York to utilize prospective employees from the community surrounding the company's plant, which commitment was made prior to the time the company was notified that the union intended to fully utilize and enforce Section 4(c) and where said notification occurred after the company advised the union of its commitment to the City, the overall unit recall list shall be applied to this company on a rotating one-for-one basis in conjunction with the company's hiring from the community. The company shall employ one prospective
employee from the community and one prospective employee from the overall unit recall list in rotation. Where the company is not required by its commitment to the City to utilize prospective employees from the community, the company shall be required to comply fully with Section 4(c).

In addition, the company shall not be required to affect the employment status of any of its current employees even if they were employed from sources other than the overall unit recall list inasmuch as there had been substantial uncertainty concerning the utilization of the list. This uncertainty has been dispelled by the definitive action of the union and by this Award.

I emphasize that this limited departure from strict adherence to the overall unit recall list is due solely to the unusual and peculiar facts of this company's situation. I can foresee no other circumstances in which departure from exclusive use of the overall unit recall list would be permissible.

This Award will be effective on the date issued.

Eric J. Schmertz
Arbitrator
DATED: June 3, 1975
STATE OF New York )
COUNTY OF New York)

On this third day of June, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
NEW JERSEY STATE BOARD OF MEDIATION, ADMINISTRATOR

In The Matter of The Arbitration
between
Local 32, OPEIU
and
Hospital Service Plan of New Jersey:

OPINION AND DISPOSITION
OF
Case #74-408

In accordance with Article X of the collective bargaining agreement dated May 5, 1972, between the above named Employer and Union, the Undersigned was designated as the Arbitrator to hear and decide disputes relating to Union grievances 74-96, 74-135 and 74-148.

Hearings were held in Newark, New Jersey on March 5, April 28, May 5 and July 7, 1975, at which time the grievant, Theola Hosten and representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived. The hearing scheduled for July 2, 1975 was adjourned after it was convened because the grievant was absent.

At the request of the parties I previously rendered, without Opinion, two Awards. In the first dated May 7, 1975 I denied the Employer's contention that grievance 74-135 was not arbitrable. In the second dated July 26, 1975 I determined the grievant's status as a consequence of the entire proceeding. I
reduced her discharge to a disciplinary suspension; with reinstatement without back pay; and with a warning that future misconduct on her part would, in my opinion, be grounds for summary dismissal.

The instant document provides a brief Opinion on and is in full disposition of all of the issues in dispute.

As noted, the three grievances relate to the same employee. Grievance 74-96 involves a disciplinary suspension imposed on her for July 17 and 18, 1974; grievance 74-135 concerns (in addition to the arbitrability question) her three week disciplinary suspension imposed from October 29 to November 15, 1974; and the subject of grievance 74-348 is her discharge on November 20, 1974.

The Employer asserts that the grievant's record, particularly the disciplinary actions taken against her as referred to in grievances 74-96 and 74-135, culminating in her offense which is the subject of grievance 74-148, justifies her dismissal. The Union in this proceeding, challenges the propriety of the Employer's action in each of the three instances, and asserts that the grievant's discharge was not founded on just cause.

Grievance 74-96: The two day suspension, July 17 and 18, 1974 was for just cause. The Employer's inquiry into the reasons and circumstance of the grievant's unauthorized absence from work following lunch on July 5, was legitimate and reasonable. Under the circumstances the grievant had the duty to cooperate with that
inquiry; to explain her absence and to substantiate the medical excuse she offered. I find, as the Employer alleges, that her statement that she took her child to a doctor or to a hospital for treatment was, if not false or misleading, unsubstantiated. It was not unreasonable for the Employer to require her to disclose the name of the doctor and the hospital and the name of the baby sitter whom she asserted called her about her child's illness. That the grievant did not do so, until much later in the course of the investigation was an unjustified refusal to comply with a reasonable inquiry into her whereabouts during hours that she should have been at work. Accordingly I cannot fault the Employer's conclusion that the grievant's absence was not only unauthorized but unjustified. Therefore the two day disciplinary suspension was proper and is upheld.

**Arbitrability of Grievance 74-135:** I denied the Employer's contention that this grievance was barred from arbitration or further processing with the grievance procedure by the time limits of Step 1 of the contractual grievance procedure simply because the record is not clear that a Step 1 meeting was definitely scheduled or that either party took unequivocal steps to fix a date certain for that meeting. The testimony on when, if at all, a Step 1 meeting was scheduled is sharply conflicting, offsetting, and hence indeterminative. In the absence of a showing that a Step 1 meeting was scheduled for a fixed date, at which either
side failed to appear, I cannot find that the five working day
time limit, set forth in the grievance procedure had begun to
run to bar, thereafter, further processing of the grievance. In
short, the condition precedent to the commencement of the time
limitation, namely a scheduled Step 1 meeting, had not been met.
Therefore in my prior Award I remanded the grievance to the
grievance procedure for prospective processing in accordance
with that procedure and the time limits thereof. Thereafter,
by stipulation in the record, the parties waived further
grievance steps on that dispute and submitted grievance 74-135
on the merits to me for determination in this proceeding.

The Merits of Grievance 74-135: It is well settled that
presistent, wilful defiance by an employee of managerial orders
or instructions, especially if committed in the presence of other
employees, constitutes insubordination warranting severe discipline
including discharge, irrespective of the employee's prior record.
If an employee believes that management's directives are improper
or even discriminatory or punitive, the remedy is not to defy,
but to comply and appeal for redress to the Union and through the
grievance procedure of the contract. (The limited exceptions to
this rule are not present in the instant case).

Where there is an understandable (but not excusable)
explation for the employee's behavior, mitigation, but not
total reversal of the disciplinary penalty is appropriate.
The circumstances of this grievance square with the foregoing rules. The Employer had reason to believe that the grievant had been leaving her work place on the day in question too often and for excessive periods of time. The Employer had similar difficulties with the grievant on prior occasions. Specifically by example there was some question as to whether she had the right, without authorization from the Department Supervisors involved, to leave her department to go to that of her Steward to discuss a problem regarding her paycheck. At other points that day she was told to return to her desk and resume work. The instant charge of insubordination arose when, after she was expressly instructed to return to her desk and work she wilfully disregarded that instruction. Her defiance persisted when the order was emphatically repeated. Her disrespect and defiance took the form of insisting on and indeed walking away from her work area to get a drink of water, and by her statement "I have the right to get a drink of water." I am persuaded that that incident was a purposeful act on her part to exhibit not only to the management personnel involved but to other employees who were present her anger with and defiance of managerial authority.

Had the Employer imposed the penalty of discharge I would not have considered it proper in this case because of mitigating circumstances within the meaning of the foregoing rule.
I conclude the grievant had reasonable grounds to believe that the Employer spitefully failed or delayed in giving her her paycheck when she had requested it earlier to cash it during lunch. (She had applied for and had been granted the next day off to attend a family funeral). I think the grievant had reason to believe that she would get the check in time to cash it, and indeed had asked about it during the morning. I accept as logical and true her testimony that she needed the cash to travel to the funeral. The Employer has not satisfactorily explained why it did not or could not deliver the check to her before lunch, especially in view of the fact that it had granted her the next day off under the bereavement provisions of the contract. Indeed there is some evidence in the record that supervision was indifferent to her needs in that regard; and did not make a good faith effort to get the check to her earlier. (The Employer cannot, for the first time during the arbitration hearing, attempt to justify its actions, impute further liability to the employee, or cast doubt on the bona fides of her need for her money by a new assertion that her request for the funeral day off was made on false grounds.) That she did not get the check until after lunch was provocative and it angered her. It is a mitigating factor in this case; it explains in part, but does not excuse her insubordination. As previously stated her remedy was to grieve; not to engage in a course of conduct in defiance of and disrespectful to managerial authority.
Accordingly though discharge would be too severe under the circumstances and though in my view a suspension of a lesser period of time would have been adequate, I do not find that the three week suspension was wrong or excessive. Therefore that penalty is upheld.

