The stipulated issue is:

Was there just cause for the discharge of Bernard Plotsker? If not what shall be the remedy?

A hearing was held on January 9, 1975 at which time Mr. Plotsker, hereinafter referred to as the grievant, and representatives of the above named parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The grievant was discharged for "low bookings."

In this case I accept as accurate the Employer's testimony supported by a written statement from his accountant, that his "break-even point" for each car in his fleet (i.e. the point at which reasonable operating expenses are met and below which it loses money) was 41.787 cents per mile for the ten month period January 1 through October 31, 1974. In this case I deem that break-even point to be reasonable. Additionally in this case, I deem cents booked per mile as a reasonable and relevant measurement of whether bookings are low or adequate, and that the ten month period
was enough time within which to make a valid determination.

The record shows that during that period the grievant was not only consistently the lowest hooker in the garage, based on the cents per mile standard, but that his bookings fell well below that break-even point, averaging about 35 to 37 cents per mile. (A level which a principal Union official conceded was unreasonable.)

I am satisfied therefore that the grievant's record is one of "low bookings" within the definition I previously enunciated and promulgated, and in this case the Employer has met the burden of showing "low bookings" within that definition.

It should be clear that this decision is applicable only to this particular case. In future "low bookings" cases I intend to decide the probative value of the evidence, the manner, quantity and quality of proof required, and standards to be applied on a case by case basis.

I have previously held that an employee may be disciplined for low bookings in accordance with the "progressive discipline" formula. I am satisfied that the purpose and intent of that formula was adequately complied with by the Employer in the instant case. Several times the grievant was warned orally and in writing about low productivity. Though not precisely suspended prior to the instant discharge, the purpose and import of a suspension was achieved by the
two previous times he was discharged, which, on the Union's intervention were revoked not simply because they were procedurally premature but rather "to give the grievant a final chance." The evidence that the Employer agreed to revoke those earlier discharges for that reason, is unrefuted. Consequently, as the purpose of a suspension is to impress upon an employee the unacceptable nature of his work and to put him on notice that unless improved, his job is in jeopardy, those two attempts by the Employer to discharge the grievant, revoked on the grounds mentioned, served that purpose. And I am satisfied that the grievant knew or should have known of that purpose. Accordingly I deem those two revoked discharges, under their particular circumstances, to be constructively equivalent to a suspension within the progressive discipline formula.

Hence, when thereafter the grievant's productivity record remained below the "break-even point," his discharge was warranted, and that action is accordingly upheld.

The Undersigned, as Impartial Chairman under the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD:
There was just cause for the discharge of Bernard Plotsker.

ERIC J. SCHMERTZ

DATED: January 21, 1975
STATE OF New York ) ss.:
COUNTY OF New York )

On this twenty first 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.
January 17, 1975

Eric J. Schmertz, P.C.
122 East 42nd Street
New York, N. Y. 10017

Dear Mr. Schmertz:

In recent arbitrations, various Employers have produced letters from their accountants which recite a "break-even point" as probative of alleged "low bookings-high mileage".

On behalf of the Union, I object to the practice on at least two grounds:

First, whatever has gone into the computation of the break-even point will forever remain a mystery unless both the accountant and supporting business records are produced.

Second, and of utmost importance, the Employers have conceded that the actual salaries of owners and managers are a factor in determining the "break-even point". These salaries represent profits. Indeed, there may be no other declared profits whatsoever. The "break-even point" is therefore equivalent to the Employers stating that, regardless of the salaries-profits that they command, they cannot "break even" unless a certain figure is attained.

This permits the Employer to set any profit margin he wishes and to discharge any driver whose bookings cannot support that margin.

This result would undermine the awards of the Impartial Chairman which awards have sought to establish a fair standard of productivity.

Very truly yours,

Donald F. Menagh

CC: Maurice H. Goetz, Esq.
In the Matter of the Arbitration
between
New York City Taxi Drivers Union
Local 3036, AFL-CIO
and
Metropolitan Taxicab Board of Trade,
Inc. on behalf of Columbia Operating
Co., Inc.

The undersigned, as Impartial Chairman under the
Collective Bargaining Agreement between the above-named
parties makes the following findings and Award:

At a hearing held on December 30, 1974, initiated by
Columbia Operating Co., Inc., said Employer sought a direct-
ive from the Impartial Chairman recognizing its right to
impose certain work rules at its garage.

I find that Columbia Operating Co., Inc. has the
right, pursuant to Article III of the Collective Bargaining
Agreement, to establish reasonable work rules at the garage.
I further find that Columbia has the right to post a notice
in its garage establishing 7:30 A.M. as the time beyond
which it will no longer hold a taxi for a steady driver and
that cabs otherwise driven by steady drivers may be dispatch-
ed to others after said time. I further find that Columbia
Operating Co., Inc. may establish a time of 4:30 P.M. as the
return time for all taxis dispatched during the morning
shift.
I hereby direct that any interference with the implementation of these work rules shall be cause for the imposition of discipline upon any employee who instigates, participates in, or gives leadership to any such interference.


Epic J. Schmertz
Impartial Chairman

STATE OF NEW YORK ) SS:
COUNTY OF NEW YORK )

On this 3 day of January, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me as the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Marsha L. Steinhardt
Notary Public

[Notary Public Seal]
In the Matter of the Arbitration between
New York City Taxi Driver's Union Local 3036, AFL-CIO on Behalf of John Gordon, Stephen Mantin, David Tobis, Paul Wasserman and Thomas Robbins and Metropolitan Taxicab Board of Trade, Inc: on Behalf of Dover Garage, Inc.

The stipulated issue is:

Is there just cause for disciplinary action against John Gordon, Stephen Mantin, David Tobis, Thomas Robbins and Paul Wasserman? If so what shall it be?

Hearings were held on December 27, 1974 and January 9, 1975 at which time the above named employees, hereinafter referred to as the "employees" and representatives of the above named Employer and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and to cross-examine witnesses. The Union and the Employer, hereinafter referred to jointly as the "parties," filed post hearing briefs. At the request of the Impartial Chairman, counsel for the parties agreed to extend the due date for rendition of the Award until on or before March 14, 1975.

The Employer seeks the right to discharge Messrs. Robbins,
Gordon, and Tobis, and to impose a three week suspension on both Wasserman and Mantin. The Employer charges that the employees violated Article XXVI, Industrial Peace of the collective bargaining agreement by engaging in a work stoppage within the meaning and prohibition of that contract section.

Article XXVI provides in pertinent part:

During the term of this contract, the Union, its officers, representatives, agents, and members agree that they shall not authorize, instigate, cause, aid, encourage, support, condone or participate in any strike, slowdown, work stoppage, boycott or picketing or patrolling directed against, or any curtailment of work, or restriction of, or interference with, the operations of the employer or any of its affiliated companies.

The Employer shall have the unrestricted right to discipline, up to and including discharge, any employee who instigates, participates in, or gives leadership to any activity herein prohibited.

The foregoing contract provisions have been the subject of numerous decisions by this Impartial Chairman. In my decision of May 28, 1974, In the Matter of the Arbitration between New York City Taxi Driver's Union, Local 3036, AFL-CIO and Metropolitan Board of Trade, Inc., on behalf of Dover Garage, Inc. (the same parties as in the instant case) the issue before me was whether there was reasonable cause for the discharge of Thomas Robbins, one of the employees herein. I decided that Robbins' actions were justified because he had been provoked by the Employer's
dispatcher and that therefore cause did not exist for his dis-
charge. However I stated:

He (Robbins) is reminded that there are no circumstances which justify the utilization of self-help to redress a grievance. All complaints against the Company are to be processed as grievances and submitted to arbitration in accordance with the contract. No other remedy is permitted. The arbitration forum is fully capable of redressing all grievances and making employees whole for any Employer breach of the contract. Consequently, as I have repeatedly held and stated, strikes, slowdowns and other interruptions of the Company's normal operations are impermissible methods of handling a grievance and constitute dischargeable offenses....In the future any complaints that he (Robbins) may have against the Company and any allegations that the Company has not followed the contract must be handled in only one way - as a grievance under the grievance and arbitration provisions of the collective bargaining agreement.

In my award of June 17, 1974 between the same parties, again involving the question of whether reasonable cause existed for the discharge of Tom Robbins I withheld decision on whether Robbins "instigated or encouraged a work stoppage" and reserved the rights of the parties on that question pending future developments. I stated explicitly, pursuant to the stipulation of the parties withdrawing that arbitration:

It is agreed that the utilization of self-help in the form of a work stoppage to redress a grievance is not justified and that all such grievances should be submitted to arbitration in accordance with the collective bargaining agreement. It is further agreed that no other remedy is permitted and that the arbitration forum is fully capable of redressing any and all grievances.

It is acknowledged that the work stoppage that occurred at Dover Garage on May 14, 1974
is an impermissible method of handling a grievance. If Tom Robbins instigated or encouraged such work stoppage, Dover Garage would be justified in imposing a disciplinary penalty up to and including discharge, subject to review under the grievance and arbitration provisions of the contract....

In the future, if Mr. Robbins commits any violation of any work rule at Dover Garage, the question of penalty may be considered in light of his entire work record....

In numerous other Awards between the Union and other employers, in industry-wide awards, and in formal and informal conferences, and rulings and directives of the Impartial Chairman, the impermissibility of work stoppages in any form was reiterated repeatedly and explicitly. Again and again the Impartial Chairman stated in decisions, directives, and meetings that the Industrial Peace section of the contract must be complied with by the Union, its designated representatives and its members, and that no matter what the underlying grievance might be, the exclusive procedure for its redress and adjudication was the grievance and arbitration provisions of the contract. There is absolutely no doubt in my mind that all employees in this industry, industry-wide, and their agents have been put on actual notice time and again that breaches of the "no strike" clause of the contract would not be tolerated and that utilization of self-help in the form of a work stoppage or any disruption of the Employer's normal operation as a means to achieve
resolution of a grievance is expressly prohibited; and that as an alternative, the arbitration forum was both available and fully capable of providing an aggrieved employee or employees a full remedy if the grievance is meritorious. It cannot be disputed that the instant employees have been put on such notice.

Moreover as the parties well know, and as has been made clear repeatedly to employees generally, and to the employees herein explicitly on at least two prior occasions, the Impartial Chairman has been ready to convene emergency arbitration hearings on the very day that a grievance arises, and to render a decision forthwith after the hearing, if the grievance is so compelling and has such immediacy as to warrant expedited attention.

Based on all the foregoing I find no justification whatsoever for the action which the employees took and which led to the instant case. I find that the employees, led by Thomas Robbins, acted in willful violation of the Industrial Peace section of the contract and in willful disregard and defiance of the foregoing Awards of the Impartial Chairman.

Under the fictitious guise of a "safety check" the employees, led by Thomas Robbins, effectively stopped the dispatching of cabs by the Employer during the dispatching period; persuaded drivers not to take out their cabs; held a shop meeting during that critical period; removed the ignition
key from the lead cab on the gas line to prevent the gassing and dispatching; and that in actuality this action was a work stoppage in retaliation for the Employer's failure to settle a different grievance, totally unrelated to safety, to the immediate satisfaction of Robbins and the other employees.

Robbins and the other employees are members of the Union's "shop committee" at this Employer. A dispute arose over a reward in the form of a check, which a passenger sent in for one of the drivers who retrieved and returned a piece of personal property left by the passenger in that driver's taxicab. In some inexplicable manner the check - was deposited by the Employer in his general account and neither it nor its equivalent in money, was given to the driver for which it was intended. The employees, led by Robbins, demanded an explanation from representatives of the Employer and a forthwith resolution of that dispute. They demanded that the dispatcher, whom they accused of improprieties in connection with the check, be confronted immediately with their demand. When the Employer asked for time to investigate the situation, the employees led by Robbins decided to pull a "safety check" on the cabs as they came in at shift time. A shop meeting was called at a time to coincide with the dispatching period. It lasted for at least twenty minutes during which time the normal dispatching of cabs, in normal quantities, was significantly delayed and disrupted. I find that the shop meeting and the safety check
would have continued for a good deal longer, thereby disrupting
the Employer's normal operations further, had not the rank and
file drivers voted to discontinue the shop meeting and the safety
check and reverse the action of the employees led by Robbins.

In contravention of the explicit provisions of the fore-
going Awards of the Impartial Chairman and his procedure to
hold emergency arbitrations when the situation warranted that
attention, the employees, led by Robbins, did not grieve the
dispute over the reward due one of the drivers nor did they
seek immediate arbitration of that issue, despite the requirement
under the foregoing awards that they follow that orderly
procedure, and despite the obvious fact that the arbitration
forum could have fully and readily remedied the problem by
directing payment of the reward to the driver who apparently was
entitled to it. Precipitous and unlawful action in the form of
a concerted and "shot-gun" safety check, designed not to find
safety problems with the cabs, but to demonstrate and impose on
the Employer the power of the employees, led by Robbins, to
shut-down the dispatching operation as punishment for failure
to settle the grievance as quickly and in the manner which
Robbins and the other employees demanded.

I need not decide whether a "safety check" is an appro-
priate action by the shop committee, because I am fully satisfied
that this was not a bona fide safety check. I take a dim view
of the right of a shop committee to unilaterally halt the
dispatching of cabs to check the condition of those cabs without the agreement, or acquiescence of the Employer and without some contractual basis for doing so. The type of action involved herein, because of the time it occurred, its application to a vast number of cabs, the manner in which the lead cab on the gas line at least was disabled so that others could not move, together with the shop meeting was a per se disruption and interruption of the Employer's normal operations within the proscription set forth in the Industrial Peace clause of the contract. This is not to say that the employees do not have a right to complain about unsafe cabs. There are methods which they may follow to protest an unsafe condition of a particular cab, which is not disruptive of the Employer's normal operations, and which is not conducted on such a mass scale, during dispatching time, as to be beyond what is permissible in such a situation. Indeed under the newly negotiated contract the parties have provided for just such a procedure which points up sharply the difference between a bona fide and orderly check on the safety of a cab, and the impermissible action and improper intent of the employees, led by Robbins, in the instant case.

The contention of the employees that their action is "protected" under the National Labor Relations Act is totally untenable. It is universally accepted and universally settled that Union representatives including members of shop committees have a higher duty to uphold the integrity of the collective
bargaining agreement, and all provisions thereof, especially the grievance and arbitration sections and the no strike clause. For members of the shop committee to engage in a work stoppage, whether under the guise of a concerted "safety check" or otherwise, is to subvert the stability of the contract and the orderly procedures which the Union and the Employer have agreed upon to resolve all disputes. And it is equally well settled that for just that reason, employees who hold union positions, and who engage in such proscribed activities are subject to more severe disciplinary penalties than are ordinary rank and file members. Indeed, in the course of the hearing the Impartial Chairman asked Mr. Robbins why he did not grieve and ask for immediate arbitration of the dispute involving the reward check due one of the drivers. Robbins responded "I thought of doing that but decided not to." Obviously then, he knew the procedure which he was to follow but willfully and knowingly rejected it. By doing so he defaulted on the higher duty which he owed to the Employer, to the Union and to the letter and spirit of the contract.

It should be clear therefore that this Employer, in seeking the right to impose on the employees the disciplinary penalties he requests, does not do so to discriminate against them for Union activity. That each of them is a member of the Union shop committee does not give them protection when they act in violation of the contract and in violation of the prior Awards of the Impartial Chairman. They cannot, as a defense
to their unlawful actions, cloak themselves with an immunity based on their representative positions with the Union.

The evidence fully demonstrates that each of the employees actively participated in and assumed some direction of the work stoppage. But the principal leader was Robbins. Based on the record it is my view that but for Robbins' leadership the so-called "safety check" and shop meeting would not have taken place no matter how angry the other employees were about the underlying grievance. Therefore while each are subject to disciplinary penalties a distinction is made between Robbins and the others.

