LABOR COST REVIEW PANEL

GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION
on behalf of MAPLE LEAF NURSING HOME,
NEW ROCHELLE NURSING HOME, GREEN PARK CARE CENTER, CONCOURSE NURSING HOME

and

STATE OF NEW YORK

AWARD

Because of the severe economic problems of the above-named Homes and facilities and pending further study of the record by the Panel and a determination of the hardship appeals of said Homes and facilities, the State is directed to increase the labor cost component of the Medicaid reimbursement rates of said Homes and facilities in the amounts of and pursuant to the methodology submitted by the State in the hearings before this Panel on said hardship appeals, for the period April 1, 1979 through December 31, 1979.

Eric J. Schmertz,
Chairman

DATED: March 26, 1980
STATE OF New York ss.
COUNTY OF New York

On this 26th day of March, 1980 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.

Concurring

DATED: March 26, 1980
STATE OF New York ss.
COUNTY OF New York

On this 26th day of March, 1980 before me personally came and
William Gormley,  
Dissenting  
Concurring

DATED:  
STATE OF ) ss.:  
COUNTY OF )  

On this day of before me personally came and appeared William Gormley 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.
Pursuant to stipulation and as the only exception to the Panel's foreclosure of consideration of fringe benefit costs re the year 1979, and because of the severe economic difficulties of East Haven Nursing Home, and pending a final determination on the hardship appeal of said Home, the State is directed to apply its methodology to the labor costs including the fringe benefits of said Home for the period April 1, 1979 through December 31, 1979, and to increase the labor cost component of the Medicaid reimbursement rate of and for said Home in the amount, if any, resulting from the application of said methodology in the manner and for the purpose set forth above.

Eric J. Schmertz,
Chairman

Jeffrey R. Cohn
Notary Public, State of New York
No. 30-46-24298
Qualified in Nassau County
Commission Expires March 30, 1979

Bartholomew J. Lawson
Concurring

Jeffrey R. Cohn
Notary Public, State of New York
No. 30-46-24298
Qualified in Nassau County
Commission Expires March 30, 1979

Bartholomew J. Lawson
Concurring
On this day of before me personally came and appeared William Gormley 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.
Because of the severe economic problems of the above-named facility and pending further study of the record by the Panel and a final determination of the hardship appeals of said facility, the State is directed to increase the labor cost component of the Medicaid reimbursement rates of said facility in the amounts of and pursuant to the methodology submitted by the State in hearings before this panel on said hardship appeals, for the period April 1, 1980 through December 31, 1980.

Dated: 9/6/80
STATE OF New York ) ss.:  
COUNTY OF New York  

On this 15th day of September 1980 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
Commission expires: 3/30/82  

Bartholomew J. Lawson
Concurring

Dated: 9/15/80
STATE OF New York ) ss.:  
COUNTY OF New York  

On this 15th day of September 1980 before me personally came and appeared Bart Lawson 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
Commission expires: 3/30/82
On this 15th day of September, 1980 before me personally came and appeared William Gormley 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.

William Gormley
Dissenting
Concurring

DATED: 9/15/80
STATE OF New York ) ss.:
COUNTY OF New York )

Notary Public
Commission expires: 3/30/83
GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION

on behalf of NEW ROCHELLE NURSING HOME —and—

STATE OF NEW YORK

AWARD

Because of the severe economic problems of the above-named facility and pending further study of the record by the Panel and a final determination of the hardship appeals of said facility, the State is directed to increase the labor cost component of the Medicaid reimbursement rates of said facility in the amounts of and pursuant to the methodology submitted by the State in hearings before this panel on said hardship appeals, for the period April 1, 1980 through December 31, 1980.

Eric J. Schmertz
Chairman

DATED: 9/1/80
STATE OF New York )ss.: 
COUNTY OF New York )

On this 14th day of September 1980 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.