Grievance 74-148: The Employer asserts that the grievant again falsified the reason for her absence from work after the lunch break and for the balance of the day, November 19. However I find that allegation, as serious as it may be, to be immaterial to the determinative facts in this case. I reverse the discharge on what may appear to be a technical ground; yet I am fully satisfied it is mandated by fundamental principles of due process. The grievant's offense was not reporting back to work after her lunch break. For that offense the Employer had predetermined the penalty and told her what it would be. She was informed that if she did not return to work that day from lunch on time, or at all, she would be docked for the time lost. In other words the Employer fixed the measure of penalty as loss of pay, and nothing else.

The grievant had overstay her lunch periods by several minutes on earlier days. For November 19 she requested a change in her lunch period, presumably to carry out some appointment. It was granted. In her discussions with supervision she was asked if she thought she would be late in returning and stated that if so, she would call.
She was not asked where she would be or what she would be doing during the lunch break. She was told that if she overstay her lunch or did not return at all she would lose pay for the time involved. Clearly supervision was on notice that she might again overstay her lunch period or might not return to work at all that afternoon. It could have warned her that a failure to report back to work would result in a disciplinary penalty (leaving the measure of discipline to later determination) or she could have been told that in light of her overall record, a failure to return on time or at all would no longer be tolerated and that she would be subject to dismissal. The Employer did neither. It told her that her penalty would be loss of pay.

The Employer did not limit the penalty of loss of pay to any specific reasons for her failure or inability to report back to work. By making it unconditional, it fashioned as the maximum penalty, the loss of pay if she failed to return to work for any reason. Indeed when she called in sometime after 3 P.M. to report that she would not return that day, she was not questioned about her whereabouts, but was again told only that her penalty would be loss of pay.

Hence the Employer's investigation into why she did not return to work, including whether or not she went to the Unemployment Insurance Office and/or had boiler trouble at home
and whether she lied about either, was superfluous, beyond
the scope of her offense, and irrelevant to the disciplinary
penalty to be imposed.

It is a fundamental rule of due process that when a
penalty is fixed for an offense, and the offending person so
notified, the penalty imposed on that person may not be expand-
ed or increased when and after he commits the proscribed act.
Here as I see it, the grievant's offense was her failure to re-
turn to work. She was told what the penalty would be. She
was not told that the penalty depended on why she did not
return to work. Consequently, and for purposes of penalty,
the question of why she failed to return and whether she was
truthful about it are both "after the fact" and immaterial.
This is not to say that she did not misrepresent where she
was and that that would not be an offense independent of the
instant case. Rather it is to say that the Employer cannot
rely on it here, when it fixed her penalty and put her on
notice that she would lose pay and nothing more. Therefore
in my prior Award, and based on the grievant's overall record
before me I reduced her discharge to a disciplinary suspension
and directed that she be reinstated without back pay and with
a stern warning that future misconduct, in my opinion, would
be grounds for summary dismissal.

The Hearing of July 2, 1975: This hearing was adjourned
at its outset because the grievant failed to appear. She had not notified the Union, the Employer or the Arbitrator that she would not be in attendance and her whereabouts were then unknown. The Employer's motion that the Arbitrator's fee and his expenses for that day including the rental of the hearing room, be assessed against the Union, is granted.

Eric J. Schmertz
Arbitrator

DATED: October 6, 1975
STATE OF New York ) ss.:
COUNTY OF New York )

On this sixth day of October, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In The Matter of the Arbitration between
Local 32 OPEIU and
Hospital Service Plan of New Jersey:

Subject to an Opinion later and later disposition of all other issues in the case, the discharge of Theola Hosten is reduced to a disciplinary suspension. She shall be reinstated but without back pay. The period of time between her discharge and suspension shall be deemed a disciplinary suspension and so noted in her employment records. She is warned that any future misconduct on her part would, in the opinion of this Arbitrator, be grounds for her summary dismissal.

Eric J. Schmertz
Arbitrator

DATED: July 26, 1975
STATE OF New York )ss.: COUNTY OF New York)

On this twenty-sixth day of July, 1975, before me personally came and appeared Eric J. Schmertz to me 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.
NEW JERSEY STATE BOARD OF MEDIATION, ADMINISTRATOR

In The Matter of The Arbitration
between
Local 32, Office and Professional
Employees International Union, AFL-CIO:

and

Hospital Service Plan of New Jersey

RULING

On Grievance #74-135
Case #74-408

The Undersigned duly designated as the Arbitrator under
the arbitration agreement of the above named parties and having
duly heard the proofs and allegations of said parties makes the
following Ruling on Grievance #74-135:

I conclude that both sides defaulted
on the contractual time limits of Step
I of the grievance procedure.

Accordingly, grievance #74-135 is remanded
to Step I, for reprocessing within the
grievance procedure. The time limits there-
in shall commence to run as of Monday, May
5, 1975.

Eric J. Schmertz
Arbitrator

DATED: May 1, 1975
STATE OF New York) ss.
COUNTY OF Nassau )

On this the first day of May, 1975 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.

Valerie R. Hansen
Notary Public, State of New York
No. 30-469031
Qualified in Nassau County
Term Expires March 30, 1976
IMPARTIAL CHAIRMAN
NEW YORK CITY TAXICAB INDUSTRY

---------------------------------------------X
In the Matter of the Arbitration

between

NEW YORK CITY TAXI DRIVERS UNION,
LOCAL 3036, AFL-CIO

On behalf of FRANCISCO SOUFFRONT
and CARLOS SOUFFRONT

-and-

JAYLEN OPERATING CORP.

------------------------X

STIPULATION AND

AWARD

The following stipulation was agreed upon as
a result of the hearing of the within matter on January 14,
1975, and upon which I make my AWARD:

1. The discharge of Francisco Souffront
and Carlos Souffront by Jaylen Operating Corp. was not for
just cause.

2. Francisco Souffront and Carlos Souffront
agree that they will not return to work at Jaylen Operating
Corp. in consideration of the terms of this Stipulation and Award.

3. Francisco Souffront and Carlos Souffront
shall retain and accrue all vacation rights under the Collec-
tive Bargaining Agreement as if any work that they shall perform
as a member of the bargaining unit represented by the New York
City Taxi Drivers Union, Local 3036, AFL-CIO, at any taxi
garage were performed at and for the fleet operated by Jaylen
Operating Corp. They shall receive vacation pay from the new
Employer or Employers according to the formula prescribed by
the Collective Bargaining Agreement that is or shall be applica-
ble at the times relevant. Any difference that may exist
between the vacation pay payable by the new Employer or Employers and the pay that they would have received had all their vacation credit been accrued at Jaylen Operating Corp. shall be payable by Jaylen Operating Corp. or their successors, assigns, or managing officers and/or owners.

4. Francisco Souffront and Carlos Souffront shall receive full credit toward their vacation rights for the periods of time between the dates of their respective discharges and the dates of their subsequent regular employment in the taxi industry, which has commenced with their current employment. The said credit shall be added to their period of service with, and shall be the sole responsibility of, Jaylen Operating Corp.