For their unlawful action which, stripped to its real purpose, intent and objective, was nothing more than a willfully instigated and implemented work stoppage in violation of the Industrial Peace provisions of the contract and in violation of the explicit Awards and other directives of the Impartial Chairman, disciplinary action is warranted and in no respect whatsoever can it be construed as discrimination against the employees either for Union activity or because of their role as representatives of the Union.

Accordingly the Undersigned, as Impartial Chairman in the contract between the above named parties makes the following AWARD:

The Employer may discharge Thomas Robbins.

The Employer may impose a two week disciplinary suspension on John Gordon, Stephen Mantin, David Tobis and Paul Wasserman.

Eric J. Schmertz
Impartial Chairman
DATED:
STATE OF New York )
COUNTY OF New York )ss.:

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 instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration
between
New York City Taxi Driver's Union
Local 3036, AFL-CIO
and
Metropolitan Taxicab Board of Trade, Inc. on Behalf of
55th Street Taxi Garage, Inc.

The stipulated issues are:

What shall be the disposition of the grievance of David Ross with respect to his alleged improper discharge?

Does the Employer have cause or the right to impose disciplinary penalties on those employees who allegedly engaged in an alleged work stoppage on March 12 and March 13, 1975?

A hearing was held at the offices of the American Arbitration Association on March 14, 1975, at which time representatives of the above-named Union and Employer appeared. All concerned were afforded opportunity to offer evidence and argument and to examine and cross-examine witnesses.

At the outset, I wish to confirm my announced finding that all grievances relating to working conditions and terms of employment at the garage may be raised by the Union and heard by the Impartial Chairman at a future date. No findings have been made with respect to such grievances and the rights of all parties are expressly reserved. Similarly, although no findings will be made, this Opinion and Award shall not
preclude the right of the Employer to seek in a future arbitration to recover from the Union the loss of any revenues occasioned by the alleged work stoppage.

David Ross was discharged on February 28, 1975 by the Employer following an incident with the cashier. Although Mr. Ross was a Union member and had been employed at Forest Maintenance prior to his employment with the Employer, a period of 30 calendar days subsequent to his employment at 55th Street Garage had not been completed. Although the Union seeks to include the date of March 13, 1975 as a day worked, Mr. Ross was permitted to work, under protest, at my direction and such working day shall not accrue to his benefit.

As I have determined this issue on the basis of contract language and interpretation it is not necessary to examine the events of February 28th or to decide whether or not just cause existed for the discharge of David Ross.

I find that Section 3 of Article XXV Seniority of the collective bargaining agreement is applicable in the instant case and that, notwithstanding an employee's industry-wide seniority, an employee shall be regarded as probationary for the first 30 calendar days after employment with an employer. Accordingly, as probationary employees may be discharged for any reason, the discharge of David Ross is upheld.

The Employer has introduced testimony concerning a work stoppage that occurred at the garage on March 12 and March 13, 1975. As I have stated on numerous occasions and in numerous awards, rulings and directives, the utilization of self-help in the form of work stoppage to redress any
grievance is not justified and the exclusive procedure for such redress is the grievance and arbitration provisions of the contract. Breaches of the Industrial Peace clause of the contract will not be tolerated and any disruption of the Employer's normal operations as a means of a resolution of a grievance is expressly prohibited.

I also reiterate my statements of earlier Awards that the Union representatives, including the members of the shop committee, have a higher duty to uphold the integrity of the collective bargaining agreement and all provisions thereof, especially the grievance and arbitration clause and the Industrial Peace clause. It is well settled that employees who hold Union positions and who engage in proscribed activities are subject to more severe disciplinary penalties for their actions in subverting the stability of the contract and the orderly procedures which the Union and the Employer have agreed upon to reserve all disputes.

As noted in the collective bargaining agreement and as stated on numerous prior occasions, the Employer has the unrestricted right to discipline, up to and including discharge, any employee who instigates, participates in, or gives leadership to a proscribed work stoppage. But for the unusual circumstances under which this expedited arbitration was scheduled, I would uphold the Employer's right to impose severe disciplinary penalties in this case.

As an impartial third-party to the settlement of the work stoppage, I have determined that disciplinary action in the instant case alone is not permissible and, accordingly,
I find no right on the part of the Employer to impose discipline by reason of the incidents in question.

In the future, all complaints against the Employer are to be processed as grievances in accordance with the contract. The arbitration forum has always been fully capable of re-dressing such grievances and there are no circumstances which justify the utilization of self-help, whether in the form of strikes, slow-downs, stoppages or other interruptions of normal operations.

[Signature]
Eric J. Schmertz
Impartial Chairman

Dated: March 19, 1975

STATE OF NEW YORK )
COUNTY OF NEW YORK )

On this 19 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 instrument, and he acknowledged to me that he executed the same.

[Signature]
Notary Public
FRANK T. ZOTTO
Notary Public, State of New York
No. 41-0211400
Qualified in Queens County
Commission Expires March 30, 1976
In the Matter of the Arbitration
between
New York City Taxi Drivers Union
Local 3036, AFL-CIO

and

Metropolitan Taxicab Board of Trade, Inc.
on behalf of Dover Garage, Inc.

The stipulated issue is:
Was there reasonable cause for the discharge of
Tom Robbins? If not, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on May 22, 1974, at which time Mr. Robbins, hereinafter referred to as the "grievant," and 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.

I find blame on both sides. The grievant is to be blamed for using profane and insulting language to a managerial employee and by using a phrase which could reasonably be interpreted only as a challenge to a fight. On the other hand I find that Mr. Isaacson, the managerial employee involved, acted in a manner which the grievant had reason to interpret as insensitive and provocative.

I find no fault with the Company policy not to accept personal phone calls for its employees at shift time when checks are being distributed. The rule is proper in order to prevent
interference with the Company's operations during that particularly busy period. However, for reasons indicated further, the Company's admission that it had not made that policy known to its employees was, in my judgment, a contributing factor to the incident between the grievant and Isaacson. Also it is clear that when the grievant's wife called on May 7th, Isaacson told her that he could not accept personal calls and discontinued the conversation before she could identify herself and tell him of the alleged emergency nature of the call. Hence at that time Isaacson did not know who was calling or that she called to tell the grievant their son was lost.

I find no particular fault with the grievant's initial action four days later (his first working day following the aforementioned phone call) when he informed Isaacson that the rejected phone call was an emergency - that his wife was trying to notify him that their son was lost. There is no evidence that this statement by the grievant to Isaacson was at that point intemperate or challenging. In response however, by his own testimony, Isaacson replied "we still don't take personal messages." Isaacson repeated the phrase "No personal calls" when the grievant again stated that the call was to inform him that his son was lost.

Considering the fact that the grievant did not know of the Company's policy not to accept and relay personal phone calls during shift hours when checks were being handed out, I consider it understandable and reasonable that the grievant interpreted what Isaacson said as a callous, indifferent and
unsympathetic response to the grievant's personal emergency, and an absolute prohibition on personal calls even in an emergency. While the grievant's conduct thereafter cannot be condoned, his intemperate, angry and challenging reaction is understandable and not unpredictable.

In short, had the Company made its policy regarding personal phone calls known to its employees, and had Isaacson's response included an explanation of that policy and some expression of concern and sympathy regarding the grievant's son, or at least that he did not know of the emergency when the call came in, I think the incident might not have occurred. On the other hand, the grievant's use of foul and insulting language to Isaacson and his challenging statement to "come outside" was both improper and unnecessary. He should have controlled his anger and complained to the Union and grieved.

I have previously held and stated on numerous occasions that unprovoked use of insulting, disrespectful and insubordinate language by an employee to supervision is a dischargeable offense. And certainly that holds for challenges to fight. However, here that penalty is mitigated by a degree of provocation, which whether so intended by Isaacson or not, was, I find, reasonably so interpreted by the grievant. Suspension, rather than discharge is the appropriate penalty here.

Accordingly the grievant shall be restored to work with his seniority intact but without back pay. He is reminded that there are no circumstances which justify the utilization of self help to redress a grievance. All complaints against the Company are
to be processed as grievances and submitted to arbitration in
accordance with the contract. No other remedy is permitted.
The arbitration forum is fully capable of redressing all griev-
ances and making employees whole for any employer breach of
the contract. Consequently, as I have repeatedly held and stat-
ed, strikes, slowdowns, and other interruptions of the Company's
normal operations are impermissible methods of handling a griev-
ance and constitute dischargeable offenses.

The Undersigned as Impartial Chairman between the above
named parties makes the following Award:

The discharge of Tom Robbins is reduced to a sus-
pension. He shall be restored to work forthwith
with his seniority intact but without back pay.
In the future any complaints that he may have
against the Company and any allegations that the
Company has not followed the contract, must be
handled in only one way - as a grievance under the
grievance and arbitration provisions of the Collect-
ive Bargaining Agreement.

Eric J. Schmertz
Impartial Chairman

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

On this 28th day of May, 1974, before me personally came
and appeared Eric J. Schmertz to me known and known to me to
be the individual described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

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

On due notice hearings were held, at which Mr. Summers, hereinafter referred to as the "grievant" and representatives of the Union and Employer appeared. All were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

Prior to the alleged offenses which triggered his discharge, the grievant had been orally warned and had received three written warnings and a six day disciplinary suspension for various offenses including singly and cumulatively, accidents, failure to complete the safe driving school as directed, a "flag up" violation, high mileage and low bookings, and bringing in his cab late.

The first question is the legitimacy of those oral and written warnings and the six day suspension. It is well settled that warnings and suspensions must be justified by the Employer if challenged when they are originally imposed. However, if unchallenged at or within a reasonable time after imposition, the warnings and suspensions are presumed justified.
Thereafter, if questioned in a later proceeding involving, as here, an employee's discharge for subsequent offenses together with that prior record, the burden is on the challenging party to refute that presumption. In the instant case that presumption has not been refuted. Consequently the oral and written warnings and the six day suspension must be deemed factual and valid.

The issue then is whether the grievant is guilty of all or any of the subsequent offenses which, together with his prior record warrants the penalty of discharge.

Based on the record before me I conclude that discharge was proper. He is charged with five subsequent offenses, namely late return of his cab, failure to call an attorney regarding an accident when instructed to do so, use of profane, contemptuous and disrespectful language to the day-line dispatcher, additional incidents of excessive mileage and low bookings following a meeting on that subject with the Union, and a failure to correct that "bad mileage ratio" following the six day suspension.

I find that I need not analyze the evidence on all five of these accusations because the grievant's conduct in connection with the third item, namely, his insubordinate and abusive use of profane and obscene language to the day line dispatcher, constitutes against the backdrop of this prior record, a dismissable offense.

I do not accept the assertion that the grievant's language was merely "joking" or ordinary "shop talk." Rather I
am persuaded that he directed invective at and to the dispatcher personally, and used obscene phrases in a grossly insubordinate, disrespectful and challenging manner. And he did so in the presence of others. I recognize that this is a taxi garage and that the language used in conversation and business dealings between employees and representatives of management may well include earthy words and phrases. But the facts here were different. The grievant used obscene phrases to insult the dispatcher, and to degrade him in the eyes of others, and I do not find that the dispatcher provoked the grievant into doing so.

Arbitration cases uniformly hold that this type of insubordinate abuse of a management representative by an employee is grounds for summary dismissal irrespective of the employee's prior record. And where, as here, a prior record includes a series of warnings and a six day suspension over a relatively short three year period of employment, the principle of "progressive discipline" has been met and the propriety of termination is manifest. This is not to say that the other four reasons pointed to by the Employer as grounds for the grievant's discharge have been either proved or disproved. Rather only that a determination of those charges is not necessary in reaching a decision on the propriety of the grievant's dismissal.

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

There was just cause for the discharge of Walter Summers.

 Eric J. Schmertz
 Impartial Chairman

DATE: March 27, 1974
STATE OF New York )ss.:
COUNTY OF New York)

On this 27th day of March, 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.
The Undersigned Arbitrators, duly designated in accordance with the arbitration agreement between the above named parties dated September 26, 1971, and having duly heard the proofs and allegations of said parties make the following AWARD:

The fourteen hour suspensions on November 13, 1972 of Francis McFawn, Jr. and Howard Franklin were not in violation of Article 9 of the current collective bargaining agreement.

Eric J. Schmertz
Chairman

James J. McDevitt
Concurring
Dissenting

Vincent J. Luca, Sr.
Dissenting
Concurring
DATED: September 18, 1975
STATE OF New York ) ss.
COUNTY OF New York )

On this eighteenth 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.

DATED: 
STATE OF 
COUNTY OF 

On this day of October, 1975, before me personally came and appeared James J. McDevitt to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: 
STATE OF 
COUNTY OF 

On this day of October, 1975, before me personally came and appeared Vincent J. Luca, Sr. to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with Article 9 of the collective bargaining agreement dated September 26, 1971 between IBEW Locals 2222, 2320-27, AFL-CIO, hereinafter referred to as the "Union" and New England Telephone Company, hereinafter referred to as the "Company", the Undersigned was designated as the Chairman of a tri-partite Board of Arbitration, to hear and decide, together with the Union and Company designees to said Board, the following stipulated issues:

1. Was the suspension of Francis McFawn, Jr. for 14 hours, November 13, 1972, in violation of Article 9 of the current collective bargaining agreement? If so, what should be the remedy, if any?

2. Was the suspension of Howard Franklin for 14 hours, November 13, 1972, in violation of Article 9 of the current collective bargaining agreement? If so, what should be the remedy, if any?

The relevant section of Article 9 (specifically 9.03(a)) reads:

If the grievance involves a discharge or disciplinary action, the Board of Arbitration shall determine whether the discharge or disciplinary action was for just cause. If the Board of Arbitration finds that the discharge or disciplinary action was without just cause, the employee shall be reinstated and may receive his straight time rate of pay for time lost, less any amount other than wages, received from the Company at time of dismissal.
A hearing was held in Boston, Massachusetts on May 19, 1975 at which time Messrs. McFawn and Franklin hereinafter referred to as the "grievants", 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. Messrs. Vincent J. Luca, Sr. and James J. McDevitt served respectively as the Union and Company Arbitrators on the Board of Arbitration. The Oath of the Arbitrators was expressly waived. The parties filed post-hearings briefs. The Arbitration Board met in Executive Session in New York City on September 22, 1975.

The grievants, both installer-repairmen, were suspended on the day and for the periods indicated in the stipulated issues, for refusing to perform the same work assignment - to climb a telephone pole, using a ladder, to perform certain work aloft.

The parties recognize the fundamental rule that employees must carry out work duties as assigned, and thereafter may grieve if they considered those assignments to be outside the scope of their job classification or otherwise improper. What is involved in this case is a recognized exception to that rule, namely the "safety exception." The grievants, and the Union on their behalf, contend that this assignment was too dangerous and unsafe under the conditions then present; that to perform the work would have subjected the grievants to bodily danger, and that therefore they were justified in refusing to perform the work within the meaning of the foregoing "safety exception."
Specifically it is contended that the job assignment was dangerous and unsafe because:

1. the pole (it was actually two poles, an old one to be replaced, attached to a newly installed pole) contained an insignia indicating "trouble aloft."

2. under prescribed procedure, because of pedestrian and vehicular traffic in the area, and because of broken cement underfoot, the ladder to be used in ascending and working aloft, had to be footed by a second employee.

3. live wires belonging to the Boston Edison Company (which use the poles jointly with the Telephone Company) had lost much of their insulation, and were hanging down close to the area at which the grievants were to work.

4. on the pole(s) was a streetlight, and light arm, (also under the jurisdiction of the Electric Company) and the through-bolt holding the light arm to the pole was too close to the area where the grievants were to work. There was no indication that the lamp arm, the through-bolt or the electrical connections thereto were grounded. If not, those locations as well as the entire pole might have been energized with dangerously high voltage, closer to the work area of the grievants than the Company's rules allow.

5. the ladder which the grievants were directed to use and from which they would perform the work was too short to permit the performance of this work within the Company's prescribed safety procedures. (The procedures call for work to be done by standing not above the fourth rung from the top of a ladder. It is asserted that the ladder's length would have required the grievants to stand at least two rungs from the top).