Notary Public
Commission expires 3/30/80

Bartholomew J. Lawson
Concurring

DATED: 9/15/80
STATE OF New York )ss.: 
COUNTY OF New York )

On this 14th day of September 1980 before me personally came and appeared Bart Lawson to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public
Commission expires 3/30/80
DATED: 9/12/80
STATE OF New York )ss:
COUNTY OF New York )

On this 15th day of September, 1980 before me personally came and appeared William Gormley 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.

William Gormley, Dissenting
Concurring

[Signature]

Steven B. Steinherdt
Notary Public
Commission expires: 3/30/82
LABOR COST REVIEW PANEL

In the Matter of the Petition between
GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION, INC. on behalf of HILLSIDE MANOR and THE STATE OF NEW YORK

THE UNDERSIGNED PANEL MEMBERS recognize the present severe economic problems of the above named facility. Therefore, without prejudice to the positions of the State and the facility, the State is directed to apply its methodology to and for the periods July through December 1979 and January through December 1980 to said facility for determination of the labor cost component of said facilities medicaid reimbursement rate for said periods. If as a result the facility is non-affordable for those periods the State shall increase the labor cost component of the medicaid reimbursement rate applicable to said facility for those periods, subject to a final determination by this panel on the question of affordability pursuant to the positions and rights of the parties as presented in the hearings before the panel. It should be recognized that such final determination may affirm, reverse, modify, increase or decrease the labor cost component of the medicaid reimbursement rate applicable to this facility for whatever periods of time are properly before the panel in the full case pending before it.

Eric J. Schmertz
Chairman

DATED: Oct 8, 1980
STATE OF NEW YORK 
COUNTY OF NEW YORK )ss:

Melanie L. Adler
Notary Public

Qualified in Kings County
On this day of October, 1980 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]

Bartholomew J. Lawson
Concurring

DATED:
STATE OF ) ss.:
COUNTY OF )

On this day of before me personally came and appeared Bart Lawson 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]

William Gormley
Dissenting
Concurring

DATED:
STATE OF )
COUNTY OF ) ss.:

On this day of before me personally came and appeared William Gormley 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 Petition between
GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION, INC. on behalf of HILLSIDE MANOR and THE STATE OF NEW YORK

THE UNDERSIGNED PANEL MEMBERS recognize the present severe economic problems of the above named facility. Therefore, without prejudice to the positions of the State and the facility, the State is directed to apply its methodology to and for the periods July through December 1979 and January through December 1980 to said facility for determination of the labor cost component of said facilities medicaid reimbursement rate for said periods. If as a result the facility is non-affordable for those periods the State shall increase the labor cost component of the medicaid reimbursement rate applicable to said facility for those periods, subject to a final determination by this panel on the question of affordability pursuant to the positions and rights of the parties as presented in the hearings before the panel. It should be recognized that such final determination may affirm, reverse, modify, increase or decrease the labor cost component of the medicaid reimbursement rate applicable to this facility for whatever periods of time are properly before the panel in the full case pending before it.

Eric J. Schmertz
Chairman

DATED: Oct 7, 1980
STATE OF NEW YORK
COUNTY OF NEW YORK

MELANIE J. ADLER
Notary Public
New York
Qualified in this County
Commission Expires Mar. 30, 1982
On this day of October, 1980 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]

Bartholomew J. Lawson
Concurring

DATED:  
STATE OF  
COUNTY OF  

On this day of before me personally came and appeared Bart Lawson 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]

William Gormley  
Dissenting  
Concurring

DATED:  
STATE OF  
COUNTY OF  

On this day of before me personally came and appeared William Gormley 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.
LABOR COST REVIEW PANEL

In the Matter of the Petition
between
GREATER NEW YORK HEALTH CARE
FACILITIES ASSOCIATION, INC. on
behalf of HILLSIDE MANOR and
THE STATE OF NEW YORK