AGREED TO:

FRANCISCO SOUFFRONT

CARLOS SOUFFRONT

DATE

DATE

DATE

DATE

FRANCISCO SOUFFRONT

CARLOS SOUFFRONT

SAM EASTMAN, EXECUTIVE COUNCIL

MEMBER, FOR THE UNION

JONATHAN GOLD, EXECUTIVE

VICE PRESIDENT FOR THE EMPLOYER

The parties may post or otherwise disseminate this AWARD.

Dated: February 10, 1975

STATE OF NEW YORK

COUNTY OF NEW YORK

On this 10 day of February, 1975, 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

Textile Workers Union of America:
Local 630, AFL-CIO

and

Johnson and Johnson Ethicon, Inc.:
The Company claims that the grievant over Stayed a medical leave of absence for more than three consecutive days without permission or proper notice. It asserts that inasmuch as the foregoing contract section permits the Company to terminate an offending employee, the lesser penalty of three weeks suspension is encompassed therein and proper.

The parties agree that the foregoing contract clause is applicable to leaves of absences including medical leaves. The grievant was granted a medical leave of absence from January 7 through January 21, 1974. The leave was thereafter extended at the grievant's request through February 4; and again extended on the same basis through February 18, 1974. Written confirmation of the last extension, which the grievant acknowledges she received, explicitly informed her that "failure to return to work by the expiration date of any medical leave will result in removal of your name from the Johnson and Johnson seniority rolls." The grievant did not return to work on February 18 nor within the three consecutive days thereafter as required by Article XIII Section H. Consequently, by letter dated February 20, 1974 she was notified of her "release from the Company." Thereafter the Company changed the penalty to a suspension of three weeks.

Neither the grievant nor the Union on her behalf assert that she was unfamiliar with the leave of absence procedure, specifically the requirement to explicitly request extensions
or at least notify the Company when a return to employment upon the expiration date of the leave was not to take place. Rather, the grievant and the Union on her behalf, contend that the Company was properly notified within the meaning of Section H. And, alternatively in any event, inasmuch as she remained under a physician's care during the period subsequent to the end of her leave of absence, she should be excused from any liability under Section H.

Clearly, under Section H the burden is on an employee to request and obtain permission for an extension of any leave of absence or at least minimally to properly notify the Company of the fact and reasons for an inability to return to work when scheduled to do so. As previously mentioned the grievant was fully familiar with this procedure, no simply because she had requested and received two extensions of the instant leave of absence, but over the years had applied for and received a series of leaves of absence and extensions, primarily for medical reasons. Here the facts are disputed as to whether the grievant notified the Company that she would be unable to return to work on or at least within three consecutive days following February 18th. She testified that she asked her daughter to call and so notify the Company and that her daughter informed her that the call was made on February 18th and the information given to a nurse on duty in the Company's medical department.
The Company offered testimony and documents in support of its contention that there is no record of any such call by the grievant's daughter or anyone else on her behalf. As the burden under Section H is on the employee to seek extensions or to notify the Company when extensions are needed, it follows that the burden also is on any employee to establish that any such notice was given. The grievant has not met this burden. She concedes she was not at home when her leave of absence expired, but rather had traveled to Florida sometime earlier because of what she asserts was a "family emergency" (she testified that a newly born grandchild there was ill, there was some question about his survival and she went to visit). Even assuming the bona fides of the reason for her trip to Florida, it is manifest that she had plenty of time between the time she left New Jersey and the date her leave expired to properly notify the Company that additional time might be necessary and to request an extension of her medical leave. Yet she concedes that she made no effort to do so herself. Her testimony that she asked her daughter to make the call and that her daughter did so is not sufficiently probative to meet the burden under Section H. Her daughter neither appeared at nor testified at this arbitration hearing, so that whether or not the call was made remains a matter of conjecture, especially in the face of Company records which indicate that no such call was received. In short, the grievant had a duty to notify the Company herself in the proper and prescribed manner and had adequate time to do so despite the reasons for her trip to Florida, even assuming the legitimacy.
of that trip while on a medical leave of absence. Accordingly
the grievant was absent from work for three or more consecutive
days without permission and without properly notifying the Company
within the meaning of Section H.

The Union's alternative argument, namely that the
grievant should be excused because she was still under medical
treatment subsequent to the expiration of her leave has been
dealt with, in my judgement, by the Company's mitigation of the
penalty from termination to a three week suspension. Though the
Company expressed in this proceeding its skepticism about the
legitimacy of the grievant's Florida trip while on a medical
leave of absence, I am satisfied that by imposing a three week
suspension rather than deeming the grievant's failure to comply
with Section H as a "voluntary quit" or grounds for termination,
it afforded her the benefit of the doubt. And thereby reduced her
liability under Section H to a level which I deem to be adequately
responsive to and dispositive of the Union's alternative argument
herein. In other words, though Section H was not complied with
and for which dismissal would be proper, circumstances were
such (apparently in the Company's view and perhaps as a consequence
of the Union's intervention on the grievant's behalf) to justify
some penalty, but not the ultimate allowable penalty under Section
H.

Therefore, considering all the foregoing I do not find the
imposition of a three week suspension for a contract violation,
the unconditional terms of which would justify dismissal, to be
unreasonable or unwarranted.
The Undersigned duly designated as the Arbitrator under the arbitration agreement between the above named parties dated June 1, 1973 and having duly heard the proofs and allegations of said parties makes the following AWARD:

The three week suspension imposed on Gwendolyn Pendleton was warranted.

DATED: December 30, 1974
STATE OF: New York )
COUNTY OF: New York )

On this thirtieth day of December, 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

Local 343, Hotel and Restaurant Employees and Bar Tenders Union, AFL-CIO

and

Laurels Hotel and Country Club

AWARD

Based on the evidence submitted at the duly noticed and scheduled hearing of April 10, 1975, the Undersigned duly designated as the Arbitrator under the arbitration agreement between the above named Union and Employer makes the following AWARD:

For the period July through October, 1974 Laurels Hotel and Country Club is delinquent in payment to and owes the Health and Welfare Security Fund of Local 343 the sum of ONE THOUSAND TWO HUNDRED DOLLARS AND NO CENTS....($1,200.00).

Laurels Hotel and Country Club is directed to pay such sum to said Fund forthwith with interest at 6% per annum.

The Arbitrator's fee of $250 shall be shared equally by the Union and the Employer. Therefore Laurels Hotel and Country Club shall pay to the Union the sum of $125. representing the Employer's share of the Arbitrator's fee, previously advanced by the Union.

Eric J. Schmertz
Arbitrator

DATED: April 11, 1975
COUNTY OF New York )
STATE OF New York )ss.:

On this eleventh day of April, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The issue is:

Whether Conductor R. Sunderman was unjustly disciplined; and if so to what remedy is he entitled?

A hearing was held at the American Arbitration Association on January 8, 1975 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.

Mr. Sunderman, hereinafter referred to as the grievant, was disciplined for failure to comply with Rule 670 of the Rules of the Operating Department, in that he "permitted his train to stop within the (Herald) Interlocking and then proceed east without proper signal authority."

The Union concedes the Rule violation. It does not dispute the Employer's charge that the grievant permitted his train to proceed without observing the proper signal. The thrust of the Union's case herein is that the penalty imposed on the grievant, a twenty day suspension, is too severe and should be reduced. The Union explains that the grievant should be excused from such a severe penalty because at the time he was
to observe the signal he was occupied in instructing and observing the work of a new brakeman, so that this new employee would not endanger himself in carrying out the train's maneuver. And also that the train was stopped just below the signal so that it could not be directly observed by the grievant from his location.