In my judgement when the "safety exception" is invoked, the burden is on the employee (and the Union on his behalf) to show not simply that he had sincere and good faith belief that the work was unsafe and dangerous beyond the requirements of his
job classification but also:

1. that an unsafe and dangerous condition endangering his "life or limb" and beyond his job classification in fact existed, in support of his sincere belief, and that his belief related to that factual condition(s);

2. that at the time he refused to perform the assignment he expressed his fears not generally, but by specific reference to the unsafe and/or dangerous conditions (contrasted with an attempt later to justify his refusal by referral to an unsafe condition which he did not know about when he refused to perform the work order);

3. that the dangerous and unsafe condition could not be eliminated or neutralized through normal or reasonable methods which the employee knew or should have been familiar with, and was capable of employing as part of his job;

While there is some question in my mind about the motives of the grievants in refusing to perform the assignment, and while the record is unclear as to whether both grievants knew of the alleged aforementioned unsafe conditions when they refused to go aloft (they and their Union representative objected at the time only because the ladder was not to be footed by a second bargaining unit employee), I find I need not make determinations in those regards. Based on the record before me I am satisfied, within the conditions I have previously set forth under which the "safety exception" may be invoked, that the issue narrows simply to the length of the ladder to be used.
The insignia on the pole indicating "trouble aloft" is not a legitimate basis to refuse to work aloft on or in the area of that pole. Indeed the Union does not make that assertion, but merely refers to the insignia as an indication that there may be a dangerous condition aloft. Assuming a real danger from the live uninsulated Edison wires; from the potentially energized street lamp, lamp arm and through-bolt; and assuming that all or some of those electrical dangers were too close to the area at which the grievants were to work, all could have been effectively eliminated or neutralized by a procedure which I find these two grievants knew of and knew how to utilize. Specifically their use of a B voltage tester could have indicated to them, before they reached any area of danger, whether the pole or any section of it was energized and if so, their use of a "temporary bond" would have eliminated or neutralized any of those electrical dangers while they performed the work as assigned. Therefore the conditions set forth in Item 3 above, namely that the potentially dangerous or unsafe condition could not be eliminated or neutralized, was not met in this case. Instead, because those hazards could have been readily handled by equipment and methods known to the grievants as part of their work procedures, the grievants may not now rely upon those dangers to justify their refusal to perform the assigned work.
The same is true with regard to "footing" the ladder. The

grievants knew or should have known of the method and procedure
to "lash" the ladder when work is being performed aloft by a
single employee without assistance below. The lashing procedure
would have eliminated any potential danger attendant to the
absence of an employee at the foot of the ladder. Moreover, as
to one of the grievants, his supervisor offered to foot the
ladder for him. So, as to that grievant, though he may have
had a subsequent grievance over the performance of bargaining
unit work by a supervisory employee, he cannot claim that he
was endangered by the failure of someone to foot the ladder.

That leaves the length of the ladder to be considered. I
find the evidence on that item to be sharply conflicting, off-
setting and hence indeterminative. The Union's case is that
the ladder was too short; that the day before when one of the
grievants performed the same work "under protest" he was forced
to stand on the second rung from the top, a position both
dangerous and proscribed by the Company's operating rules. On
the other hand there is the offsetting testimony in the record
by the supervisor who climbed the ladder and performed the work
after the grievants refused, that he was able to do the work at
waist height, standing on the fourth rung from the top. And
there is no evidence in the record of any significant difference
in height between the grievants and that supervisor which would
make any material difference. Additionally, as is its right
in making summation argument, the Company in its brief set forth certain drawings and mathematical dimensions which support the assertion that a ladder of this length (24 feet) could be placed at a proper angle and that an employee working from it could perform the work involved in this case at about waist level standing on the fourth rung from the top. In short, with the burden on the grievants to prove dangerous or unsafe conditions, the evidence on the single remaining question, namely the adequacy of the length of the ladder simply has not met that burden.

For the foregoing reasons I do not find that the grievants or the Union on their behalf have shown that the work assignments involved were or would have remained so unsafe or dangerous to life and limb as to warrant a refusal to perform those duties. Accordingly the suspensions of the grievants are upheld.

Eric J. Schmertz
Chairman
In The Matter of The Arbitration between
International Brotherhood of Electrical Workers, Locals 2222, 2320-27, AFL-CIO and New England Telephone Company

The Undersigned Arbitrators having been duly designated in accordance with the Arbitration Agreement between the above named parties, and having duly heard the proofs and allegations of said parties make the following AWARD:

The grievances on the suspensions of Splicers F. Samuel, R. Duggan, D. May and J. Dowd present an arbitrable issue in this case.

Eric J. Schmertz
Chairman

Vincent J. Luca, Jr.
Concurring

James Grandfield
Dissenting

DATED: April 14, 1975
STATE OF New York ss.
COUNTY OF New York

On this fourteenth 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 the Matter of the Arbitration
between
Local 210 International Brotherhood
of Teamsters

and
Continental Connector Corporation

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

The discharge of Dorothy Lee Brown Walley is reduced
to a disciplinary suspension. She shall be reinstat-
ed but without back pay. The period from discharge
to reinstatement shall be deemed a disciplinary sus-
pension for an unsatisfactory attendance record. She
is on notice that unless that record shows immediate
improvement and becomes and remains satisfactory, she
would be subject to summary discharge.

Dated: April 6, 1972
STATE OF New York ss:
COUNTY OF New York

On this 6 day of April, 1972, before me personally came
and appeared Eric J. Schmertz to me known and known to me to
be the individual described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between

Local 210 International Brotherhood of Teamsters

and

Continental Collector Corporation

Opinion

The stipulated issue is:

Was there just cause for the discharge of Dorothy Lee Brown Walley? If not what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on February 18, 1972 at which time Mrs. Walley, hereinafter referred to as the "grievant," and representatives of the above named Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The parties expressly waived the Arbitrator's oath.

The grievant was discharged because of excessive tardiness and absenteeism.

It is clear and well settled, as I stated in an earlier Award between the parties, that the Company is not required to indefinitely tolerate excessive absenteeism or other irregular attendance by an employee.

However, in the instant case, though over a three year period from 1969 until May of 1970 the grievant's record of attendance and punctuality has not been satisfactory, I am persuaded that there are mitigating circumstances which warrant a reduction in the penalty.
The grievant's principal offense for the total period has been tardiness in reporting to work. Her absentee record showed some discernible improvement in 1971. But for her continuing inability to report to work on time I think she may not have been discharged.

Chronic excessive tardiness, standing alone, is also grounds for termination if it continues following imposition of lesser penalties pursuant to a progressive discipline formula. However, in the instant case I conclude that some of the circumstances surrounding the grievant's tardiness were not only beyond her control, but were due to a temporary condition, namely pregnancy, no longer present. I am satisfied that this condition and its attendant illnesses were responsible for a portion of her tardiness. Hence there is reason to believe that her record should and can improve. Also, many of her latenesses were a matter of minutes, which though not excused or excusable, are not as serious or disruptive to the Company's operation as if they had been of greater duration or if she had not reported to work at all.

Finally, and perhaps most important at least to my mind, is that offenses of this type should be subjected to a disciplinary suspension step within a progressive discipline formula. By losing time from work without pay, an employee is impressed with the seriousness of the offense and the Company's dissatisfaction with his record. Subjected to a temporary removal from the payroll, an offending employee is given the most unequivocal notice short of discharge that he must re-
habilitate himself to retain his job. I am not persuaded that a warning notice alone, not matter how many, can impress an employee that his job is in jeopardy if his record does not markedly improve. And that is why most arbitrators require an intermediate step between warnings and discharge, namely a disciplinary suspension - in cases where summary discharge is not warranted.

In my judgment this case, which involves primarily tardiness rather than absenteeism, and where the tardiness in many instances was for short periods of time, and conceivably in some others the result of pregnancy, falls within that general rule.

Accordingly I shall reduce the grievant's penalty of discharge to a suspension. She shall be reinstated but without back pay, and the period of time from discharge to reinstatement shall be deemed a disciplinary suspension. She is on notice that unless her attendance record shows immediate improvement and becomes and remains satisfactory, she would be subject to summary discharge.

[Signature]
Eric J. Schmertz
Arbitrator
In The Matter of The Arbitration between

International Brotherhood of Electrical Workers, Locals 2222, 2320-27, AFL-CIO and New England Telephone Company

In accordance with the arbitration provisions of the collective bargaining agreement dated September 26, 1971 between the above named Union and Company, the Undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide, together with the Company and the Union designees to said Board the following stipulated issue:

Do the grievances on the suspensions of Splicers F. Samuel, R. Dugjan, D. May and J. Dowd represent an arbitrable issue in this case?

Messrs. James L. Grandfield and Vincent J. Luca, Jr. served respectively as the Company and Union Arbitrators on the Board of Arbitration.

A hearing was held in Boston, Massachusetts on January 16, 1975, at which time 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 Oath of the Arbitrators was expressly waived. The parties filed post hearing briefs, following which they agreed to waive executive session of the Board of Arbitration.
The Company's assertion that the issue is not arbitrable is overly technical, and in this case unnecessary to preserve the purpose, meaning, and integrity of Article 9 Section 9.01 of the contract. That Section reads:

If the Union contends that the intent and meaning of one or more of the Articles of this Agreement (except as otherwise provided in the Agreement) has been violated by the Company, it may demand arbitration provided that written notice is received by the Company no later than thirty (30) calendar days after the conclusion of the final step of the grievance procedure.

By subsequent Agreement the parties stipulated:

2. Under Article 9 of the collective bargaining agreement effective September 26, 1971, the date of post-mark on an envelope containing a Demand for Arbitration (AAA form) to the Company shall be considered the date the demand for arbitration is made on the Company.

The effect if the subsequent agreement is to make timely a Demand for Arbitration that is mailed and postmarked on the thirtieth day after the conclusion of the final step of the grievance procedure, irrespective of when it thereafter reaches the Company.

In the instant case it is undisputed that the Union's Demand for Arbitration was not received by the Company within the thirty calendar days prescribed in Section 9.01, nor was it mailed and postmarked on the thirtieth day as permitted under the subsequent Agreement. Instead the Union hand delivered the Demand
for Arbitration to the Company on the thirty-first calendar day. It is uncontested that it was received by the Company shortly after the opening of business on that thirty-first day. Also, it is stipulated that the thirty-first day, on which the Demand for Arbitration was hand delivered to the Company was a Monday (June 10, 1974). The thirtieth calendar day, Sunday (June 9, 1974), was of course, a non-working day.

Had the Union mailed its Demand for Arbitration to the Company on Sunday, June 9th, and had it been postmarked on that day, the Union would have been in compliance with Section 9.01 as modified by the subsequent Agreement, and the Company would not have raised the issue of arbitrability.

I find what actually happened to be of insignificant difference. For assuming "next day" mail delivery is assured in Boston and delivery is made before or shortly after offices open for business, the Union's hand delivery of the Demand for Arbitration reached and became known to the Company at the same time as if it had been mailed on the thirtieth day.

Based on the foregoing, I fail to see how the Company was prejudiced by the Union's failure to precisely follow the procedural requirements of Article 9 in filing its Demand for Arbitration. Manifestly, the intent and purpose of the time limit
set forth therein is to prevent grievances from festering after they had cleared though the grievance procedure; to protect the Company from the requirement that it arbitrate grievances that are stale after the Company has reason to believe, as a result of Union inaction, that the Union did not intend to arbitrate that matter; and to prevent unreasonable delays during which witnesses may become unavailable, memories may fail, and evidence may not be so readily at hand. None of these factors are present in the instant situation. Article 9 requires that the Union's Demand for Arbitration be mailed and postmarked no later than the thirtieth day following the conclusion of the final steps in the grievance procedure. The purpose and effect of that requirement is that the Company receive notice of the Union's Demand for Arbitration by the thirty-first day or shortly thereafter depending upon the efficiency of the postal service. Here, the Company received notice of the Union's intent to arbitrate within the time intended under Article 9. Consequently there were none of the foregoing circumstances of delay which could prejudice the Company's preparation and presentation of its case on the merits.

In my view to uphold the Company's technical argument under the particular circumstances in this case, would introduce into the collective bargaining agreement an antiquated concept of rigid common law pleading. I am certain that that is not what the parties want or was intended under Article 9.
In sum, though the Union did not follow the procedures of Section 9.01 of the contract as modified by paragraph 2 of the subsequent Agreement precisely and absolutely in every respect, its notice to the Company of its intent to arbitrate this case exceeded any requirement of "substantial compliance." I would characterize the Union's notice to the Company in the instant case as constituting "virtual compliance", which in no way that I can see prejudiced the Company's rights and opportunity to prepare and present its full substantive case on the grievances. In fact I do not even see that the Company has been inconvenienced.

Accordingly the grievances are arbitrable.

Eric J. Schmertz
Chairman
The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated September 2, 1968 and having duly heard the proofs and allegations of the Parties, Award as follows:

There was not just cause for the discharge of Chester Zaremba within the meaning of Article 9.03 of the contract. His discharge is reduced to a two month suspension. He shall be reinstated with back pay less pay for the two month suspension and less earnings if any from employment elsewhere during the period of the discharge.

Eric J. Schmertz
Chairman

Leonard J. Sprague
Concurring

Norman I. Baker
Dissenting

Case No. 1130 0385 71
DATED: May 1972

STATE OF New York

COUNTY OF

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

DATED: May 1972

STATE OF

COUNTY OF

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

DATED: May 1972

STATE OF

COUNTY OF

On this day of May, 1972, before me personally came and appeared Norman I. Baker to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration
between
International Brotherhood of Telephone
Workers, Locals 2222, 2320-27

and

New England Telephone & Telegraph Co.

Opinion
Chairman

In accordance with Article 9 of the Collective Bargaining Agreement effective September 2, 1968 between New England Telephone & Telegraph Company, hereinafter referred to as the "Company," and International Brotherhood of Telephone Workers, Locals 2222, 2320-27, hereinafter referred to as the "Union," the Undersigned was selected as the Chairman of a tripartite Board of Arbitration to hear and decide, together with the Company and Union designees to said Board, the following stipulated issue:

Was the Company without just cause in discharging Chester Zaremba within the meaning of Article 9.03 of the contract? If so what should be the remedy?

A hearing was held in Boston, Massachusetts on March 8, 1972 at which time Mr. Zaremba, hereinafter referred to as the "grievant," and representatives of the Union and Company, hereinafter referred to jointly as the "parties," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. Messrs. Norman I. Baker and Leonard J. Sprague served as the Company and Union Arbitrators respectively on the Board of Arbitration. The parties expressly waived the Arbitrators' oath.

The parties filed post hearing briefs. The Board of Arbitration met in executive session in New York City on May 17, 1972.
The pertinent part of Article 9.03 of the contract delineating the authority of the Board of Arbitration to determine the propriety of a discharge reads as follows:

If such grievance involves a discharge or disciplinary action, the Board of Arbitration shall determine whether the discharge or disciplinary action was for just cause, and may not substitute its judgment for that of the Company unless it finds that the Company acted without making a reasonable investigation or that it acted upon evidence that could not have led a reasonable person to take such action.

Based on the foregoing contract language, I conclude that the Company's decision to discharge an employee may be overturned by a Board of Arbitration only if it finds that the Company acted without making a reasonable investigation or if a reasonable person would not have imposed the penalty of discharge upon the evidence in the record.

I find nothing unreasonable about the Company's investigation of the events and facts leading up to the grievant's discharge. But I am not satisfied that the evidence in the record before us in this arbitration, would have led a reasonable person to impose the penalty of discharge.

I am persuaded that the Company discharged the grievant primarily because it believed he was part of a criminal conspiracy, or at least a willing accessory to that conspiracy, to obtain confidential Company information from which certain criminal elements could locate and assassinate an informer sequestered by the FBI somewhere in New England. In my judgment the Company only secondarily charges the grievant with violations of Company rules and a Federal statute regarding
the confidentiality of the telephone records.