INTERIM AWARD

THE UNDERSIGNED PANEL MEMBERS recognize the present severe
economic problems of the above named facility. Therefore, without
prejudice to the positions of the State and the facility, the State
is directed to apply its methodology to and for the periods July
through December 1979 and January through December 1980 to said
facility for determination of the labor cost component of said facili-
ties medicaid reimbursement rate for said periods. If as a result
the facility is non-affordable for those periods the State shall
increase the labor cost component of the medicaid reimbursement rate
applicable to said facility for those periods, subject to a final
determination by this panel on the question of affordability pursuant
to the positions and rights of the parties as presented in the hearings
before the panel. It should be recognized that such final determination
may affirm, reverse, modify, increase or decrease the labor cost component
of the medicaid reimbursement rate applicable to this facility for what-
ever periods of time are properly before the panel in the full case pend-
ing before it.

Eric J. Schmertz
Chairman

DATED: Oct 8, 1980
STATE OF NEW YORK
COUNTY OF NEW YORK

Melanie Adler
Notary Public
State of New York
On this day of October, 1980 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.

Melanie Adler

Qualifying Commissioner
Commission Expires May 31, 1982

On this day of before me personally came and appeared Bart Lawson 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 ) ss.: 
COUNTY OF )

On this day of before me personally came and appeared William Gormley 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 ) ss.: 
COUNTY OF )

William Gormley
Dissenting
Concurring
The stipulated issue is:

Did the Employer violate the contract by failing to award the Meter Mechanic Grade I position posted on February 27, 1978 to George Schmidt? If so what shall be the remedy?

A hearing was held on November 13, 1979 at which time Mr. Schmidt, 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 parties filed post-hearing briefs.

At the time he bid for the Grade I Meter Mechanic job the grievant was an Apprentice Meter Mechanic. The Company rejected his bid, and awarded the job to Tommy Kusumotono, a less senior employee who had progressed to the position of Meter Mechanic - Grade II. Both the grievant and Kusumotono had previously served the full requisite period of time as Helper in the Meter Department.

There are two basic questions in this case. First, whether
an incumbency in the job of Meter Mechanic - Grade II is a pre-
requisite for promotion to Meter Mechanic - Grade I; and second,
whether the Company's denial of the grievant's bid was arbitrary
or capricious within the meaning of Article V Section 7 of the
contract and the Award of this Arbitrator of December 2, 1975 in
Case #1330 0716 75.

With regard to the first question, the pertinent part of
Schedule I of the contract reads:

Note (i)-Meter Mechanic-Grade I shall be entitled to an additional 5¢ per hour after
three (3) years of satisfactory service in this classification, and an additional 5¢
per hour after five (5) years of satisfactory service.

Note (j)-Apprentice Meter Mechanic after one (1) year of satisfactory service to the Authority
shall be entitled to an additional 5¢ per hour, and after one and one-half (1½) years of satis-
factory service to the Authority in this class-
ification shall be entitled to classification
of Meter Mechanic-Grade II. Such amount shall
be in addition to the hourly rates specified hereinabove for this job classification.

Note (k)-Helper in the Meter Department shall
be entitled to an additional 5¢ per hour after
six (6) months of satisfactory service to the
Authority in this classification, and after one (1) year shall become an Apprentice Meter
Mechanic. If after one (1) year the position
is vacated, it will revert to the position of
Helper.

Ordinary logic suggests that promotions within the Meter
Department from the lowest position of Helper, to the ultimate
and highest position of Meter Mechanic-Grade I, are hierarchal,
moving sequentially through each higher paying job; i.e. from
Helper to Apprentice Meter Mechanic; to Meter Mechanic-Grade II and then to Meter Mechanic-Grade I. On that basis, service as a Meter Mechanic-Grade II would be necessary to qualify for the Grade I job.