Considering the manifest importance of this particular signal to operating safety, I cannot accept these explanations as mitigating excuses. A failure to observe and comply with this particular signal means, as it did here, that the train proceeded through the Interlocking onto a easterly track blind, without certainty or knowledge that the track was clear and that another train was not approaching in the opposite direction on the same single track. In short, as I understand it, this particular signal prevents head-on collisions of trains moving in opposite directions. That the grievant's train did not carry passengers, was operated at night and that an accident did not result are immaterial to the grievant's unconditional responsibility under the Rule.

Under the circumstances I am not prepared to conclude that a suspension of twenty days is too severe, especially where, as here, that period of suspension though so recorded on the grievant's record, involved a loss of only six days pay.
The Undersigned, duly designated as the Arbitrator in the above matter, and having been duly sworn and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

There was just cause for the disciplinary penalty imposed on Conductor R. Sunderman.

DATED: January 20, 1975
STATE OF New York ) ss.
COUNTY OF New York )

On this twentieth day of January, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The issue is the propriety of the discharge of Trainman Lawrence Driscoll.

A hearing was held at the offices of the American Arbitration Association on March 24, 1975 at which time representatives of the above named parties appeared.

I find material fault on both sides. Therefore I reduce the discharge of Mr. Driscoll, hereinafter referred to as the "grievant", to a disciplinary suspension. Provided he is found by the Employer's medical department to be physically and mentally fit, he shall be restored to duty without back pay.

There is no question but that the grievant acted irresponsibly, and by his own failings initiated the chain of events leading to his discharge. He failed to report for work on November 4, 1974 and was not heard from again until after his dismissal following a Trial held in his absence on December 10, 1974. Through the Union he asserts that he called in ill on November 3.
But the Employer has no record of that call, and there is no substantiation in support of the grievant's assertion in the record before me. Even assuming the veracity of that assertion, the grievant nonetheless had the clear duty subsequent to November 3 to keep the Employer informed of his status, condition and location. An employee who absents himself from work, even if ill, cannot assume that for more than one month thereafter the Employer may not have reason to contact him, to know of his current condition and his whereabouts. Under that circumstance the employee has the duty to communicate with the Employer at reasonable times. The grievant did not meet this duty. More specifically, I find that the grievant should have known that he had this duty because, he had been informed, earlier in October, 1974, that the Employer was not satisfied with the post office address he gave as his "residence" and that a better address was needed. So he was on express notice that the Employer wanted current and accurate information as to his whereabouts when off the job and should have kept the Employer informed of his whereabouts especially because, as he avers, he was "transient". The grievant's bare and unsubstantiated assertion in the record below that he reported off the job sick and his failure to be mindful of the Employer's request and need for a more definitive address at which he lived or resided,
constitute failings by which the grievant initially and solely put himself in an adverse position subject to disciplinary action.

The situation became compounded not simply by his failure to report to work for training for a conductor promotion on November 4, 1974, but his failure thereafter to respond to a "ten day letter" sent on November 9, by certified mail to his last known address, and his failure thereafter to respond to notice of Trial, which was held on December 10, 1974.

The Employer argues that it made every good faith effort to contact the grievant with regard to each of the foregoing, by not only sending certified notices to the last known residence which he gave to the Employer in October, but also by dispatching a representative to that address to see if the grievant could be found. The Employer points out that each letter was returned by the Post Office with notations that the grievant had moved and left no forwarding address. The official who visited the residence reported similarly. Also efforts to telephone the grievant, utilizing the phone number which he had previously given, proved unavailing because the number had been disconnected.

On the face this would appear as full compliance by the Employer with any good faith obligation to seek out the grievant; to give him notice that he was AWOL and subject to a disciplinary trial. Yet an examination of the record before me discloses that the Employer had another address which the grievant had previously indicated would be the better one through which he could be
reached, and which, though a post office box number that did not meet the Employer's requirement for a "residence", could have been used by the Employer in conjunction with or subsequent to notices to the grievant's last known residence, if a complete effort to locate the grievant was to be undertaken. This is not to say that the Employer must accept a post office box number in lieu of a definitive residence, but rather that in the instant case, where the Employer apparently was anxious to find the grievant, to give him notice of his AWOL status and impending Trial I fail to see why it did not make use of the post office box number as well. To do so would have been neither burdensome nor unreasonable. The record before me indicates that on an earlier occasion, in September, 1974, in connection with notice to the grievant to report to the Employer following his failure to respond to notice to take a medical examination, the Employer sent the letter to the post office box; the grievant received it and responded satisfactorily. In short had the Employer in November attempted to communicate with the grievant through the post office box number which the grievant had earlier indicated was his "better address" because he was at the time transient and living with various friends, this case may not have reached as serious a stage as it did. The grievant's AWOL status on and shortly after November 4, 1974 would have been made known to him; he could have then responded by attempting to substantiate his assertion that he called in sick on November 3; he could have
reported for work or confirmed his continued illness, and his
disciplinary Trial might have been obviated.

Considering all the foregoing a disciplinary penalty is
warranted, but short of discharge. The record is unclear as to
the grievant's present physical and mental condition. Though he
was certified as fit for work by the Employer in October, his
earlier history of difficulties suggest that on and after
November 4 certain physical and/or mental conditions may have
reoccurred which not only then impeded his ability to work but
which may still be present. I do not accept the Union's
contention, based on certification by the grievant's physician
that he was and is fit to return to work since the end of
December, 1974. Instead the grievant's present medical condition
shall be ascertained by the Employer. If found fit he shall be
reinstated but without back pay. The period of time between the
date of his discharge and his reinstatement shall be deemed a
disciplinary suspension and so noted in his employment record.

The Undersigned having been duly designated as the
Arbitrator under the Arbitration Agreement between the above
named parties, and having been duly sworn and having duly heard
the proofs and allegations of said parties makes the following
AWARD:
The discharge of Lawrence Driscoll is reduced to a disciplinary suspension. If found fit for duty by the Employer's Medical Department Driscoll shall be re-instated but without back pay.

Eric J. Schmertz
Arbitrator

DATED: April 7, 1975
STATE OF New York )ss.:
COUNTY OF New York)

On this seventh day of April, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with the arbitration provisions of the contract between the above named parties, the Undersigned was designated as the Arbitrator to hear and decide certain disputes relating to "run failures."

The hearing was held at the offices of the American Arbitration Association on September 10, 1975 at which time representatives of the above named parties and the employees involved in the "run failures" appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

There is no dispute that each of the affected employees missed or failed to cover the specific assignment or run as charged by the carrier. What is in question is whether they were justified or have an acceptable excuse.

Having been duly sworn and having duly heard the proofs and allegations of the parties, I render the following AWARDS:

A. J. Melleby does not have an acceptable excuse for his third run failure on August 7, 1975. The third run failure violation is sustained.
The burden of establishing justification or an acceptable excuse for an otherwise undisputed run failure, is on the employee. Here, particularly after two previous run failures the burden was on the employee to establish that he was ill as he alleges. He has not done so to my satisfaction. He did not seek or obtain medical attention; nor did he ask either his wife or his brother-in-law who were in the house with him at the time to notify the carrier of his illness at the time it occurred; nor did either of those persons testify in this proceeding to corroborate his story.