Based on my analysis of the evidence before this Board of Arbitration, I find that the Company has adequately proved the latter secondary charges, not the principal charge - at least not by the standard of clear and convincing evidence traditionally required in discharge cases.

This is not to say that the grievant was not a participant in the alleged criminal scheme but rather that the evidence presented falls significantly short of the measure of proof required for a reasonable person to find the grievant culpable.

The United States Attorney and a Federal Grand Jury investigating crime in the New England area had before it the same evidence regarding the grievant which was submitted in this arbitration. Yet an indictment was neither obtained nor handed up. Indeed the record indicates that the grievant's role in seeking the proscribed information from the records of the Company was fully investigated by the FBI, considered by the U.S. Attorney and the Grand Jury, and no criminal action was commenced against him.

The question therefore simply is whether this Board of Arbitration should on the same evidence, but based on the lesser standards of proof acceptable in arbitration cases, as compared to criminal matters, find the grievant culpable of participating in that alleged conspiracy.

I find we should not. Though the U.S. Attorney testified in the arbitration hearing, he did not (and indeed is prohibited from doing so) say what transpired before the Grand Jury. He
merely affirmed the fact that though the Grand Jury did not
indict, he nonetheless requested the Company "to take disciplin-
ary action" against the grievant. Neither in making that re-
quest of the Company nor in his testimony in this arbitration
did the U.S. Attorney explain his reasons for making that re-
quest. No doubt it was based upon his evaluation of the in-
estigation of the grievant, or on what took place before the
Grand Jury. Just what that is or was remains speculative. And
speculation is not the kind of clear and convincing evidence
required to convince a reasonable person that the penalty of
discharge is warranted. No doubt the testimony of the U.S.
Attorney in this arbitration was designed to persuade the Board
of Arbitration that it should infer that the grievant had some
nefarious connection with the alleged conspiracy, and that
based on that inference the Company's decision to discharge
the grievant ought to be upheld. Again we are asked to substi-
tute "inference" for the traditional quantum of clear and con-
vincing evidence. And again, in my judgment, a reasonable per-
son would not find that type of inferential conclusion to be
adequate support for the penalty of discharge.

Finally, the grievant, in his testimony in this arbitra-
tion, expressly denied any participation in a conspiracy or
knowledge of any reason why his brother and one Tilley wanted
the toll call records. The Company argues that this testimony
should not be believed because, concededly, the grievant lied
in the first stage of the investigation about who requested
him to obtain that information. Also the Company argues
that the grievant's testimony should not be believed because if he knew Tilley for a significant number of years he must have known that Tilley had an extensive police record and that a request for telephone records must have been for an improper purpose. I do not dispute totally the Company's reasoning that because he first lied and because he could not have known Tilley for so many years without knowing his criminal background, the grievant's testimony is suspect. Yet in my view - and I believe in the mind of a reasonable person - this degree of suspicion is just not enough to establish a clear and convincing connection between the grievant's efforts to obtain the prohibited information and his knowing participation in an alleged criminal conspiracy. For other explanations are at least equally possible and logical.

I can conceive of how he may have thought that his status in the eyes of his brother and Tilley may have been diminished had he involved them when the investigation began; and this could well have been enough reason for him to lie without imputing to him knowledge of why they allegedly wanted the telephone records. Indeed when the investigation was assumed by the FBI the grievant told the truth. No doubt because he then realized the apparent seriousness of the investigation. And confronted with an investigation of that magnitude, truthful answers were obviously more important to him than his standing with his brother and Tilley.

Also, though the Company offered no direct evidence to rebut the grievant's testimony that he did not know Tilley's criminal record, I cannot conclude that even if he had it means
he knew the particular purpose for which Tilley may have wanted the telephone call information. For a variety of reasons other than being part or having knowledge of any alleged conspiracy the grievant may have wished to accommodate Tilley; but any such accommodation cannot alone implicate the grievant in any criminal plans which Tilley and others may have had.

What I am saying is not that these are factual explanations for the grievant's action or that the grievant did not in fact seek to obtain the telephone records for a known criminal purpose, but that absent other implicating evidence these explanations are at least as reasonable as any unsavory interpretation.

In summary I must conclude that that major element in the Company's case against the grievant - an element which in my judgment caused his termination - has not been proved up to the level required in discharge cases. Therefore, in my view a reasonable person, unconvincing of the grievant's culpability with regard to the alleged criminal conspiracy, would not have taken discharge action against him. Accordingly under Article 9.03 of the contract the discharge shall be set aside.

The remaining question is one of remedy. In the stipulated issue the parties gave the Board of Arbitration authority to fashion a remedy in the event we found that the Company was without just cause within the meaning of Article 9.03 of the contract. Having so found we are authorized to fashion what we consider to be an appropriate remedy.

I am satisfied that the grievant's efforts to obtain confidential telephone call records was either a violation or attempted violation of an express Company rule and possibly a
Federal statute. That the grievant may not have known the import of the rule and statute is possible. But even so I cannot excuse him. It is undisputed that he signed statements during the course of his employment acknowledging familiarity with that rule and statute. And while employees may sign certain statements in connection with rules and laws without a conscious understanding of what they have read or are supposed to read, I have no choice but to conclude that the grievant had constructive if not actual knowledge of the rule and statute prohibiting the disclosure of telephonic communications and was bound to adhere to them. And though technically nothing was "disclosed," because the grievant did not obtain the information, I find that an "attempt" to do what the rule and statute prohibit is a violation in and of itself, for which discipline is warranted.

The extent of the grievant's inquiry of the Company to obtain the record of toll telephone calls originating from particular telephone numbers is not disputed. He first called a foreman who referred him to a business office supervisor. That supervisor told him that she could not discuss the matter further. The grievant then made a second effort by calling an account manager. That manager told the grievant that he could not give him the information requested and reprimanded the grievant for seeking it. No further effort was made by the grievant to obtain the information. Though violative of a Company rule and possibly a Federal statute, I do not find the grievant's efforts to obtain the information to have been as persistent or unyielding as the Company suggests. He did not try to get the
telephone records in a clandestine manner, but went directly to managerial and supervisory personnel. Though the Company suggests that this is an ideal way by one with criminal intent to turn aside suspicion it is also the logical way that an unsophisticated and innocent employee would attempt to obtain those records. So again the Company's extreme explanation is no more reasonable or acceptable than one that is not incriminating.

Accordingly I find only a bare violation of the Company rule and possibly the Federal statute. The grievant should have known better and therefore should not have sought those telephone records. He knew or should have known of the rule and statute prohibiting disclosure, and should not have made inquiry which could have led to disclosure. But based on the record before me I cannot find that he violated the rule and statute with criminal intent or with any other nefarious objective. Therefore, for what has been established against him - and because in the public interest the integrity of the rule and statute must be maintained - a disciplinary suspension without pay of two months is sufficient. Accordingly the grievant's discharge is reduced to a two month suspension without pay. He shall be re-instated and his records and pay shall be adjusted accordingly.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Telephone Workers Union of New Jersey Local 827, International Brotherhood of Electrical Workers, AFL-CIO

and

New Jersey Bell Telephone Company

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated May 29, 1971 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Award, as follows:

The Company discharged Robert Ball with proper reason within the meaning of Article VII Section 2 of the Collective Bargaining Agreement.

Eric J. Schmertz
Chairman

J. B. White
Concurring

C. J. Werkley
Concurring

John Crenny
Dissenting

Edgar M. Price
Dissenting
DATED: April 1972
STATE OF New York )ss.: 
COUNTY OF New York )

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

DATED: April 1972
STATE OF )ss.: 
COUNTY OF )

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

DATED: April 1972
STATE OF )ss.: 
COUNTY OF )

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

DATED: April 1972
STATE OF )ss.: 
COUNTY OF )

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

DATED: April 1972
STATE OF )ss.: 
COUNTY OF )

On this day of April, 1972 before me personally came and appeared Edgar M. Price to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 1217 71
In the Matter of the Arbitration between

Telephone Workers Union of New Jersey
Local 827, International Brotherhood of
Electrical Workers, AFL-CIO

and

New Jersey Bell Telephone Company

Opinion
of
Chairman

In accordance with Article XI of the Collective Bargaining Agreement dated May 29, 1971 between Telephone Workers Union and New Jersey Local 827, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "Union," and New Jersey Bell Telephone Company, hereinafter referred to as the "Company," the Undersigned was selected as the Chairman of a tripartite Board of Arbitrators to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

Did the Company discharge Robert Ball with proper reason within the meaning of Article VII Section 2 of the Collective Bargaining Agreement? If not what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in New York City on January 24, 1972, at which time Mr. Ball, 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. Messrs. John Crenny and Edgar M. Price served as the Union members of the Board of Arbitration. Messrs. J. B. White and C. J. Werkley served as the Company members.
The Board of Arbitration met in executive session on March 15, 1972 following which the hearings were declared closed.

The charge against the grievant, which is the basis for his discharge, is that he assaulted his foreman.

It is well settled that an unprovoked assault by an employee on a supervisor is insubordination of the most obvious and blatant type and grounds for summary discharge irrespective of that employee's prior work record. If the assault is proved and was unprovoked, whether the penalty should be less than discharge or otherwise mitigated because of an employee's long years of service and prior unblemished record, is a matter for consideration by the employer not the Arbitrator. Assuming that the Company has met its burden of establishing the grievant's culpability I could not contractually fault the Company's decision under Article VII Section 2 of the contract to impose the ultimate penalty of discharge even if I believed that because the grievant had worked satisfactorily for 17 years, a long term suspension would be sufficient to both set an example and uphold the integrity of the Company's disciplinary procedures. In short, because discharge is a proper penalty for that kind of offense, this Arbitrator cannot substitute his judgment for that of the Company even if he believes that a long term suspension would be sufficiently protective of the Company's rights.

There is no real dispute that the grievant physically engaged the foreman. The record shows that while Foreman Boucher
was orally reprimanding the grievant for remaining out with his truck after quitting time, the grievant forcefully grabbed the foreman's tie and thrust him violently backward against one of the trucks; and stopped only when separated from the foreman by the physical intervention of other employees.

What is in dispute is the matter of provocation. The grievant and the Union on his behalf contend that Boucher provoked the incident by four acts of provocation. First that he "pushed his men too hard" and maintained too close a surveillance over their activities including surveillance that very afternoon. Second, that he harassed the grievant particularly; picked on him and threatened to get him fired. Third, that during the oral reprimand the grievant grabbed Boucher's tie and thrust him backward only after Boucher raised an arm menacingly. And fourth, that Boucher persistently blew cigar smoke into the grievant's face during the course of the oral reprimand.

Based on the evidence before me I do not find the first two defenses to constitute either justification for or provocation of the assault. And the facts do not support the third and fourth defenses. Whether or not Boucher pushed his men "too hard" or maintained close supervision over their activities is immaterial, because assuming he did, the grievant's remedy is not a physical assault, but to grieve if Boucher's supervisory activities were improper.

The same is true if Boucher unjustifiably picked on him, or discriminated against him or dealt with him unfairly, or
unjustifiably sought or threatened his termination.

The testimony in the record does not support the assertion that Boucher raised his arm first before the grievant grabbed his tie and thrust him backward. Indeed the testimony of a Union witness, who observed the incident, was that Boucher raised his arm only after the grievant grabbed the tie. This latter version is more plausible. The raising of an arm in the manner suggested is a normal reflex reaction to an attack.

The fourth point is the one upon which the Union and the grievant principally rely, namely that Boucher blew cigar smoke into the grievant's face. Boucher denies it, and no other witnesses were able to testify decisively regarding that phase of the altercation.

Critical and determinative, to my mind, is the grievant's own written statement of the incident and his complaints about Boucher. Though his statement consumes almost four single spaced hand written pages, nowhere does he mention the cigar smoke contention. It seems to me that had Boucher blown cigar smoke in the grievant's face, that assertion, so proximate to the incident involved, would have been mentioned prominently in the grievant's report of what happened and in his complaints about Boucher. For the grievant to have omitted it entirely especially in view of the conflicting testimony, permits of only one reasonable conclusion, and that is that that phase of the incident did not take place.

I recognize that a rigid and demanding foreman can generate anger and emotional reactions among his employees. But even if the grievant had become angered and lost his self control because of Boucher's supervisory methods, I cannot excuse
the assault, or find "provocation" within the proper meaning of that word in assault cases for that reason alone.

Accordingly based on my introductory remarks regarding just cause for this type of offense and the facts as I have found them, I have no choice but to uphold the discharge.

Mitigation of that decision because of the grievant's long years of service is now a matter within the exclusive discretion of the Company. I believe that with its right to discharge for this type of offense now clearly upheld by this decision, the Company would not prejudice or subvert its disciplinary authority if it now decided to reduce the penalty to a long term suspension. Nor in my judgment would such a determination by the Company be injurious to the normal supervisor-employee relationship because, for other reasons, Boucher has now been transferred to a different work jurisdiction. However, any such change in the penalty is a matter solely for the Company's consideration.

Eric J. Schmertz
Chairman
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 between said parties.

A hearing was scheduled for September 17, 1975. At that time the parties settled the issues in dispute. At their request the terms of the settlement, as follows, are made a CONSENT AWARD:

1. Kenneth D. Snyder shall pay to Julie Newmar the sum of two thousand four hundred dollars ($2,400).

2. Travelers Insurance Company shall pay to Julie Newmar the sum of five hundred and fifty four dollars ($554).

3. The aforementioned total sum of two thousand nine hundred and fifty four dollars ($2,954) is in full settlement of all claims herein by either party against the other. There shall be an exchange of mutual general releases between Julie Newmar and Kenneth D. Snyder individually and Atlantic Buffet, Inc., covering all claims of each party against the other.

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.
In the Matter of the Arbitration:

between

Communication Workers of America:
AFL-CIO

-and-

New York Telephone Company

OPINION
and

AWARD

The stipulated issue is:

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

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

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

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

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

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

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

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

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

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

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

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

Eric J. Schmertz
Arbitrator

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

On this 20 day of September, 1974, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
IMPARTIAL CHAIRMAN, NEW YORK CITY TAXICAB INDUSTRY

In the Matter of the Arbitration between

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

and

Nicel Operating Corp. and Corporations on attached list, jointly and severally

The Undersigned, as Impartial Chairman under the contract between the above named parties, and having duly considered the evidence presented at the duly noticed hearing of January 14, 1975 makes the following AWARD:

For the period November 1973 through January 1974 Nicel Operating Corp. and Corporations on attached list are delinquent in payment to and owes the New York City Taxicab Industry, Local 3036 Benefit Fund the sum of Fifteen thousand nine hundred six dollars and fifty three cents ($15,906.53), jointly and severally.

Accordingly said Employers directed to pay said sum to the Fund forthwith.

Eric J. Schmertz
Impartial Chairman

DATED: February 27, 1975
STATE OF New York )
COUNTY OF New York )

On this 27 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.
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The Undersigned, duly designated as the Arbitrator under the Collective Bargaining Agreement between the above named Union and Employer, and having duly heard the proofs and allegations of said Union and Employer, makes the following AWARD:

Mr. John Padovano, hereinafter referred to as the grievant, shall be examined by a psychiatrist mutually selected by the Union and the Employer, the expense of which shall be shared equally by the Union and the Employer.

If the grievant is found fit for normal duty as a cashier as a result of that examination he shall be restored to work as a cashier without back pay at a location to be determined by the Employer.

As a condition of continued employment, the grievant shall undertake ongoing psychiatric treatment by a psychiatrist or a facility selected by him and the Union and which is acceptable to the Employer. Such treatment shall be on at least a once a week basis unless the psychiatrist or facility treating the grievant deems that a lesser sequence of treatment is all that is needed.
The grievant shall continue such treatment until medically discharged therefrom.

The Undersigned retains jurisdiction over this case for the purposes of implementation and compliance by the Union, the Employer, and the grievant with the foregoing.