But any prima facie logical view must be supported by the contract. The Union calls attention to the fact that the foregoing contract language sets forth specific time limits for progression from Helper to Apprentice Meter Mechanic and from Apprentice Meter Mechanic to Meter Mechanic-Grade II, but does not specify service as a Meter Mechanic-Grade II as a condition precedent to the classification and pay of Meter Mechanic-Grade I. The Union concludes therefore, that while service as a Helper may be necessary to qualify for the Apprentice job; and service as an Apprentice may be required before promotion to the Grade II Meter Mechanic, there is no contract bar to promotion to Grade I Meter Mechanic from the Apprentice level provided the bidder is qualified.

Moreover the Union asserts that the progressions referred to in the foregoing contract provisions, particularly the progression from Apprentice to Meter Mechanic-Grade II, are not based on differences in skills or significant differences in job duties, but rather were negotiated to provide pay increases and monetary incentives to employees to remain in the Meter Department, and that substantively there are no significant job distinctions
or differences in skills between the Apprentice and the Grade II Meter Mechanic.

I do not interpret the foregoing sections that way, and it is to the contract language that the arbitrator is bound. Undisputedly there are four distinct job classifications in the Meter Department, namely Helper, Apprentice Meter Mechanic, Meter Mechanic-Grade II and Meter Mechanic-Grade I. Progressively, each, after a requisite period of service, carries with it a higher rate of pay. Any traditional interpretation of different pay scales, which increase progressively with higher classified jobs, establishes a strong presumption that the increased pay is attendant to increased job duties, responsibilities, or required skills. Consequently unless rebutted, I find a contractual presumption, from the bare contract language, that there are significant distinctions between the jobs of Apprentice Meter Mechanic and Meter Mechanic-Grade II to justify the pay differences.

Additionally besides any implicit requirement of step by step progression within the cited jobs of the Meter Department which may logically be drawn from the classification and pay differences, I also find explicit language which bars an Apprentice Meter Mechanic from jumping over the Meter Mechanic-Grade II classification in seeking promotion to Meter Mechanic-Grade I.

Paragraph (j) above provides that an Apprentice Meter Mechanic

"...after one and one-half (1½) years of
satisfactory service to the Authority in this classification shall be entitled to classification of Meter Mechanic-Grade II."

(emphasis added)

To my mind this means that only after a year and one-half may an Apprentice be promoted, and then only to Meter Mechanic-Grade II.

That interpretation bars the grievant on two grounds. At the time of his bid he had not yet completed one and one-half years as an Apprentice, and of course, the promotion he sought was not as paragraph (j) provides, to Grade II Meter Mechanic, but rather to Grade I Meter Mechanic.

The Union's claim that the classification definitions between Apprentice and Meter Mechanic-Grade II were constructed only to provide pay incentives and are not based on substantive job differences, must be supported by evidence showing the duties of both classifications to be substantially the same. The record before me does not meet that test. Though there is evidence indicating that employees in both classifications perform many overlapping functions and that the grievant knew about some of the meter repair work primarily performed by the Grade II Mechanic, and even may be able to do that work if it was assigned to him, the record before me shows that repairs of the larger meters are performed virtually exclusively by the Grade II Mechanics; are not assigned to the Apprentice; and the work is carried out at locations at which the Apprentice does not work. Though the grievant and the Union on his behalf claim that the grievant can do the larger meter repair work - and there is evidence that this
may well be so - I am not able to hold that the two jobs are the same or that the Company has made arbitrary distinctions between the two. In short, even if the grievant is able to perform the duties of the higher classification, that does not mean that the two classifications involved are substantively one.

Finally, because of the contractual restrictions of Schedule I, paragraphs (i), (j) and (k), which accord an apprentice Mechanic only the right to move upward from that classification to Meter Mechanic-Grade II, the grievant's potential ability to do those parts of the Grade II job which had not been assigned to him as an Apprentice, (and to thereby be treated as if he occupied the Grade II classification), is immaterial. Hence, the Employer's determinations under those circumstances cannot be deemed arbitrary or capricious.