W. C. Robinson has an acceptable excuse for his third run failure on July 25, 1975, but does not have an acceptable excuse for his fourth run failure on July 26, 1975. Accordingly the third run failure charge is reversed and the fourth run failure charge (which per force becomes a third run failure for disciplinary purposes) is sustained.

I accept the employee's testimony and the documentary evidence that he experienced car trouble on July 25, 1975 when he started out to work. I accept his statement that his battery was dead and his evidence that he purchased a new battery that very day. I believe he had no prior warning that the battery was weak or dead. I am satisfied that his car trouble in that regard was unforeseen, and but for that difficulty had allowed himself enough time to drive to work.

However with regard to the next day the employee has not established that he was sick as he alleges. I find no reason why the carrier's investigator would falsely testify about the lack of bona fides of the doctors' notes which the employee presented. Additionally, though the employee spent a considerable amount of time allegedly going to a hospital and then to the offices of two doctors he did not at any time call to notify the carrier of his condition or that he had missed his run. His failure to do so casts additional doubt on the validity of his defense.
J. R. Knight has acceptable excuses for his third and fourth run failures of July 28 and August 1, 1975. Accordingly both run failure violations are reversed.

Both run failures were due to car trouble. Here the employee has not only proved to my satisfaction that his car was inoperative, but established that he made a determined effort to have his car repaired; had reason to believe each time he took it in for repairs that the difficulties were corrected; and on both July 28 and August 1st had reason to believe that his car was operative and could get him from his home to Babylon where he was to take a train to New York to meet his run. It is undisputed that the employee allowed sufficient time to drive from his home to Babylon and that but for the difficulties with his car, which he reasonably believed on both occasions had been corrected, would not have been late for or missed his run.

While it can be argued that the employee was less than diligent on August 1st, when, upon discovering car trouble again, he made no effort to obtain alternate transportation to Babylon even though he had two hours to do so. However I am going to give him the benefit of the doubt and excuse him on that occasion as well because I believe he was so exasperated and frustrated over the continued car trouble despite his efforts and the costs incurred to have it repaired that he should be excused from a normal obligation to calmly and objectively attempt to obtain alternate transportation to work. To his credit he called the carrier and reported his predicament. He frankly sought to avoid a run failure violation. He asked for the day off or a "personal day off" but was denied both. He then requested that he be marked ill. His unrefuted testimony is that the dispatcher stated "he could go off sick." This is not to say that the dispatcher excused him from the run failure but rather that under the circumstances the employee had reason to believe that "sickness" was substituted for a "run failure" and that he would lose two days pay which is mandatorily attendant to reporting off sick, rather than suffer a fourth run failure violation.
L. Furia does not have an acceptable excuse for his third run failure of June 24, 1975. That run failure violation is sustained.

Eric J. Schmertz
Arbitrator

DATED: September 18, 1975
STATE OF New York) ss:
COUNTY OF Nassau

On this eighteenth day of September, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did Paul Varlese receive the correct amount of vacation pay in 1974 in accordance with Article IX of the Collective Bargaining Agreement? If not what should the remedy be?

A hearing was held in Waterbury, Connecticut on June 24, 1975 at which time Mr. Varlese 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 waived. The parties filed post-hearing briefs.

Article IX (effective July 1, 1973) reads:

A. An employee with three (3) months but less than one (1) year of seniority will not be entitled to vacation time off until June 1 of the vacation year. These employees' vacation pays will be computed from June 1 to May 31 of the preceding year. Vacation pays for all other employees will be computed from their W-2 form as follows:

(1) Employees with three months, but less than one year of seniority, will be entitled to vacation pay of 2% of their gross earnings during the prior year.

(2) Employees with one year, but less than two years of seniority, will be entitled to a vacation of 2.4% of their gross earnings during the prior year.
(3) Employees with two years, but less than three years of seniority, will be entitled to a vacation pay of 2.8% of their gross earnings during the prior year.

(4) Employees with three years but less than five years will be entitled to a vacation of 2 weeks at 5% of their gross earnings during the prior year, effective on the anniversary date of hiring.

(5) Employees with six years but less than ten years will be entitled to a vacation of 2 weeks at 5½% of their gross earnings during the prior year effective on the anniversary date of hiring.

(6) Employees with ten years but less than fifteen years will be entitled to a vacation of 3 weeks at 7% of their gross earnings during the prior year, effective on the anniversary date of hiring.

(7) Employees with fifteen years but less than twenty years will be entitled to a vacation of 4 weeks at 8% of their gross earnings during the prior year, effective on the anniversary date of hiring.

(8) Employees with twenty years or more seniority will be entitled to a vacation of 4 weeks at 9% of their gross earnings during the prior year, effective on the anniversary date of hiring.

On November 4, 1974 the grievant reached his twentieth year of service with the Company. Prior to that date, during August, 1974 and during the contractual vacation year (January 1 to December 31) he took a four week vacation for which he was paid "8 percent of his gross earnings during the prior year."

It is the Union's contention that effective November 4, 1974 he should receive an additional one percent of gross earnings as vacation pay for the year 1974 applied retroactively to cover the four weeks of vacation taken in August. In short the Union
interprets the contract to mean that an employee who reaches his twentieth year of seniority during the 1974 vacation year is entitled to 9 percent rather than 8 percent of gross earnings as vacation pay for his 1974 vacation regardless of when during the year he takes his vacation, and even if, as here, the full vacation was taken prior to the anniversary date of the twentieth year of service.

In support of its position the Union asserts that its interpretation of the foregoing contract provision was agreed to in bargaining between the parties when the current contract was negotiated; that the Company settled prior similar grievances or granted vacation pay consistent with the Union's position herein; that the phrase "effective on the anniversary date of hiring" found at the end of those paragraphs of Article IX which set forth the vacation entitlement of employees with three, six, ten, fifteen, and twenty years of service, means and was intended to accord the higher rate of vacation pay to an employee who moved from one of those seniority levels to the next irrespective of when during that year he took his vacation.

The Company denies that during the course of the negotiations it agreed to the Union's interpretation of the pertinent parts of Article IX, and argues that if Union representatives reported any such agreement to the membership that report was both erroneous and self serving; that other than in two cases (one which was an error and the other a settlement without precedent) the consistent practice has been to pay vacation pay at the percentage of gross earnings applicable to an employee's
seniority at the time the vacation is taken. Therefore in the instant case, because the grievant was still an employee with fifteen years service in August, 1974 when he took his full four week vacation he was paid at the rate of 8 percent. Had he waited, the Company points out, until after November 4, 1974 he would have been paid for his vacation at the rate which obtained for an employee with twenty years service, namely at 9 percent. Further, by example, the Company claims that where an employee who moves from one of the aforementioned seniority levels to the next within the vacation year and takes a part of his vacation prior to that point of transition and the balance of his vacation thereafter, he has been paid at the lower rate for the first part of his vacation and at the higher rate for the balance of his vacation.

Despite the contentions of the parties that the contract language clearly supports their respective but divergent positions, I find that language to be unclear and ambiguous. The question simply is whether there is a significant substantive difference between employees with three through twenty years of service (i.e. the foregoing seniority steps of three years, six years, ten years, fifteen years and twenty years) and those employees covered under Article IX with three months, one year and two years of service. As to the latter group there is no dispute between the parties that the Company's interpretation of the contract, is correct. The Union concedes that an employee who takes a vacation at the time his seniority is at least three months, but less than one year would receive vacation pay at the rate of 2 percent, and would not thereafter,
upon achieving one year of seniority receive an additional .4 percent vacation pay applied retroactively to the actual vacation he took earlier. And similarly employees who take their vacations after one year of work but less than two would receive vacation pay at the rate of 2.4 percent and would receive no additional vacation pay thereafter, when during the year they moved to the two year level. The difference which the Union relies upon is that unlike that junior group, and beginning with three years of service the contract language includes the concluding phrase "effective on the anniversary date of hire."