DATED: April 2, 1975
STATE OF New York )
COUNTY OF New York ) ss.: 

On this second 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.
On an experimental basis, horse racing at New York tracks has been authorized and planned for eleven consecutive Sundays beginning Sunday, June 8, 1975.

As a consequence, OTB intends to operate 109 of its 144 betting offices on those days.

The Union and OTB are in dispute over the rate of compensation to be paid bargaining unit cashiers assigned to work on any of those Sundays. The Union seeks double time. OTB has offered time and one half.

The issue as presented does not involve an interpretation or application of the current collective bargaining agreement between the parties. Although both sides have made reference to the contract and the New York City Collective Bargaining Law, and what they consider to be their respective rights thereunder, they do not rely thereon in attempting to resolve the Sunday pay question. Sensibly and in good faith they have tried to reach agreement on that question by de novo direct negotiations, rather than involve themselves in a confrontation on the meaning or applicability of the contract or the "practical impact" or unforeseeable circumstances" provisions of the New York City
Collective Bargaining Law. When direct negotiations failed to produce a settlement they asked for mediation assistance; and when, at the mediation session on May 30, 1975 it appeared that the dispute could not be successfully mediated in the short time available, asked that I make non-binding fact finding recommendations for resolution.

Accordingly I deem that what the parties want is a recommendation that reconciles the divergent positions of the parties on grounds that are as equitable and reasonable to both as possible.

OTB acknowledges one point. And that is that despite its technical view that under the contract it could unilaterally schedule Sunday work as a part of the regular work week at straight time pay, to do so would simply be unacceptable and contrary to general practices regarding pay for work performed on a Sunday. Hence, as a result of direct negotiations between the parties and prior to this proceeding, OTB offered to pay for Sunday work at the rate of time and one half regardless of when during the work week Sunday fell. OTB has continued that offer in this proceeding.

The Union's demand for double time is based primarily on two grounds. First it points to the fact that pari-mutuel clerks employed by the tracks are paid double time for Sunday work, and argues that OTB cashiers should get no less. Second, it asserts that OTB work on Sunday is particularly burdensome because a large
number of cashiers already work Saturdays as part of their regular schedule. And that those who may be required to work both days will be deprived of time off that weekend, thereby further disrupting their normal private lives and activities. This major inconvenience the Union contends, must be compensated for by pay at double time. The Union argues further that double time for Sunday work is all the more compelling under that circumstance because pay for work performed on Saturday (a matter covered by the contract, not involved in this proceeding, and hence not before me) is at straight time unless that work exceeds the fortieth hour of the work week.

OTB asserts that to pay double time for Sundays would have an inexorable precedential effect on what the City of New York may have to pay others in its employ; that in this period of economic adversity and budget crisis the City cannot and should not be faced with that precedent; and that OTB cannot and should not be required to assume that responsibility.

The issue is therefore narrow. Whether Sunday work should be compensated at time and one half or double time. (The parties agree that in either event overtime pay shall not be "pyramided" i.e. the contractual overtime payment for work in excess of forty hours a week shall not be added to the time and one half or double time for Sunday when work performed on the Sunday constitutes hours in excess of forty).

Obviously, as is often the case in such disputes, there is merit to the contentions of both sides. I cannot shut my eyes
to the precedential effect on other City employment, if double
time for Sunday work is granted to OTB cashiers. In these
times of extreme economic adversity and chronic budget in-
adequacies I do not find sufficient justification to add to
those troubles by recommending pay at double time for Sunday
work standing alone.

However, I do find an exception under which the bulk of
the employees should receive double time pay when they
work on Sunday. The Union has made a persuasive argument
for special consideration for those assigned Sunday work
who have also worked the Saturday immediately preceding.

OTB concedes that Saturdays are heavy and busy work days at those
OTB installations that are open. On a rotational basis, 75 to
80 percent of the cashiers work Saturdays. From the standpoint
of OTB it is an important day of business, and by contract the
Union and the employees, recognizing the nature of the OTB
business and the importance of Saturdays to that business, have
accommodated that fact by agreeing to include Saturdays, for
the most part, within the regular work week at straight time pay.
One consequence has been that employees who work Saturdays lose
one weekend day from time customarily available for leisure or
to spend with family and friends who are off work then. Frankly,
in my view, to add an additional days work immediately there-
after - on the Sunday that follows - is simply too much of a
disruption to an employee's normal life and too burdensome, following such a heavy and straight time business day as Saturday, to permit scheduling at a pay rate of only time and one half.

I make no judgment on the adequacy of the Saturday rate of pay. That is not before me and is governed by the contract. Any change is a matter for contract negotiation between the parties when this current contract expires. But, I think it proper and appropriate in considering what should be paid to an employee assigned to work on Sunday who has also worked the Saturday before, to take cognizance of what happens on Saturday and that when the parties reached their contract agreement to treat Saturday as a regular work day, Sunday employment on the same weekend apparently was not seriously anticipated or contemplated. Under that circumstance, fairness and logic not only compel a recommendation that the rate of pay for the second work day of a weekend, a Sunday, be at double time, but on balance, outweight what precedential effect if any, it may have on the employment of other employees of the City who may work under a similar schedule and conditions.

Finally it should be observed that these recommendations are only temporary in nature, Sunday racing is an experiment, confined to eleven Sundays upcoming. It remains to be seen if it, and attendant Sunday employment, will continue thereafter.
Moreover, it is noted that the collective bargaining agreement between the parties expires in one year, in June 1976, with bargaining due to begin before that date. So, within a relatively short period of time both sides will have ample opportunity to negotiate contractually on the matter of pay for Sunday work, as well as on other terms and conditions of employment.

In my view, these recommendations represent, for the present, a fair and justifiable resolution of the instant dispute. I hope both sides will consider them carefully and fully and find them acceptable.

The Undersigned, duly designated as the Fact Finder in the above matter, makes the following voluntary recommendations:

1. A bargaining unit employee who works on Sunday and who also worked the Saturday immediately preceding, should be paid for Sunday at the rate of double time.

2. Bargaining unit employees who have not worked the Saturday before should be compensated at the rate of time and one half for work performed on Sunday.

---

Eric J. Schmertz
Fact Finder

DATED: June 4, 1975
STATE OF NEW YORK ) ss.
COUNTY OF NEW YORK)

On this fourth 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.
In The Matter of The Arbitration:

between

Air Line Pilots Association, International

and

Overseas National Airways, Inc.

OPINION AND AWARD

In accordance with Section 23 of the collective bargaining agreement between the Air Line Pilots Association, International, hereinafter referred to as the Association and Overseas National Airways, Inc., hereinafter referred to as the Employer, the Undersigned was designated as the fifth member or Referee of a tri-partite board of arbitration to hear and decide, together with Association and Employer designees to said Board, a dispute between the Association and the Employer involving the grievances of D.A. O'Connor (ALPA Case Nos. NY-68-74 and NY-75-74).

Messrs. James Correa and Richard Elten served as the Employer representatives on the Board of Arbitration and Messrs. Frank Foster and Gerald Smallwood served as the Associations representatives on said Board.

A hearing was held at the offices of the Employer on January 29, 1975 at which time Mr. O'Connor hereinafter referred to as the grievant and representatives of the parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators was waived. The parties filed post-hearing briefs and the Board of Arbitration met in Executive Session on July 1, 1975.
This case involves the application and interpretation of Section 6 (Deadheading) of the collective bargaining agreement. The facts concerning how and when the grievant traveled from his flight termination point in Georgia to his domicile on the West Coast; and thereafter from that domicile to flight training school at Kennedy Airport prior to his next flight assignment, are not disputed and are amply set forth in the stenographic record and in the briefs.

What is in dispute is whether the grievant was required to travel both directions by direct route, and within certain time limits in order to receive the full credited hours of service for pay and flight time and per diem under Section 6, which he claims in his grievances.

The Employer denied the grievant his claim because he did not accomplish the deadheading "between points and on the date or dates assigned by the Company."

Specifically it is the Employer's position that a pilot must deadhead by direct route from his termination point to his domicile and then from his domicile directly to his next assignment, and that each trip must be accomplished within no more than one week earlier or later than the date or dates of the deadheading assignment.

It is undisputed that the grievant did not travel directly from his termination point in Georgia to his domicile on the West Coast, but traveled from the first location to the second,
circuitously, by way of his home in Islip, Long Island. Also
and consequently he did not accomplish the deadheading assign-
ment within one week earlier or later than the date or dates of
that assignment. The same was true for his travel from the West
Coast to Kennedy Airport for ground school training.

The Association contends that the contract does not set
forth the travel method and time limitations which the Employer
says it requires. It argues that so long as a pilot does not
"manipulate" the dates on which he travels to "pyramid" his
credited flight time from one calculated month to another, and
provided the Employer's monetary obligation in all respects under
Section 6 does not exceed what it would be required to pay or
credit the pilot had he traveled directly and with the one week
leeway, a pilot should not be foreclosed from traveling indirect-
ly and at times more convenient to him, so long as he meets his
assignments on time.

The Employer's position is fully set forth in its Pilot
Bulletin No. 30-74 dated April 22, 1974. However the details of
that Bulletin, particularly the explicit requirement that the
pilot accomplish his deadheading "between the points and on the
date or dates assigned by the Employer" are nowhere found in the
provisions of Section 6 of the collective bargaining agreement.
The Employer argues that its Bulletin is a reasonable, regulatory
implementation of Section 6 (because it wants to safeguard against
the "pyramiding" of credited flight time hours, and wishes to
know where a pilot is between assignments and when, approximately
he is traveling from one completed assignment to the next), but
primarily because the Bulletin "reaffirm(s) a long standing
practice concerning expenses and credit hours while deadheading
at Employer direction and assignment." In short the Employer
asserts that its conditions on travel direction and time for
deadheading credit and pay are reasonable managerial rules in
implementation of Section 6 and supported by past practice.

Unless the "past practice" to which the Employer avers or
the long standing effectiveness of the restrictions can be
established, the reasonableness of the Employer's rule is not
before me in this proceeding simply because Pilot Bulletin No.
30-74 is dated April 22, 1974, subsequent to the events giving
rise to the instant grievances. The Bulletin attempts to establish
a retroactive effect covering the grievances by stating that it
reaffirms a long standing past practice. But that statement is
merely self serving unless prior past practice can be established
or unless there is persuasive evidence that the Employer's policy
set forth in that Bulletin was previously noticed to and adequately
disseminated amongst the affected employees prior to the events of
the instant grievances.

For the same reason I need not decide whether Mr. Simandl
testified as an authoritative representative of the Association
and whether his testimony binds the Association to the inter-
pretation of Section 6 as set forth in the Bulletin. Mr. Simandl advanced views not dispositive of the instant grievances, because his testimony concerning the reasonableness or applicability of that Bulletin was prospective, from April 22, 1974 forward. Hence, whether from the date it was promulgated on April 22, 1974, Pilot Bulletin 30-74 is a binding interpretation of Section 6 pursuant to the Employer's managerial authority, is a question for the future, not determinative of the instant grievances, both of which predated that Bulletin.

What is consequential to the instant case is whether the terms and conditions of that bulletin can be retroactively read or implied into Section 6, to cover the instant case, either because of past practice or because its content had been previously made known to the employees and the Union without objection or by acceptance or acquiescence. The burden of establishing past practice or prior notice and dissemination rests with the party alleging it, particularly where, as here, the explicit contract language does not contain the restrictions which the Employer seeks to impliedly introduce into the contract for its interpretation and application. That burden, which is thus the Employer's in this case, has not been met. The record does not contain sufficient evidence of prior cases in which deadheading credit was denied pilots who failed to travel directly between points and within the week leeway of the assigned dates. Rather there is information that pilots have traveled in different directions.
and at different times than the Employer now prescribes, and have received deadheading pay. Additionally there is some evidence in this record that the manner and method which the grievant employed to get from his termination point in Georgia to the West Coast (by way of his home in Islip) was known to and affirmatively acted upon by representatives of the Employer, if not expressly authorized. In my view had the Employer's policy, as set forth later in its April 22, Pilot Bulletin, been effectively controlling at that time, it would or should have been known to those who issued the grievant commercial airline tickets for his circuitous travel and they and the Chief Pilot would or should have acted decisively to either deny him those tickets or otherwise inform him of the restrictions in response to his notification as to how he intended to travel during the "deadhead" period, but they did not. I take that to mean either that the policy was not then in effect, or was not adequately disseminated to be known both to the grievant and to those who acted on his travel plans. And if that circumstance did not constitute actual or constructive authorization for a deviation from the Employer's restrictions, the grievant at least cannot be faulted in his belief that he could so travel and still be eligible for deadheading credit under Section 6.

For all the foregoing reasons, and with the provision as stipulated by the Association at the hearing that it will not permit a pilot to manipulate his deadheading travel time to pyramid
his flight credit, and that in no respect would the Employer's monetary obligations under Section 6 exceed that to which a pilot would be entitled had he traveled directly between points and within prescribed dates, the grievant's claims for additional credited hours of service for pay, flight time and per diem as set forth in his grievances are granted.

The Undersigned, duly designated as the Arbitrators under the provisions of the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties make the following AWARD:

The grievances of D.A. O'Connor (ALPA Case Nos. NY-68-74 and NY-75-74) are granted. The Employer shall credit and pay Mr. O'Connor for the additional hours of service and flight time and per diem which he claims in those grievances.

Eric J. Schmertz
Chairman

Frank Foster
Concurring

Gerald Smallwood
Concurring

James Correa
Dissenting

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

On this 26th 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.

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

On this day of 1975, before me personally came and appeared Frank Foster and Gerald Smallwood to me known and known to me to be the individuals described in and who executed the foregoing instrument and they acknowledged to me that they executed the same.

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

On this day of 1975, before me personally came and appeared James Correa and Richard Elten to me known and known to me to be the individuals described in and who executed the foregoing instrument and they acknowledged to me that they executed the same.
In the Matter of the Arbitration between System Council IBEW and Public Service Electric & Gas Company

The Undersigned Arbitrator, having been duly appointed in accordance with the collective bargaining agreement between the above named parties and having duly heard the proofs and allegations of said parties makes the following AWARD:

1. Grievances 1084 and 1200 are denied.

2. Grievance 1071 is denied.

3. Grievance 1068: The ten (10) day disciplinary suspension of Robert Eltringham is reduced to a disciplinary reprimand. He shall be made whole for the time lost.

Eric J. Schmertz
Chairman

Dudley Allen
Concurring in #1 & #2 dissenting from #3

Alfred W. Giles
Concurring in #3 dissenting from #1 and #2
DATED: August , 1973
STATE OF New York )ss:.
COUNTY OF New York )

On this day of August, 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.

DATED: 
STATE OF 
COUNTY OF 

On this day of August, 1973, before me personally came and appeared Dudley Allen to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: 
STATE OF 
COUNTY OF 

On this day of August, 1973, before me personally came and appeared Alfred W. Giles 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 Undersigned was appointed as Chairman of a tripartite Board of Arbitration to hear and decide the disputes involved in grievances 1084, 1200, 1071 and 1068. (Grievance 1093 was settled and withdrawn from arbitration during the course of the hearings).

Messrs. Alfred W. Giles and Dudley Allen served respectively as the Union and Company members of the Board of Arbitration. Hearings were held on September 20, November 1, November 15, and December 13, 1972. Representatives of the Union and Company appeared and full opportunity was afforded all concerned to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators' was expressly waived. The Board of Arbitration met in executive session on July 5, 1973.

Grievances 1084 and 1200 (which the parties agreed to treat as one) are denied. Considering the nature, requirements and quality of the disputed work, the descriptions of the job classifications in question, the past practices of the parties in connection with that type of work, the settlement of prior relevant grievances and disputes, and the fact that the classification Utility Man is the successor to Mechanical Utility Helper.
(and other Helpers), I conclude that the painting work in dispute was "unskilled" and properly assigned to Utility Men.