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

The Employer did not violate the contract by failing to award the Meter Mechanic-Grade I position to George Schmidt.

DATE: January 29, 1980

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

On this twenty-ninth day of January, 1980 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:

Were the layoffs of Marjoria Rand and Rose Chimienti in violation of the collective bargaining agreement? If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on December 18, 1979 at which time Ms. Rand and Ms. Chimienti, hereinafter referred to as the "grievants" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

What the Union seeks in this case is beyond the provisions of the collective bargaining agreement. It claims that the grievants, laid off from their jobs as matrons, should have been allowed to bump less senior employees in the custodian classification. However the contract does not accord employees bumping rights from one classification to another based on seniority in layoff situations, nor does the contract determine
seniority on a company-wide basis. Rather, Article IX Seniority provides

\textit{inter alia}

"....seniority rights shall be exercised ....according to classifications."

It goes on to specify that the jobs of matron and custodian are, among others, different job classifications and that

"In the event of a layoff employees shall be laid off on the basis of seniority as described above."

The phrase "as described above" refers to the previously mentioned seniority by classification and the job distinction between matron and custodian.

Accordingly under the contract the grievants acquired seniority only within the classification of matron; were laid off from that classification pursuant to their seniority, and had no seniority or contract right to bump into the different classification of custodian despite the fact that some custodians had been employed by the Company a shorter period of time.

What the Union seeks in this proceeding is a matter of collective bargaining, not arbitration.

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

The layoffs of Marjorie Rand and Rose Chimienti were not in violation of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator
DATED: January 17, 1980
STATE OF New York )ss.:
COUNTY OF New York )

On this seventeenth day of January, 1980 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company have proper cause pursuant to Article X Paragraph E of the contract to discharge Mr. Irving Jacobson? If not what shall the remedy be?

A hearing was held at the Company offices in New York City on December 17, 1979 at which time Mr. Jacobson, hereinafter referred to as the grievant and representatives of the above named Union and Company appeared. All concerned were offered full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

On August 18, 1978 the grievant, then a fuel delivery driver, negligently pumped 500 gallons of non-leaded premium gasoline into a customer's tank reserved for and containing non-leaded regular gasoline. This "co-mingling" which was the grievant's fourth "co-mingling" mistake over the last five years of his employment, triggered his discharge.

It is undisputed that the grievant committed "co-mingling" mistakes on January 22, 1974, March 28, 1974 and July 19, 1976.
He was disciplined for these errors by disciplinary suspensions of one day, three days and one day respectively.

The Union claims that the instant incident which resulted in the grievant's discharge was not serious in that the co-mingled product was not contaminated; the product was marketable by the customer at only a minor monetary loss to the Company; that it was not comparable to a serious co-mingling of leaded and non-leaded gasoline or the adding of regular gas to premium which would contaminate the resultant product; that co-mingling is an inherent probability of the job because of the large number and quantities of deliveries made; that by practice co-mingling errors only brought penalties of from one to three days suspensions at most; and that therefore the penalty of discharge imposed on the grievant was too severe.

The Company relies on its application of "progressive discipline" for those similar prior offenses committed by the grievant together with the fact that on earlier discharge of the grievant for a delivery "spill" and for using intemperate language to a supervisor was reduced to a disciplinary suspension by an arbitrator who reinstated the grievant with "a last chance to prove himself." The Company asserts that the instant offense, occurring less than five months thereafter, constitutes a default by the grievant on the last chance condition imposed by the prior arbitrator. The Company asserts therefore that based on the grievant's entire record including the last co-mingling mistake,
his discharge was for cause.

Though I think an extended disciplinary suspension would have been adequate in this case, I cannot find that the Company's decision to impose the penalty of discharge was improper.