I do not find that this additional language is either clarifying or by its own terms subject to a single interpretation. It could well mean, as the Union asserts, that the new vacation pay rate is to be paid **throughout the vacation year** retroactively as well as prospectively whenever an employee during that vacation year progresses from one of the covered seniority levels to the next. Under that interpretation an employee, like the grievant, would be entitled to the additional percentage of vacation pay, applied to whenever he took his vacation during that year. On the other hand the phrase could mean, with equal logic, that the increase in the rate of vacation pay becomes **effective** and is payable **only on and after the anniversary date** of an employee's movement from one specified seniority level to the next. In that case the grievant would not be entitled to additional vacation pay because the anniversary date of his movement from fifteen to twenty years of seniority was subsequent to when he took his vacation in the year 1974. Also, as the Union argues, that the disputed phrase ("effective on the anniversary date of hiring") is found in Article IX as obtain-
ing to employees with three, six, ten, fifteen and twenty years of seniority but not to those with three months, one year and two years of seniority may mandate a different application of vacation pay for the two delineated groups. Or, as the Company contends may be nothing more than an express recitation of what obviously is or would be implied throughout Article IX in order to give it its logical, traditional and hence proper meaning. Again, in short, the inclusion of the disputed phrase in one part of Article IX but not in another, could mean either that the two parts should be interpreted differently, or that the latter section, which includes the clause, was simply more explicit as to what was intended throughout. For these reasons Article IX is neither clear nor devoid of ambiguities, and cannot by its own terms be interpreted conclusively one way or the other.

Where critical contract language is ambiguous the traditional approach is for the arbitrator to look to what transpired at negotiations leading to the disputed contract clause, and at past practice to determine what was agreed to and how the parties have intended that clause to apply. Unfortunately in the instance case neither are helpful. The evidence and testimony surrounding the negotiation of the clause is sharply conflicting and offsetting. The "past practices" upon which both sides rely do not constitute evidentiary past practice within the traditional meaning of that phrase. The Union relies on two prior cases in support of its interpretation
of Article IX, Two examples do not make a past practice, especially where one of them (the Hunihan grievance) was expressly settled with the statement that "under no condition will we extend this consideration to any other employee", or in other words, without precedent. The remaining example, the Mancini case, was, claims the Company, simply an error. Whether error or not a single payment at the higher rate does not meet the requirements of a past practice.

On the other hand the Company's evidence of past practice is also indeterminative. The list of employees who were paid for their vacations at the rate applicable to their seniority at the time the vacation was taken, turned out to be confined to employees with three months, one year, two years but less than three years seniority, and there is no dispute that employees at those levels do not fall within the Union's claim in this case. Offsetting the Mancini payment is the settlement of the DeMano grievance. There the parties stipulated "On anniversary date of employee, Company will always pay remainder of vacation time to the new percentage." If as it reads, the new percentage was applicable only to the remainder of vacation time that settlement is supportive of the Company's assertion that the higher percentage is only paid prospectively to any remaining vacation time after the anniversary date, but has no retroactive effect.

So the evidence on the negotiation of the clause is inconclusive; what prior cases there have been are irrelevant
or inconsistent, and as to the latter, of insufficient quantity and duration to meet the minimum requisites of a "past practice."

It is well settled where the contract language is unclear and ambiguous, where clarification cannot be obtained from the contract negotiations leading to that disputed language, and where there is no past practice or an inconclusive past practice, the Union (and its grievance) does not meet the burden of establishing a right under contract, and must fail.

Accordingly the Undersigned, duly designated as the Arbitrator under the arbitration agreement dated July 1, 1972 as extended, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

Paul Varlese received the correct amount of vacation pay in 1974 in accordance with Article IX of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: July 15, 1975
STATE OF New York )
COUNTY OF New York ) ss.: 
On this fifteenth day of July, 1975 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

and

METROPOLITAN LIFE INSURANCE COMPANY

Case Number : 16 30 0047 74

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 dispute is arbitrable. The Company did not violate the contract by awarding the commission involved to District Sales Manager Windsor.

AWARD

Eric J. Schmertz
Arbitrator

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

On this 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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration:

between

INSURANCE WORKERS INTERNATIONAL
UNION, AFL-CIO

and

METROPOLITAN LIFE INSURANCE COMPANY

Case Number: 16 30 0047 74

--- X

In accordance with Article VIII of the Collective Bargaining Agreement dated 1972-1975, between Metropolitan Life Insurance Company and Insurance Workers International Union, AFL-CIO, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

"Whether the Company violated the contract in awarding the commission involved to District Sales Manager Windsor, with the stipulation or statement by the Arbitrator that the Company is alleging, also, at the threshold, that the dispute is not arbitrable, and the rights of the parties on that phase of the dispute reserved, and may be presented fully and in their entirety to me."

A hearing was held in Baltimore, Maryland, on July 9, 1974. The parties were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Both parties submitted post-hearing briefs.
Insurance Workers International Union, AFL-CIO (the Union), is the collective bargaining representative of "Regular, Office Account and canvassing Agents" of Metropolitan Life Insurance Company (the Company), in various jurisdictions including the state of Maryland. The representation status of the Union as defined in Article I ("Union Recognition") of the agreement, specifically excludes District Sales Managers, Sales Managers and Sales Representatives, among others.

The Union alleges and the Company concedes that on August 24, 1973, District Sales Manager (Belmar District) Windsor wrote, and thereafter received commissions for, conversions from group insurance to individual policies insuring the lives of Charles Kelly, Sr., and John Kelly. The Union maintains that the commissions for these conversions should have been paid to Agent Jerome Fried, the grievant, rather than to District Manager Windsor. In support of this contention, the Union shows:

1. that Charles Kelly, Sr., and John Kelly (the Insureds) reside in the Guilford District, the Agency in which Fried serves, rather than in the Belmar District where Windsor is in charge;
2. that Agent Fried had insurance in force on members of the families of the Insureds although he had never done any business with either Charles Kelly, Sr., or John Kelly directly.

The Union cites the following contract provisions and sections of Company directives, all of which were in evidence herein, in support of the claim that commissions on the conversions were payable to Agent Fried:

Agreement, Article XIII (Compensation)

"1. Subject to approval of the necessary governmental authorities, during the term of this Agreement, the rates of commission, other forms of compensation, and methods of determining compensation shall be set forth in Schedules I through VIII in Appendix B hereof subject to revisions of the rules and regulations of the Company made to effectuate the compensation changes contained in Appendix B, provided that such revisions shall not violate the express provisions of this Agreement . . ."