Grievance 1071 is denied. I conclude that Robert Brown was "hired" as of September 24, 1970 to the extent that the Utility Man job for which he was selected was thereafter no longer open or available to be filled pursuant to subsequent postings. That Brown started work not before October 8, 1970 does not constitute either a willful or inadvertent circumvention or violation of Article IV Section F of the contract and did not improperly deprive any employee applicants, who responded to the October 1st posting (or those subsequent) of appointment to that job classification. In short, I find that the vacancy for which Brown was hired on September 24, 1970 was no longer open on October 1st, even though Brown did not actually commence work until October 8th.

It is noted that the Company did not delay Brown's reporting to work. On the contrary, Brown requested a two week deferral from September 24th to October 8th because of difficulties in moving his family. The Company granted his request for this bonafide reason, with the obvious and logical attendant understanding that the job would be kept available for him until October 8th.

Also, his seniority commenced as of October 8th, not September 24th. Hence the Company neither instigated nor was responsible for Brown's two week delay in reporting for work.
but rather accommodated him, pursuant to his request and accorded him a proper seniority date consistent with the date he began work.

Had the circumstances been different - had the Company ordered the delay in Brown's reporting date or granted him seniority rights from an earlier date, or had it authorized or been responsible for circumstances which could be construed as designed to or having the effect of circumventing or violating the contract, whether purposeful or not, I would have had no hesitancy in according the employee(s) adversely affected a higher seniority date in the job classification, as requested herein by the Union. Consequently this decision is based on the particular facts of this case, and cannot be deemed precedential for any future matters.

Grievance 1068. The ten (10) day suspension of Robert Eltringham is reduced to a disciplinary reprimand. I do so not because I condone the grievant's actions. On the contrary, he manifestly over-stepped the bounds of his role as a union official in a highly dangerous and intemperate manner. His instructions and exhortations to fellow employees, in response to the Company's decision to search vehicles, could have incited to violence, and injury, if not worse. But I find that the Company by dealing with the grievant (in his capacity as a union official) in an unorthodox and irregular manner initiated and directly contributed to the circumstances and atmosphere that caused the grievant's outburst.
I do not see the instant circumstances as similar to an ordinary disciplinary or investigative case, where a union steward is asked to observe an employee engaged in misconduct, or to be present when a penalty is imposed. The search of vehicles, whether "voluntary" or not, is a controversial procedure which generates opposition, excitement and adversariness. Here, the Company significantly heightened the problem by not telling the grievant what it intended to do or what he was requested to observe until the very last moment. And then only after he had accompanied Company representatives to a point in the parking lot where the search announcement was made. As I see it, the Company put the grievant in a position where it would appear to other employees that he knew/or condoned, or even was participating in the search.

Also, though the Company may have had reasonable grounds to do so, I can appreciate how the grievant may have felt "used" if not denigrated by not being told earlier that the Company planned to search vehicles, and that his presence for that purpose was needed. For the Company to involve him in so controversial a procedure without that prior notice, I deem to be provocative and a proximate cause of his outburst. In short, I consider the way the Company handled the grievant as a union official to be both incongruous with regular labor-management methods and unfair.
That the other Union officials who were present at the two locations where the vehicle searches were made voiced their objections in a restrained and responsible manner means only that the grievant acted wrongly, not that he should bear the full blame for how he reacted. When provoked or when felt to have been unfairly dealt with, people react differently. The grievant acted improperly and is not excused. But I doubt he would have been so extreme had the Company been free of contributory blame.

This conclusion makes the full ten (10) day suspension insupportable. A full exoneration of the grievant is equally unwarranted. The options are a lesser suspension or a reprimand. On balance I deem the latter more appropriate.

Eugene J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration

between

System Council U-2, IBEW

and

Public Service Electric & Gas Co.

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

1. Grievance #74-1972-18 is arbitrable
2. Grievance #74-1972-18 is denied.

Eric J. Schmertz
Chairman

Alfred W. Giles
Union Arbitrator
Concurring in #1
Dissenting from #2

Thomas H. Johnson
Company Arbitrator
Dissenting from #1
Concurring in #2

DATED: July 1974

STATE OF New York ss.
COUNTY OF New York

On this day of July, 1974, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described and who executed the foregoing instrument and he acknowledged to me that he executed the same.
DATED: July 1974
STATE OF New York ) ss.:
COUNTY OF New York) ss.:

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

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

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

Case No. 1330 1036 73
In accordance with the Arbitration provisions of the Collective Bargaining Agreement dated May 1, 1971 between Public Service Electric & Gas Co., hereinafter referred to as the "Company," and System Council U-2, IBEW, hereinafter referred to as the "Union," the Undersigned was designated as the Chairman of a tri-partite Board of Arbitration to hear and decide a dispute between the Union and the Company involving the Union's grievance #74-1972-18. Messrs. Alfred W. Giles and Thomas H. Johnson served respectively as the Union and Company designees on the Board of Arbitration.

A hearing was held at the offices of the American Arbitration Association on April 1, 1974 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. The parties filed post hearing briefs and the Board of Arbitration met in executive session on July 15, 1974.

I reject the Company's contention that the issue is not arbitrable, but I deny the Union's grievance on the merits.

The decision of the majority of the Board of Arbitration
is applicable to and dispositive of the instant arbitrability issue. Accordingly for the reasons and with the conditions set forth in the Chairman's Opinion in that cited case, the instant grievance #74-1972-18 is arbitrable.

On the merits I find that the disputed clerical work assigned to Servicemen Specialists on the midnight to 8 A.M. shift in the Jersey City District is an "incidental" part of that job classification within the meaning of item 3, page 2 of the Preamble to the Job Specifications, namely "performing the paper work required in connection with that job."

One of the undisputed functions of the Serviceman Specialist is to replace aged gas meters. It is also undisputed that incidental to that assignment, Servicemen Specialists (also called Dispatchers) regularly made telephone appointments with customers to be sure they would be home when the meter was to be changed. The instant disputed work, namely addressing envelopes or written communications to customers for the same purpose, is, in my view, nothing more than a procedural variation of the work the Serviceman Specialist has been performing all along in communicating with customers he serves. Hence I deem it to be paper work ... "in connection with that job" within the meaning of item 3 page 2 of the incidental job functions enumerated in the Preamble to the Job Specifications.

I agree with the Union that the Company made this assignment (which previously was performed by light duty personnel of various classifications including Servicemen Specialists) for economical reasons, especially to fill out the work shift
of Servicemen Specialists on the midnight to 8 A.M. shift where those employees had not been fully occupied. But in doing so, I find that the Company made an assignment which is directly related to the duties of that classification (i.e. arranging for and replacing meters) and which is not materially different in purpose and objective from the work those employees have regularly performed in communicating with customers. And there is no question that they, as well as employees classified as Clerks are fully capable of performing this type of work. Accordingly the Union's grievance #74-1972-18 is denied.

Eric J. Schmertz
Chairman
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration

between

System Council U-2 IBEW

and

Public Service Gas & Electric Company

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated May 1, 1973, and having duly heard the proofs and allegations of the parties, Award as follows:

1) Union grievances 1100 and 1230 are granted. Messrs. Curran and Kertesz should have been promoted pursuant to their respective bids. Curran who has since been promoted shall be made whole for the difference in wages. Kertesz shall be promoted and shall be made whole for the difference in wages.

2) Union grievance 1139 is granted. Grievant Klima should have been promoted to Chief Stockman. Inasmuch as he has since been promoted to that job he shall be made whole for the difference in wages.

3) Union grievances 1136 and 1157 are arbitrable.

4) Union grievances 1136 and 1157 are denied. The Company did not violate the Agreement in connection with the contracting-out of overhead line work in Camden beginning September 1971 and in New Brunswick in January 1972.

Eric J. Schmertz
Chairman
Alfred W. Giles
Concurring in #1, #2 and #3
Dissenting from #4

George H. Barnstorf
Concurring in #4
Dissenting from #1, #2 and #3

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

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

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

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

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

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

Case No. 1330 1291 73
In the Matter of the Arbitration
between
System Council U-2 IBEW
and
Public Service Gas & Electric Company

In accordance with the Arbitration provisions of the Collective Bargaining Agreement dated May 1, 1973 between Public Service Electric & Gas Company, hereinafter referred to as the "Company," and System Council U-2 IBEW, hereinafter referred to as the "Union," the Undersigned was designated as Chairman of a tri-partite Board of Arbitration to hear and decide disputes relating to grievances 1100, 1230, 1139, 1136 and 1157. Messrs. George H. Barnstorf and Alfred W. Giles served respectively as the Company and Union members of the Board of Arbitration. Hearings were held on January 7 and 9, 1974 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. The Board of Arbitration met in executive session on April 9, 1974.

Grievances 1100 and 1230

Because the contract issue is the same, these two grievances were tried together and a single ruling will be dispositive of both. The stipulated issues are:

1100) Did the Company violate the Agreement by denying W. Curran a promotion to Automotive Mechanic Grade 1 on January 1, 1971?

1230) Did the Company violate Article IV E2a or Article IV Section V of the Agreement by denying J. Kertesz the promotion to Truck Driver - Winch Truck on May 5, 1972?
When the grievants bid for the promotions referred to in the respective issues, they were not accorded credit in the calculation of their seniority for the period of time that each had earlier spent in those particular jobs. Curran had worked as an Automotive Mechanic Grade 1 for 9 years, 10 months and 6 days from July 3, 1959 to May 4, 1969. Kertesz worked as a Truck Driver - Winch Truck for 8 years and 1 month from August 14, 1959 to September 15, 1967.

I conclude that the Company's refusal to accord the grievants seniority credit for the periods of time they previously worked in those jobs was violative of Article IV E2a of the contract. That Section reads in pertinent part:

"For promotions to all job classifications within the bargaining unit .... seniority shall govern."

Seniority is defined by Article IV B. In pertinent part that Section reads:

"Length of service in each classification within an occupational group .... shall be known as 'seniority.'"

It is undisputed that the jobs of Automotive Mechanic Grade 1 and Truck Driver - Winch Truck are "classifications" within the meaning of Article IV B. Also there is no dispute about the ability of the grievants to respectively perform the jobs in question.

I fail to see why each grievant was not given credit for his length of service, previously acquired in each of the classifications to which they subsequently sought to return.

Article IV B places no conditions or restrictions on
the "length of service" acquired in the classification. It does not exclude periods of time which are broken by subsequent service in other jobs nor does it provide for the loss of seniority acquired from service in a classification by subsequent transfer to or work in some other job or classification. Hence I find no basis upon which the grievants were properly denied seniority credit for their prior periods of service in the classifications Automotive Mechanic and Truck Driver - Winch Truck.

Accordingly, in applying Article IVE the provision that "seniority shall govern" must per force include all the service time they acquired in those classifications. Therefore the Company erred when it did not include that credit in calculating the grievants' seniority in considering their respective bids. It is undisputed that if those periods of seniority were included, both grievants would have been promoted. Subsequently Curran was promoted to the Automotive Mechanic Grade 1 classification. Therefore he shall be made whole for wages lost for the period of time from which his bid should have been accepted to the date that he was promoted.

Kertesz has not been promoted. Accordingly he shall be promoted to the classification Truck Driver - Winch Truck and shall be made whole in wages for the period of time from which his bid should have been accepted to the date he is promoted.

Grievance 1139

The stipulated issue is:

Did the Company violate the Agreement when it selected Frank MacDonald for the Chief Stockman vacancy on August 13, 1971?
This issue requires an interpretation of the following portion of the jointly negotiated "qualifications" language of the Chief Stockman job description:

"Must have had at least 3 years experience as Stockman or Stockman-Driver or the equivalent" (emphasis added).

I am persuaded that the foregoing language should not be interpreted to accord preference in a bidding situation to a junior employee who has more experience than a more senior bidder, where the greater experience was acquired in similar or related work with a different employer and not within this bargaining unit.

In the instant case MacDonald was with the Company only 18 months, but had worked for upwards of 38 years as Chief Stockman for another employer. The Company deemed this outside experience preeminent in awarding him the Chief Stockman job over the grievant (Mr. Klima). Yet Klima had greater seniority and he met the minimum experience requirements, namely more than 3 years experience as Stockman-Driver within this bargaining unit.

It seems to me that the Company's interpretation is incongruous with the general contractual provisions that "seniority shall govern ...." especially where, as here, the grievant met the minimum qualifications. To accept the Company's interpretation would mean that a bargaining unit employee with greater seniority, who meets the minimum qualifications set forth in the job description, would lose out to a newer employee who had acquired greater related experience elsewhere.
I cannot accept this interpretation not only because of contractual limitations, but because I think it runs counter to the traditional intent and spirit of the collective bargaining relationship, (i.e. job protection, seniority, the integrity of the bargaining unit, etc). It seems to me that if the Company's version was intended, the parties would and should have been more specific in defining the meaning of the phrase "or the equivalent." Absent a more specific definition, I am constrained to conclude that that phrase relates to equivalent experience acquired either within the bargaining unit or in a manner and of a type which does not result in permitting a qualified senior employee to be jumped by a junior employee in a job bidding situation.

Accordingly I interpret the disputed language in one of the ways advanced by the Union, namely that the phrase "or equivalent" may be resorted to only if there is no senior bargaining unit employee with the specific qualifications required. In other words if a senior bidder does not possess at least 3 years experience as a Stockman or Stockman-Driver, the Company may then consider the equivalent experience of that bidder or equivalent experience of other bidders acquired in other jobs within this bargaining unit or under the other circumstances previously referred to. But where, as here, the senior bidder, grievant Klima, met the threshold experience requirement, namely more than 3 years experience as a Stockman-Driver, the Company had no right to bypass him by accepting the greater, but outside equivalent experience of MacDonald.
This is not a reversal of a prior decision of Arbitrator Milton Friedman. In deciding his case Mr. Friedman dealt with a distinction between quantitative and qualitative experience acquired **within this bargaining unit**. His view regarding circumstances under which outside factors could be utilized to meet the equivalency test was dicta, and not in specific answer to the issue before him.

Nor am I persuaded by the Company's distinction between the "qualifications" language of the Chief Stockman job description and the somewhat different "qualifications" language of other job descriptions such as that of Radio-Operator-Mechanic. I believe the differences arose because the job descriptions were negotiated at different times and for reasons unique to the particular jobs involved.

I consider it too strained to infer that because some other job descriptions such as Radio Operator Mechanic allow the Company to consider "equivalency" only if there are no applicants to meet the minimum specified qualifications based on bargaining unit experience, the different language of the Stockman description therefore allows a competitive relationship between an applicant who meets the minimum qualifications and other applicants, including those less senior who possessed equivalent or more equivalent experience from a different employment relationship. I think an acceptance of that inference is so contrary to the traditional collective bargaining relationship and the benefits traditionally accorded qualified employees in promotional situations, as to require more specific contract language to achieve the result which the Company seeks herein.
Accordingly the Company violated the contract when it selected MacDonald rather than Klima for the position of Chief Stockman. Klima was subsequently promoted to Chief Stockman. Accordingly for the period of time between August 13, 1971 and the date that he was promoted, he shall be made whole for the difference in wages.

Grievances 1136 and 1157

These two grievances involve the same contract section, were tried together, and a single ruling shall be dispositive of both.

The stipulated issue is:

Did the Company violate the Agreement by employing contractors to perform overhead line work in Camden beginning in September, 1971 and in New Brunswick in January 1972?

The issue is arbitrable because it involves the application and interpretation of Article VN2 of the contract which reads:

"The Company and the Union shall abide by the 'Award of Arbitrator' and 'Opinion of Arbitrator' dated December 15, 1944, made by Arbitrator George W. Alger, concerning contracting-out work customarily performed by employees within the bargaining unit."

In the instant proceeding the Union seeks an Award directing the Company to give adequate prior notice to the Union at the Corporate-System Council level of work to be contracted out, to afford the Union a realistic opportunity to argue against the plan and to propose alternatives which would keep the work within the bargaining unit.
The instant grievances do not allege that the work of the contractors at the locations and times set forth in the stipulated issue deprived bargaining unit employees "from receiving employment in the various forms of employment in which they are customarily engaged" within the meaning of that language in Arbitrator Alger's Award and Opinion. So the grievances are confined to whether or not the Company has a contractual obligation to provide the Union with the type and manner of prior notice which the Union seeks.

Of necessity, an interpretation of Article VN2 requires an interpretation of the Alger Award and Opinion. The Award makes no mention of "notice" so the Award has not been violated.

But the Opinion does deal with the question of notice. Mr. Alger made a recommendation. He stated

"The policy of consultation with the Union on larger matters involving contracting out of work is desirable, has been followed in the past and proved helpful to the employer as well as to the Union. This course, to be sure is not required by the contract ..... This policy was not pursued in the present instance. I recommend its use, even though it is not required by the contract, in future dealings between the Union and the Employer before making contracts for work which might be done by the present staff. The ultimate decision, of course, is a matter for the employer, and doubtless on many smaller matters consultation would prove time wasting and not feasible."

In my judgment the reference in Article VN2 to the "Opinion of Arbitrator" means, so far as the instant issue is concerned, that the Company agrees to continue to consider the Alger recommendation in this regard, and that that recommendation includes by its terms the Company's right to utilize
or not utilize it. Therefore the Company is not bound to and has not contractually agreed to consult with the Union prior to making contracting-out contracts. It has agreed to no more than what Mr. Alger recommended, namely that it will consider consulting with or giving notice to the Union prior to making contracting-out contracts, but whether or not it does so is a matter for it alone to decide.

That being so, the Union's interpretation herein is rejected and the Union's claim that Article VN2 requires prior consultation and/or notice on the Corporate-System Council level is denied. However, the Company should do no less than present practice, i.e. the practice of giving enough notice where there is to be contracting-out of significant work to allow the Union sufficient time to suggest to the Company alternative methods of retaining work within the bargaining unit. But this practice has not been followed and as Mr. Alger stated is not applicable in a contracting-out situation where notice and consultation "would prove time wasting and not feasible."

Eric J. Schmertz
Chairman
In The Matter of The Arbitration between
Local 58 International Brotherhood of Firemen and Oilers, AFL-CIO
and
Reichhold Chemicals, Inc.

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

The discharge of John Davis is reduced to a disciplinary suspension. He shall be reinstated without back pay. The period between the date of his discharge and his reinstatement shall be a disciplinary suspension for his unsatisfactory attendance record. He is warned that in the opinion of this Arbitrator, if he does not attain and maintain a satisfactory attendance record within the next two months and thereafter the Company would have just cause to discharge him summarily.

DATED: November 20, 1975
STATE OF: New York  ss:
COUNTY OF: Nassau

On this twentieth day of November, 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

IBPS & PMW, Hyman Gordon Local 107
AFL-CIO

and

Revere Copper & Brass Corporation

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 4, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The discharge of Johnny Browning was for just cause.

Eric J. Schmertz
Arbitrator

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

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

Case No. 1330 1049 71
In the Matter of the Arbitration
between
IBPS & PMW, Hyman Gordon Local 107
AFL-CIO

and
Revere Copper & Brass Corporation

In accordance with Article III Section 3 of the Collective Bargaining Agreement dated September 4, 1969 between Revere Copper & Brass Corporation, Foil Division, hereinafter referred to as the "Division," and Hyman Gordon, Local 107 International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, hereinafter referred to as the "Union," the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Did the Division discharge the grievant, Johnny Browning on or about September 8, 1971 for just cause under the Agreement?

A hearing was held at the offices of the American Arbitration Association on January 12, 1972 at which time Mr. Browning, hereinafter referred to as the "grievant," and representatives of the Union and Division, hereinafter referred to jointly as the "parties," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The grievant was discharged because of excessive absenteeism and lateness. On numerous occasions over a two year period prior to the discharge, he was warned, and at the end of July, 1971 he received a one week disciplinary suspension.

Under the facts presented and in view of the express provisions of Article X Section 2(d) of the Agreement, I have no
choice but to sustain the discharge.

The grievant's record of absenteeism and lateness over more than a two year period from June 1969 to early September 1971, has been undisputedly excessive and therefore need not be recited in detail. The sole question is whether the circumstance which gave rise to that record, namely his wife's illness is sufficiently compelling to vitiate the discharge and, as mandated by Article X Section 2(d) to restore the grievant to work with back pay. As no doubt the parties knew when they negotiated that clause, Article X Section 2(d) precludes the Arbitrator from mitigating a discharge if he believes that the penalty of discharge, though generally applicable to the offense involved, ought to be reduced to a disciplinary suspension because of special circumstances.

The grievant's discharge fits within the well settled general rule regarding excessive absenteeism and lateness. Discharge is a proper penalty when, following the imposition of lesser penalties pursuant to a "progressive discipline" formula, an offending employee's chronic record of absenteeism and lateness remains unsatisfactory. And this is true even if his failure to report to work regularly and on time is due to circumstances beyond his control or fault. The ruling is based on the equally well recognized proposition that an employer is entitled to regular and prompt attendance by his employees in order to meet production and service requirements and need not retain an employee who cannot work regularly, no matter what the reason for his difficulty.
The instant case meets that test. For an extended period of time despite warnings and a disciplinary suspension, the grievant's record of absenteeism and lateness continued at an unreasonably high level. That it was in part at least beyond his fault or control is not an exception to the rule; and therefore a matter to be considered in mitigation only by the Division, not the Arbitrator.

But the particular circumstances in this case while in no way changing my Award, impel me to make a recommendation to the Division; a step I rarely take. It appears that a significant amount of the grievant's unsatisfactory attendance record was due not to misconduct or negligence but to the illness of his wife and the need that he remain home to care for his child. If this was a present and continuing condition I would not venture to recommend an alternative remedy to the Division. But the grievant testified, and I believe honestly, that this has now abated. Though his wife remains ill, he has located a responsible person to care for the child while he is at work. One of the principal obstacles to regular and prompt attendance may now be overcome. Or in other words, there is reason to believe that the chronic pattern of the grievant's poor attendance record can now be broken. It seems to me that in view of the unfortunate personal difficulties which the grievant has experienced, and which are unrebutted in the record, the Company should give him a final opportunity to demonstrate that he can now meet the obligations of his job.

Accordingly I recommend that the Company reinstate him
without back pay; treat the period of time between his dis-
charge and return to work as a disciplinary suspension for ex-
cessive absenteeism and lateness; and give him a three month
period within which to dramatically improve his attendance
record. If, in the judgment of the Division, within that per-
iod of time or any time thereafter, the grievant's attendance
record remains unsatisfactory or resumes its unsatisfactory
nature, he would be subject to summary discharge.

This recommendation does not alter my Award. Obviously,
it is discretionary with the Division to accept the recommend-
ation in lieu of the Award. Absent the willingness of the
Division to do so, the Award upholding the discharge stands.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
Local 702 I.A.T.S.E., AFL-CIO
and
Scotchwood Quality Services, Inc

The Undersigned, Permanent Arbitrator in the collective bargaining agreement between the above named Union and Employer, renders the following AWARD based on the evidence presented at a duly noticed and scheduled hearing of April 8, 1975:

For the period August 1974 through December 1974 Scotchwood Quality Services, Inc. is delinquent in payment to and owes the Motion Picture Laboratory Technicians Local 702 Pension Fund the sum of four thousand two hundred ninety six dollars and sixty cents ($4296.60).

For the period August 1974 through December 1974 Scotchwood Quality Services, Inc. is delinquent in payment to and owes the Motion Picture Laboratory Technicians Local 702 Welfare Fund the sum of three thousand six hundred fifty six dollars and sixty-nine cents ($3656.69).

Scotchwood Quality Services, Inc. is directed to pay said sums to said Funds forthwith with interest at 6% per annum.

April 9, 1975

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

On this 9th 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.
AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated April 1, 1974 and having been duly sworn and having duly heard the proofs and allegations of the Parties, awards as follows:

I conclude that Article VI, Section B permits the Company to promulgate a rule requiring employees to complete an "explanation of absence form". The Company's determination that its action was "necessary and proper for the conduct of its business" has been adequately shown and was not unreasonable or unrelated to the meaning of that phrase in Section B. There is no real dispute that one important factor in the efficient operation of the Company's business (delivering furniture to customers) is the full and regular attendance of its employees. It has been shown that absenteeism has been a problem; that the bonafides of each absence may be taken out of dispute by the use of the form; and that since its introduction attendance has improved. I agree with the Union that the form and/or parts thereof may be unnecessary to the Company's right to discipline for poor attendance. However with the contract right to promulgate such a rule for the "necessary and proper conduct of its business", whether it is ordinarily necessary for discipline is immaterial. Here however, the form may "cut both ways". By requiring particularization of absences it may not only establish for the Company the reason for a particular absence and the circumstances thereof, but may be protective to the employees by relieving them of liability for, or removing from their cumulative records, absences that are legitimate. The Union's grievance is denied.

Arbitrator's signature (dated)

Eric J. Schmertz
Arbitrator

STATE OF New York
COUNTY of New York

On this 5th day of May, 1975, before me personally to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
Transport Workers Union of America, AFL-CIO, Transport Workers Union of Philadelphia, Local 234, AFL-CIO, hereinafter referred to as the "Union" and Southeastern Pennsylvania Transportation Authority, City Transit Division, hereinafter referred to as "SEPTA" have been unable as yet to directly negotiate a full collective bargaining agreement to succeed the current contract.

In accordance with the Public Employee Relations Act (No. 195) of the Commonwealth of Pennsylvania the Undersigned was designated as the fact finder to hear and make recommendations on the unresolved contract issues between the Union and SEPTA.

Hearings were held in Philadelphia, Pennsylvania on February 10, 23 and 24, 1975, at which time representatives of the Union and SEPTA, hereinafter referred to jointly as "the parties", appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post hearing briefs.
Certain contract issues the parties reserved to themselves for further negotiations. Those issues were not submitted to the fact finder and are not recited herein. The issues submitted to the fact finder, upon which evidence and testimony were adduced are:

**Union Proposals**

1. A wage increase of $2.25 per hour across the board effective March 15, 1975, protected by a cost of living clause.

2. A one year contract.

3. (a) Existing Blue Cross-Blue Shield coverage to be expanded to include optical, drugs and dental benefits.
   (b) Blue Cross-Blue Shield provisions to be expanded to cover early retirees, disabled retirees and spouses.
   (c) Special Blue Cross provision for member and spouse after 65.

4. (a) Sick benefit payments to be increased to $125 a week for 200 days beginning with the second day, with present restrictions on the filing date removed.
   (b) Alcoholism to be defined as a compensable illness.
   (c) Full pay for time lost due to job related injury.

5. Life insurance to be increased to $10,000 without reduction for retirees.

6. Four additional holidays, with all holidays worked to be paid at double time plus one days pay.

7. Clothing and tool allowance to be increased from $125 to $175.

8. (a) One-half pay pension after 25 years of service regardless of age with pension to continue to surviving beneficiary.
   (b) Five years of service to qualify for total disability pension at full pension amount.
(c) Pensions of existing retirees to be increased by cost of living adjustment.
(d) Increase in severance pay to $150.

9. Vacations:
   Two weeks after one year.
   Three weeks after three years.
   Four weeks after eight years.
   Five weeks after fifteen years.
   Six weeks after twenty years.

10. Night Premium:
    10% night premium from 6 P.M. to 6 A.M. Monday through Thursday.
    10% night premium from 6 P.M. Friday to 6 A.M. Monday.

11. Meal allowance to be increased to $3 and accident report allowance increased to $2; both allowances paid immediately in cash. SEPTA to pay complete cost of stolen tools.

12. SEPTA passes to be valid on all SEPTA operated lines excluding Penn Central and Reading Railroads.

13. Thirty (30) minutes paid lunch period for cashiers.

14. Except as agreed upon in the current negotiations the provisions of the prior agreement continue in full force and effect.

SEPTA Proposals

1. The contract to extend for a period of three (3) years, terminating midnight March 14, 1978.

2. The right to hire part-time workers.

3. An employee who works on one of his regularly scheduled days off will be paid at the overtime rate (time and half time) only if he has successfully completed his work assignments for his regularly scheduled work days in that particular work week. If he has not he will be paid at the regular straight time rate.
4. All work performed within a specific week by an extra person will be credited against the minimum weekly wage guaranteed for that week.

5. The Union recognizes the principle that it is a sound economic and social objective to produce more without the necessity of increasing the labor force.

6. Transportation operators hired on March 15th, 1975, and thereafter, will receive for the first year of service $.75 per hour less than the operator's top rate.
   For the second year of service $.50 per hour less than the operator's top rate.
   For the third year of service $.25 per hour less than the operator's top rate.
   After the third year of service they will receive the regular operator's top rate.

The record before the fact finder is voluminous, consisting of some 113 exhibits, extensive testimony and comprehensive briefs. It is one of the most complete and detailed cases presented to him in his many years as an arbitrator, fact finder and mediator. The research, preparation, documentation and presentation of the cases of both sides are of the highest quality. The personnel responsible for that work are commended for the professional excellence demonstrated.

As I hope the parties recognize, the time between the close of the hearings and the deadline for rendition of these recommendations has been too short for the fact finder to write an extension recitation and appraisal of the arguments and evidence advanced by the parties on each of the issues. Suffice it to say that the full record has been studied intensively, and as required by the Public Employee Relations Act No. 195, the findings
of fact and recommendations are based upon "reliable and credible evidence produced at the hearings."

Accordingly I have limited this report to my recommendations on the issues (separately or in combination) together with a short or relatively concise statement setting forth the essential facts upon which the recommendations are based. On the matter of wages, concerning which, understandably, the parties devoted the bulk of their respective cases, I have deemed it appropriate to recite in relatively brief form the principal contentions of the parties. And I have explained some of the reasons behind my wage recommendation more fully than on the other issues. But because the parties are thoroughly familiar with the details of their own positions and the positions of each other, and because those positions are fully amplified in the record, I consider unnecessary and more than time will allow, to respond to each of the contentions and the facts advanced in support thereof, in the detailed and thorough manner in which they were presented to me.

In synopsis form, the Union and SEPTA cases on the wage issue are respectively as follows:

**Union Position**

The wages of the covered employees are significantly lower than comparable employees of the transit systems in Washington, Baltimore, Boston, New York and Pittsburgh. Other public employees in Philadelphia, particularly teachers and firemen, compare favorably with those other cities (and are
ahead of some) whereas Philadelphia transit workers lag substantially behind similar employees of those cities. Wages of private sector employees in Philadelphia compare favorably and have kept pace with private sector employees in the other five cities whereas Philadelphia transit workers lag behind their counterparts in those cities. Not only is this wage discrepancy substantial but that since 1958 the gap has increased to the point where today the bus operator's top rate in SEPTA is $1.20 an hour below the average of those five cities.

Increases in the cost of living of over 23½% in Philadelphia since the last negotiations has eroded a substantial part of the wage increases gained by the SEPTA employees in recent years. An immediate wage increase of $1.20 an hour and a further increase of $1 an hour is minimally essential to recover the purchasing power eroded by inflation and to slot SEPTA employees at a proper level with those compared. That level thereafter during the contract term should be protected by a cost of living escalator clause.

Based on BLS moderate standard of living budgets for the five cities mentioned, the average annual straight time wage of the transit operators in those other five cities averages 91.3 percent of their respective budgets whereas the wage of SEPTA employees averages 73.6 percent of the moderate standard of living budget for Philadelphia.