Agreement, Schedule I
(as referred to in Article XIII)

" First-Year Commissions - All Agents
The commission rates set forth in this Schedule are payable on policies and contracts with issue dates on and after January 1, 1973, except as otherwise specified.
"A - PERSONAL LIFE INSURANCE PREMIUM NOTICE POLICIES

<table>
<thead>
<tr>
<th>Kind of Policy</th>
<th>Percent of First Policy Year Premiums:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other than Executive</td>
</tr>
<tr>
<td></td>
<td>Equity</td>
</tr>
<tr>
<td>CONVERSIONS FROM GROUP</td>
<td></td>
</tr>
<tr>
<td>(Including Wholesale) and</td>
<td></td>
</tr>
<tr>
<td>EMPLOYER BENEFIT PLAN</td>
<td></td>
</tr>
<tr>
<td>To Single Premium Policies</td>
<td>1.0</td>
</tr>
<tr>
<td>To All Others</td>
<td>7.5</td>
</tr>
</tbody>
</table>

Field Management Procedural Change (9/8/72)

New Business Leads

"To District Sales Management and Branch Management

"The following procedures (effective immediately) have been established for the handling and assigning of new business leads that are referred to a District or Branch Office.

"When a new business lead is received at the Public Window or by telephone, the Clerk should establish whether the person has any preference for a particular representative. If no preference is given, the Clerk should establish, in conversation with the prospect, whether there is any present Metropolitan business in the family and, if there is, ask the prospect if he knows the name of the representative (and, if necessary, the agency number and District) who services his business.

"If identification is obtained, the lead is to be referred to the servicing representative. If the individual is in another Office, the request is to be referred to that Office. If no identification of a representative is obtained in the discussion with the prospect, the lead is to be referred to the District Sales Manager or Branch Manager. It is not necessary for the Clerk to refer to any Office records to determine the servicing representative.

"The same procedures are to be followed by any Sales Manager who receives a lead as a result of a telephone call or visit by a prospect who is referred to him by a Clerk."
"The District Sales Manager or Branch Manager should give any lead that is referred to him, to a highly qualified representative (other than a member of Management) and should rotate such leads among his sales staff as much as possible.

"All referred leads received from the Home Office in conjunction with a sales support program or for any other reason, or any leads received in the District or Branch Office by mail where a particular representative is not identified, are to be given to the District Sales Manager or Branch Manager for distribution in the same manner described above.

"Appropriate revisions will be made in the manuals of instruction, and in the instructions for the Service Call Memorandum, Form 2297, at next reprint. Please have your Office Supervisor review and discuss this new procedure with the Clerks in your Office."

Supplemental Rules for District Management
Clause 50-B

"B. DUTIES - A District Manager is responsible for the supervision and training of the personnel in his District. An Agency (M.I.C.) Manager is to aid his District Manager as he may be directed. The duties of each are as defined in their respective appointments, as described in this Manual, and as embodied in instructions from the Officers of the Company. District Managers and Agency (M.I.C.) Managers are to have no business connection with any other insurance company, business organization, firm, or other person.

"Successful management of the Company's business in a District involves proper training and supervision of the District personnel, establishment and maintenance of good will toward the Company through service to policyholders and the public generally, procurement of applications for new business on desirable risks, conservation of the business presently in force, maintenance of friendly relations with representatives of competing companies, prompt receipt and remittance of premiums and other amounts due the Company, avoidance of deficiencies or practices harmful to the reputation of the Company or any of its employees and Agents, and careful safeguarding of the interests of the Company and its representatives."
"The Management may not be deemed satisfactory, even though the production record of the District may be good, if the Agents are not adequately and properly trained to carry on effectively their various duties, or if the accounts of the Agents show deficiencies, high arrears, disproportionate lapses, low receipt of premium payments, or if there is a high ratio of controllable terminations.

"District Managers and Agency (M.I.C.) Managers are permitted to write business to their own credit; however, as a part of Management they are to restrict their selling to persons who are not under canvass by any other Metropolitan representative. Also, because of the information they have with respect to the prospecting and sales activities of the Agents in their Districts, care should be taken to avoid situations which would place them in conflict with the sales efforts of their Agents. Therefore, any personal insurance written by a District Manager or Agency (M.I.C.) Manager on an individual who has other Metropolitan insurance in force in an Agency in the same District is to be written to the credit of the Agent assigned to that Agency if:

(1) Any of the Metropolitan insurance already in force on the life proposed was written by that Agent within the past two years, or

(2) The Agent can show reasonable evidence of having canvassed such person or having serviced his insurance within the 12 months preceding the date of application.

"Recognized forms of Business insurance or business written with corporate or business beneficiaries, or Business insurance written to cover Federal estate taxes, and identified as such, may be written to the credit of the District Manager or Agency (M.I.C.) Manager at any time wherever it is evident that the Agent has not attempted to sell the applicant such forms of insurance."

The Company argues that because this is a dispute relating to "District practices and administration" the matter falls within the purview of Article VII of the Agreement and is consequently not arbitrable. Article VII reads, in pertinent part, as follows:
ARTICLE VII - COMPLAINT PROCEDURE

1. The term 'complaint' as used herein shall mean disputes or difficulties concerning District practices and administration, affecting an Agent or group of Agents, which do not constitute a grievance as defined in Article VIII. However, disputes involving the application of general Company rules or amendments as issued by the Home Office shall be processed as grievances under Article VIII.

* * *

5. No complaint may be referred to or become the subject matter of arbitration except that the arbitrator shall not be precluded, without limitation on any other methods for such determination, from determining whether a dispute constitutes a 'grievance' or 'complaint' within the meaning of this article.

In the alternative, the Company maintains that if it is found on the threshold issue stated above, that the matter is arbitrable, the grievance must be denied because no violation of the Agreement has been shown as required by Article VIII of the Agreement which reads in pertinent part as follows:

ARTICLE VIII - GRIEVANCE MACHINERY AND ARBITRATION

The following procedure is established for presentation by the Union of grievances and for the consideration thereof.

Definition of Grievance

The term grievance as used herein shall mean disputes arising over the interpretation or application of any of the provisions of this collective agreement, including disputes arising over the termination of the employment of an Agent.

* * *
"Limitations on Arbitration

"With respect to arbitration, it is mutually understood and agreed that it is not the intention of the parties to submit to arbitration, either directly or collaterally, the validity or reasonableness of the Company's rules and regulations except as otherwise provided in Article XVI. It is expressly understood and agreed by the Union that the Company has the sole right to direct and control its Agents, including the exclusive right to hire, transfer, promote, demote or to terminate the employment of any Agent, subject only to the provisions of this Agreement.

"It is further understood and agreed that the Company's rights with respect to the handling and disposition of Agencies, as well as the Company's underwriting rules, the methods of handling and treating applications and policies, the collection and receipt of premiums, and all matters related thereto, and all other general management questions, as well as the revision, substitution, and amendment of any and all agency agreements and commission rates in any manner not contrary to this Agreement, are matters to which the arbitration procedure provided for above is not applicable.

"Both parties agree to be bound by the Arbitrator's lawful award; further, they both agree that arbitration is and shall be in lieu of any and all other remedies available to the Union under the collective agreement, and that the arbitration of an issue shall constitute a final disposition of the matter."

As to the issue of arbitrability, I find that the Union alleges a violation of Article XIII of the Agreement which deals with Compensation, refers to Compensation for conversations of group insurance, and is based, in part and by reference, upon Rules and Regulations of the Company. Without reaching the questions raised by the Union with regard to the applicability of the findings in the Nullmeyer Arbitration Opinion or the alleged past practice of the parties as to initiating challenges to arbitrability, I find
that the underlying dispute as to payment of commissions finds sufficient basis in the Agreement and Company Rules and Regulations to warrant arbitration thereof. This finding is, of course, based solely upon the Union's invocation of specific Agreement provisions and Company Rules and Regulations which, on their face, relate to the subject matter of the underlying dispute and which allegedly have been violated; it does not reflect any further examination of the facts of the case nor interpretation of the cited sections of the Agreement or of Company Rules and Regulations.