SEPTA's claim of inability to pay is immaterial. The employees cannot be expected to subsidize SEPTA's deficits. SEPTA, the appropriate public officials and the legislative bodies have the duty to make funds available to provide wages for SEPTA employees at a decent level comparable to what others, similarly situated, earn, irrespective of SEPTA's financial difficulties. Distinguished fact finders in prior fact finding proceedings between the parties and in other relevant fact finding cases have enunciated that proposition, especially (citing David L. Cole) "when the employees are seeking to raise themselves from substandard to standard conditions."
Philadelphia is a relatively high annual income area ranking third after New York and Washington among the five cities compared. Yet the wage rate of the SEPTA bus operator for example, which once ranked with the best among those five cities is today 90¢ an hour behind Baltimore, 87¢ an hour behind Pittsburgh, more than $1.13 an hour behind New York, more than $1.44 an hour behind Washington and more than $1.63 an hour behind Boston; and that other covered SEPTA classifications are similarly disadvantaged.

SEPTA Position

The wages of SEPTA employees are already high, productivity has declined, the economy has deteriorated and the City Transit Division has no funds to pay for increased wages and benefits. In 1974 SEPTA's operating loss was more than 45 million dollars compared to an operating loss of 34.5 million in 1973. The trend is toward greater deficits with a projected operating loss, before subsidy of 61.5 million for 1975. Whereas in 1961 the payroll and fringes constituted 62 percent of its revenues, labor costs last year amounted to a deficit producing 120.9 cents of every revenue dollar. Additional sources of funds in the form of governmental subsidies from the City of Philadelphia, from the Commonwealth or under the Federal Mass Transportation Assistance Act of 1974 are still indeterminative, but even if anticipated subsidies are received they will erase only a portion of projected operating losses. SEPTA does not have the power to tax, the law prohibits the transfer of money from any other division to the City Transit Division (assuming such funds were available). A fare increase to raise revenue is self-defeating and counterproductive because it affects those least able to pay and results in significant reductions in ridership revenue. Indeed, after a short period of increase due to the energy crisis, ridership has resumed its fall-off with attendant fare-box revenue losses. And this fall-off would have been more pronounced but for the reduced fares for senior citizens and the senior citizen subsidy. The present recession with its increasing unemployment decreases fare-box revenues and inhibits subsidies from governmental bodies whose tax collections have been sharply hit by the fall-off of the economy generally.
Settlements over the past several years have exceeded the rise in the consumer price index and no additional wage increase is warranted. During the period 1957-1959 to December, 1974, the SEPTA hourly rate increased from $2.18 to $5.28 or 142.2 percent, while the consumer price index rose 85.9 percent. From 1967 to December, 1974, the hourly rate increased 69.8 percent as compared to the Philadelphia CPI increase of 59.2 percent. And from December, 1968 to December, 1974, the hourly rate increased 56.2 percent as compared to the CPI rise of 48.6 percent. Considering these figures there is no justification to the Union's "catch-up" rationale.

The Union's comparison with the other five cities mentioned is not meaningful. The economic strength of the Delaware Valley region compares unfavorably with that of the other localities. New York for example has a significantly higher per capita disposable income per year than Philadelphia. And the financial base of the transit systems in these cities vary tremendously as to the subsidies they receive, the tax revenues made available to them, or their assessment powers.

SEPTA rates compare favorably with the wage rates and wage increases granted employees of the City of Philadelphia and the Commonwealth of Pennsylvania. Indeed SEPTA's employees fared better in the years 1973 and 1974. Also a comparison between the weekly earnings of SEPTA operators and the weekly earnings of every industry in the Philadelphia labor market area shows that SEPTA operators do better, and that additionally they are guaranteed a minimum weekly wage.

No increase in wages should be paid in light of present economic conditions especially when the present job guarantees of City Transit Division employees are considered. A basic tenet of economics is that in times of economic crisis, particularly when unemployment is high and jobs not readily available, demands
for higher wages and benefits for those who are employed should disappear. SEPTA employees enjoy an unusual and highly valuable contract right, in that after completion of one year of service they are immune from layoff. This is a unique and special benefit in the face of worsening economic conditions, when unemployment is expected to go over 10% nationwide and higher within the city of Philadelphia. The value of both employment with SEPTA and the protection from layoff is enhanced by the fact that SEPTA receives considerably more job applications than it has vacancies to fill.

An analysis of wage levels cannot ignore the dollar value of fringe benefits. Fringe benefits to SEPTA employees amount to approximately $2.30 an hour compared to a national average for industry of $1.54, and this favorable comparison should be included in comparing the total compensation of SEPTA employees with others. Also the Union’s comparison with five other major cities, all but one of which is outside of Pennsylvania, ignores the lower wage rates paid to employees in other eastern Pennsylvania transit systems. Additionally SEPTA wage scales should be compared with the general wage levels in Philadelphia which have traditionally been in the lower middle range.

Fact Finding and the Role of the Fact Finder

Of the two principal adjudicatory methods available for the resolution of contract terms, the Public Employee Relations Act No. 195 provides for fact finding with advisory, non-binding recommendations rather than arbitration with mandatory finality. That process was acceptable to me when I was originally asked to serve and it remains acceptable. The fact finding process and the role of the fact finder differ subtly but significantly from that of the arbitrator. Neutrals and practitioners are not in full accord on the scope of the role of the fact finder as compared to that of the arbitrator, but I have definite views on
that subject. Like the arbitrator, the fact finder must make judgments on the merits of the issue in dispute. But unlike the arbitrator for whom it may be unnecessary because of his authority to impose a determination, the fact finder must also give important attention to what he judges will be acceptable to both sides. I interpret the statute as calling upon the fact finder to assist the parties in completing their contract by making recommendations for the settlement of the unresolved issues. The statute would be meaningless or largely ineffectual if it did not have that purpose and objective in mind. I construe the statute to mean that the legislature and the affected parties want recommendations for settlement or recommendations that will provide a framework for a settlement with some further negotiations. What is not wanted in my judgement, are recommendations for non-settlement or recommendations which, in the view of the fact finder will be rejected by either or both. As I see it the fact finder's role may require consideration of facts beyond what may be required in an arbitration; to fashion recommendations that are not only fair, reasonable, responsible and meritorious but also recommendations which both sides can accept or with which both can live. The fact finder, under this statute, is an aid to the direct collective bargaining process. He is asked to assist the parties in doing for them what they were not fully able to do for themselves - to recommend substantive
terms for the completion of their contract. As such he should consider as a "fact" to be determined, what in his best judgement the parties would or should have negotiated had they been able to do so directly. Related to this, the fact finder is asked to help avert a strike. Therefore a relevant "fact" before him is how in his judgement the parties should have settled their disputes through direct bargaining to avert a strike.

It would be salutory and of course determinative if these responsibilities of the fact finder and these objectives neatly coincided with his findings or views on the bare evidentiary merits of the issues. Then, there would be no need for the fact finder to go further. But if, based on his experience in this kind of process, his sensitivity to the realistic dynamics of the collective bargaining process, and his recognition of the influences and interests that work on both sides, the fact finder concludes that findings on the bare merits of the issues will not settle the dispute and will not be acceptable to either or both sides, should his judgement on what it will take to achieve a settlement and acceptability be disregarded? I think not. Together with all other material facts, the "fact" of what is conservatively needed for a settlement is as much a key fact as any other. In that event, in my view, an adjustment in the bare
merits of the issue to accommodate the requirements of settlement is not only what the parties and the public should want, but best serves the purposes and intent of the statute and the fact finding process, provided of course that the adjustments are fair, reasonable and conscionable. In my experience, between the bare merits of the issue on the one hand and unwarranted adjustments therein on the other, there is sufficient ground to accommodate modifications that are not unduly or unreasonably burdensome and which square with "reliable and credible evidence", but which may be necessary to achieve the principal objective of settlement. In short I do not believe in fact finding for settlement's sake regardless of the terms, but rather fact finding which, because the recommendations meet the basic needs and abilities of the parties in a fair, equitable and responsible manner within the collective bargaining setting, offers greater assurance of acceptance and settlement on decent terms.

Within the foregoing context certain observations and findings of fact, principally on the wage issue, warrant discussion. Manifestly, in the view of the fact finder there is no absolute right or wrong on the wage issue, and in large measure the problems which both sides face are not of their making and are beyond their control. The parties have been the victims of the
cross and mutually inconsistent influences of a national if not international economic phenomena of simultaneous inflation and recession. Spiralling inflation over the past contract term has eroded a significant part of the purchasing power of the wage increase which the employees gained through collective bargaining. And with a present indication of only a relatively minor abatement in the period ahead, the actual and anticipated increases in basic living costs adds legitimate thrust to the demands of the employees, not only for a wage increase but for some protection this time against the effects of the inflationary impact on their real earnings.

Conversely SEPTA's ability to pay such increases though not determinative, is nonetheless quite relevant. The recession, coupled with increased costs for fuel, equipment, parts, new buses and other operating facilities has compounded SEPTA's deficit status. SEPTA operates more in the red or projects its operations more in the red with each passing year. Fare revenues are insufficient. SEPTA and the Union agree that a fare increase would be imprudent and counterproductive, by over-burdening those who must rely on the transit system and who are least able to bear the increase - namely low and moderate income citizens and senior citizens. It is agreed that the inevitable consequence of a fare increase would be to reduce the number of riders using the system with a corresponding decrease in fare revenues. The fact finder is in full accord with this view and would not, even
if he had the authority to do so, recommend a fare increase.

In short I deem material to the determinations and recommendations which I must make the following juxtaposed set of seemingly conflicting facts; the inflationary affects on real wages, and ability to pay; the legitimate right of employees to wage increases and a wage scale comparable with others similarly employed elsewhere, and SEPTA's limited resources for additional revenues and subsidies; the relatively favorable position of SEPTA employees compared with the Philadelphia labor market generally, and the unfavorable status of SEPTA's employees compared with transit employees of other major cities; and the recessionary effect on the ability of the public treasury to increase subsidies, and the duty of public officials and bodies to maintain essential transit services with competitive wage scales and other benefits for the employees thereof. These sets of factors, albeit incongruous or divergent are nonetheless of importance and relevant to a recommendation on what should be done about the wages and other monetary benefits of SEPTA employees.

To explain further. The transit system of greater Philadelphia is an essential service. It must run, in the public interest, deficit or not. Perforce its employees are an integral part of that essentiality. There is no suggestion whatsoever in the record that SEPTA is over staffed with bargaining unit employees. The productivity issue is imprecise and incomplete as to facts and evidence and I shall treat with it below and in the recommendations that follow. However I deem it unfair and unwise for employees of an essential facility to be asked to work for any extended period of time at wages or other conditions of employment discernably less favorable than what prevails in other comparable employment relationships. In that regard I conclude that "other comparable employment relationships" encompass both the Philadelphia labor market and transit employment in other large northeastern cities of the United States. Any such significant inequity cannot for long be justified on the grounds that the employer lacks the funds, due to falling revenues, inadequate appropriations, or curtailed or rejected subsidies, to pay or meet the relative competitive wage scales and other standards of employment in comparable employment relationships. As an essential service with essential employees I think it a default of public responsibility and contrary to the welfare of the vast riding public if public officials and the appropriate legislatures fail to assist SEPTA in maintaining or improving wages and
conditions of employment at or to standard levels. Put another way I think it basically unfair to impose on employees a de facto burden of subsidizing some of the deficit through lower wages or other less favorable benefits.

At the same time however, while employees may need and be entitled to increased wages to meet increasing living costs, to make up losses in earnings due to an inflationary rate beyond what was anticipated or bargained on in the last contract round, and to satisfy a claim for normal improvement expectations, the bleakness of the general economic picture is equally material. Unemployment mounts at a frightening rate. Jobs are increasingly scarce and qualified applicants for SEPTA positions far exceed the number of vacancies. The grimness of the economy places a legitimate damper on the prospect of larger public subsidies to SEPTA; tax revenues have decreased; public budgets are being sharply cut; public employees face layoffs; and apparently many types of essential governmental services are being maintained by increased deficit financing. So a job with SEPTA is a valuable property. And the contract prohibition on layoffs after one year of service is, though the Union argues that "it has yet to cost SEPTA anything", a highly valuable right and protection in recessionary times.

Additionally the Union and SEPTA should recognize that despite deficit operations before and at the outset of the last
contract term, fact finder Kleeb recognized the bona fide needs and claims of the employees for wage increases and other improvements, and recommended them. Balancing all the equities, and even though SEPTA's financial position is now more precarious than before, I shall do so also. And my recommendations on wages may be construed as more favorable to the employees than those recommended by Mr. Kleeb for the predecessor contract term.

What is required in my judgement is a delicate balance between the reasonable needs and expectations of the employees for wage increases and other improvements, and the precarious economic condition of SEPTA and the realistic constraints on its ability and the ability of public treasuries to pay for increased labor costs. Because, in the instant contract negotiations those bona fide but divergent influences are more pronounced than before, the balance, if not more delicate shall be different than in prior years. For example, I consider the wage package more compelling than specific improvements in fringe benefits. And though not in the predecessor contract, a cost of living adjustment sometime during the upcoming contract term to protect the recommended wage increases, is a concept whose time has come.

2. Mr. Kleeb recommended wage increases of approximately 6.5%, 3% and 3% over the two year contract term.
By the same token SEPTA's claims regarding productivity warrant careful and objective attention. There is no dispute that improved productivity where and when possible, if not already achieved, can make a real contribution towards covering increased costs, and SEPTA is entitled to consideration of its claims in that respect. Therefore without making a subjective judgement on the issue (because the evidence in the record is insufficient and inconclusive) I shall include a recommendation on SEPTA's "productivity proposal."

Considering all the foregoing the Undersigned, duly designated as the fact finder, makes the following RECOMMENDATIONS:

**Contract Term**

The contract term shall be two years commencing March 15, 1975 and ending midnight March 14, 1977. A two year contract is not simply the midpoint between the Union's demand for a one year agreement and SEPTA's demand for a three year agreement, nor is it simply the same length as the predecessor agreement. More importantly, as I see it, it represents the right amount of time to give both sides a reasonable period of stability of employment and services, and not bind them to terms and conditions for too long when the economy is uncertain and unsettled.
Wages

a. Wages shall be increased by 11% across the board effective March 15, 1975.

b. Wages shall be further increased by 4% across the board effective July 15, 1976.

c. Wages shall be further increased by 4% across the board effective December 15, 1976.

Cost of Living Adjustment

It is recommended that there be a cost of living adjustment made during the last quarter of the second year of the contract based on a one cent an hour increase for each .5 increase in the 1967 = 100 Consumer Price Index for the Philadelphia area, with a maximum adjustment of 12¢ an hour.

Fringe Benefits

SEPTA views the fringe issues as additional cost items. In my judgement some improvement in fringe benefits is justified but that it is best for the fact finder to recommend an amount of money which SEPTA should commit to those improvements leaving it then to the parties to negotiate how that sum should be applied to or allocated
among fringe benefit proposals. Accordingly it is recommended that in addition to the foregoing wage increases SEPTA commit an amount of money equivalent to 5 cents an hour to be allocated to fringe items as determined by negotiations between the parties.

SEPTA Productivity Proposal

The fact finder has stated his views regarding the desirability of a workable arrangement to review and improve, where necessary, the productivity of the work force and services. The fact finder takes judicial notice of the productivity arrangement between this Union and the New York City Transit Authority, and the joint productivity committees established thereunder. The fact finder recommends that the parties hereto agree to a similar arrangement, with similar procedures and objectives.

Other Issues Before the Fact Finder and Other Contract Terms

The parties are presently in negotiations and presumably will continue in negotiations after rendition of these Recommendations. The parties
have the right to negotiate further on the Recommendations. Also the fact finder does not wish to foreclose the parties from negotiating further on any other unresolved issue. Therefore in addition to their respective rights to negotiate on the specific Recommendations, they may upon mutual agreement to do so, negotiate on other items submitted to the fact finder on which he has not made specific recommendations.

Except as agreed upon or changed as a result of these negotiations, either as a consequence of the instant Recommendations or by agreement otherwise, the provisions of the prior agreement shall be carried over in full force and effect into the new contract.

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

On this sixth 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 instrument and he acknowledged to me that he executed the same.

ERNEST DOEBLER
Notary Public, State of New York
No. 03-9004659
Qualified in Bronx County Commission expires March 30, 1976