Having determined that the matter is arbitrable, an examination of the facts of the case is now appropriate. The following recital consists of a statement of those facts in evidence which I find to be relevant as well as findings of fact as to matters of fact in dispute.

Charles Kelly, Sr., and John Kelly were President and Vice-President, respectively, of Kelly-Hanley Pontiac, Inc., a Baltimore automobile dealership, which maintained a Group Life insurance plan under a General Motors Corporation agreement with the Company. In February or March, 1973, at the Orchard Inn, Charles Kelly, Sr., approached
District Manager Windsor, whom he had known approximately twenty-three years, informed him of the impending termination of the automobile dealership, and told him that he wished to consult with him regarding conversion of the group insurance to individual coverage. In this and two subsequent conversations, on June 4 and June 27, 1973, both of which took place in the same restaurant, and both at Mr. Kelly's initiative, Mr. Windsor discussed with Mr. Kelly the conversion of the group insurance and agreed to assist in the matter. On July 20, Charles Kelly, Sr., telephoned Mr. Windsor, told him that he and his brother, John, wished to meet with him to discuss the conversion, and the three men met later that day and discussed the matter. In the course of that meeting, Mr. Windsor advised the Messrs. Kelly as to the costs of conversion, cash values of the individual policies, the relative costs and merits of individual policies in various amounts less than the maximum of $100,000 to which they were entitled, and the effects of the insurance upon their estates and estate taxes. Each of the brothers had some reservations, based mainly upon costs, and the meeting ended with agreement that they would consider the matter and then contact Mr. Windsor and advise him as to how much insurance they wished to obtain by way of conversion.
On July 24, 1973, a Ms. Iscowitz of the home office of the Company called the Belmar District Office, of which Mr. Windsor was District Sales Manager, and the Guilford District Office, in which Mr. Fried was employed as an Agent and in which Mr. James Ross was then serving as Acting District Sales Manager, to inform them of the conversion rights under the automobile dealership group policy. Mr. Ross, on behalf of the Guilford Agency, thereupon called Mr. Charles Kelly at his office in Baltimore, and Mr. John Kelly who was on vacation in Ocean City, Maryland. The following week, while himself in Ocean City, Mr. Ross again telephoned to Mr. John Kelly, was unable to obtain a meeting with him at that time and place and arranged for a meeting at Mr. Kelly's Baltimore office on August 6, 1973, at 8:30 a.m. That meeting was cancelled by a telephone call from Mr. Kelly's office and Mr. Ross was told by Mr. Kelly later that day that he had already made arrangements for the conversion and would not require the services of Mr. Ross.

Mr. Ross testified that he knew the Kelly brothers very well and that he had met with Charles Kelly, Sr., on July 24, 1973. By his own testimony, it is clear that Mr. Ross did not meet personally with John Kelly at any time
in connection with the subject conversion. According to the testimony of Charles Kelly, Sr., he did not know Mr. Ross and had never seen him before the day of the hearing herein. In this connection, I find that no meetings took place at any time between Mr. Ross and Mr. Charles Kelly, Sr., in connection with the subject conversion. Agent Fried did not know, had never met and never had any insurance business dealings with either of the Kelly brothers, nor is it alleged by the Union that he did. Nor was it shown that Ross, Fried or any other Guilford district employee ever sold any insurance to or ever canvassed or serviced insurance for or of either of the Kelly brothers.

On August 20, 1973, there was a further conference between Mr. Windsor and the Messrs. Kelly at which they finalized their decision to take conversions to individual $100,000 policies and the applications for these conversions were signed by the brothers at Mr. Windsor's office on August 24, 1974.

In September or October, 1973, Mr. Windsor met on separate occasions with the wives of Charles Kelly, Sr., and John Kelly, spending several hours with each, to explain to them the conversion, benefits, etc.

The Union relies upon Article XIII of the Agreement which provides that compensation shall be paid according to certain schedules annexed to the Agreement, including Schedule I which deals with commissions for Conversions from Group Insurance, "subject to the rules and regulations
of the Company . . . " There is thus no express language in Article XIII which specifically provides for the diversion of new business relating to conversion to an Agent or the payment to an Agent of commissions on such business. Schedule I merely shows the rates of commission payable for such business.

The Union also cites certain Company directives, however, maintaining that if these documents are read together with Article XIII, it will be seen that payment of commissions to Windsor rather than to Fried was in violation of the Agreement.

Granting to the Union the most favorable construction of the cited documents and assuming, arguendo, that:

1. the words "subject to the provisions of the rules and regulations of the Company" in Article XIII constitute an incorporation into the contract to the benefit of the Union of all such rules and regulations; and

2. the Company directives (Field Management Procedural Changes - New Business Leads, 9/8/72 and Supplemental Rules for District Management, Clause 50-B)
cited by the Union are Rules and Regulations of the Company in contemplation of Article XIII; and

3. the said directives are intended to govern inter-district business rather than to regulate intra-district operations;

it, nevertheless, appears that no basis can be found to sustain the Union position herein. The first directive, Field Management Procedural Changes deals with the handling of new business referred to a District or Branch Office. The Procedure is clearly intended to protect the established interest or claim of any Company representative who may already have rendered service to the prospect. If no such interest or claim exists, it is the further purpose of the Procedure to provide for an equitable distribution of such new business, on a rotating basis, to all members of the sales force. Similarly, Clause 50-B of the Supplemental Rules for District Management, the second directive cited by the Union, is clearly intended to provide for equitable distribution of new business to all sales personnel and to prevent Management personnel exploiting their special
positions and greater access to new business at the expense of other members of the sales force. In my view these cited directives were not intended to apply to business obtained as that of the Messrs. Kelly was obtained, nor can any reasonable reading of those directives support such an interpretation. The Messrs. Kelly did not go the "Public Window," nor did they telephone the Company office. And even if that procedural provision applied, the Company's Clerk is required to first establish if the "person has any preference for a particular representative." Only if "no preference is given" is "present Metropolitan Business in the family" relevant. Here, the record clearly indicates that the Kellys had a preference for Windsor, making inconsequential the fact that Fried had written or serviced insurance on other members of the Kelly family.

But I do not find that this was a "lead" within that meaning. Rather the Kellys approached Windsor personally, outside of his office, in what can be described only as a social setting and against a background of over twenty years of personal acquaintance and friendship and asked for his advice and assistance, which he gave.
I cannot conclude that the directives in question were intended to require that a District Manager turn the matter over to another representative, unknown to the prospect, under those circumstances.

Nor under the instant facts and circumstances was Clause 50-B of the Supplemental Rules for District Management violated. It prohibits a District Manager from writing insurance for his own credit in only two situations; where a claiming agent 1. has written company insurance for the prospect within the preceding two years, or 2. has canvassed or serviced the prospect within the preceding 12 months. No other limitations are placed on the District Manager. Neither Agent Fried nor Mr. Ross, who acted on his behalf throughout this matter, could satisfy either of these conditions. By July 24, 1973, when Ross and, perhaps, Fried, first heard of the Kelly account, Windsor had already been servicing that account, at the specific request of the two prospects, for several months. It follows that Fried and Ross had acquired no status protected by Clause 50-B. Under that circumstance together with the fact that there are only two specific contractual limitations on a District Manager writing insurance for his own credit, I find no basis to award the commission to Fried on different grounds, namely because the Kellys resided in Fried's geographic district. Accordingly the grievance is denied.

Eric J. Schmertz
Arbitrator