This was the grievant's fourth similar offense. By the application of progressive discipline, the grievant was put on notice that co-mingling was neither an incidental nor acceptable part of carrying out fuel delivery duties. That this latest incident was not as serious as if leaded and non-leaded gas had been mixed, or as if a regular blend had been mixed with premium, is really immaterial. As the fourth co-mingling incident it must be construed as a clear indication of the grievant's propensity for negligence, and the Company has the right to protect itself from further such incidents, serious or less serious. In short I am not persuaded that the Company is required to await a more serious co-mingling by the grievant of leaded and non-leaded gas, or of premium pumped into regular tanks, before it can terminate the grievant's employment.

The Union's claim that only short periods of suspensions have been imposed as discipline for co-mingling mistakes has not been shown to be applicable to circumstances similar to this case. The fact is that warnings and suspensions are and have been the proper penalty for first or second offenses, but where as here, a fourth offense has occurred following disciplinary suspensions
for earlier acts, a greater penalty is proper and appropriate. Otherwise the Company could never discharge an employee for repeated co-mingling mistakes, but would have to tolerate his continued employment indefinitely. The illogic of any such circumstance is manifest.

The Union asserts that previously no employee has been discharged for co-mingling. What would be material in support of that assertion are examples of other employees with prior disciplinary records similar to that of the grievant, more particularly employees with at least three prior incidents of co-mingling over a similar or relevant period of time, who were not dismissed. The Union has now shown that essential comparability to support its contention that the penalty of discharge imposed on the grievant was either excessive or discriminatory.

Considering the foregoing I find that I need not deal with the decision of Arbitrator Benjamin C. Wolf which reduced the grievant's prior discharge to a suspension. Needless to say I do not see how any analysis or consideration of that decision (which dealt with a spill rather than a co-mingling and also dealt with the grievant's insubordination under the particular circumstances of that situation) could be helpful to the grievant's case herein.

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

The Company had proper cause to discharge Irving Jacobson.

Eric J. Schmertz
Arbitrator

DATED: April 11, 1980
STATE OF New York )ss.: 
COUNTY OF New York )

On this eleventh day of April, 1980 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with Article XI of the collective bargaining agreement dated September 4, 1979 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the suspension of Alger Ambrose in violation of Article V Section 4(g) and the Preamble of the collective bargaining agreement and/or an unfair labor practice under Section 8(a)(3) of the National Labor Relations Act, as amended? If so, what shall be the remedy?

A hearing was held in Waterbury, Connecticut on July 9, 1980 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 Arbitrator's Oath was taken.

The Company claims that on January 14, 1980 it informed Mr. Ambrose, hereinafter referred to as the "grievant" or "Ambrose", that production requirements would not permit certain union members to attend, as planned witnesses, an arbitration hearing scheduled for the next day, and further claims it directed the grievant to rescind his instructions or not to instruct those employees to
attend as a group. The Company imposed the suspension for the
grievant's failure to comply with that directive, asserting that
it constituted "insubordination."

The cited contract provisions read:

/Preamble/

...The provisions of this agreement constitute
the sole procedure for the processing and settle-
ment of any claim by an employee or the Union of
a violation by the Company of this Agreement. As
the representative of the employees, the Union
may process complaints and grievances through the
the complain and grievance procedure, including
arbitration, in accordance with this Agreement or
adjust or settle the same.

ARTICLE V - RESPONSIBILITIES OF THE PARTIES

Section 4. In addition to the responsibilities
that may be provided elsewhere in this Agreement,
the following shall be observed:

(g) There shall be no discrimination, restraint
or coercion against any employee because of mem-
bership in the Union.

The Company contends that contrary to its instructions to him,
the grievant told eight employees to attend the arbitration hear-
ing during their regular working hours. The Company asserts that
it made clear that it would be willing to permit two employees at
a time to attend the arbitration hearing and after those two had
finished testifying they could be replaced by two others, contin-
uing the process until all the proposed union witnesses had tes-
tified. The arbitration hearing was to be held at a motel approx-
imately five minutes in travel time from the Company's plant. The
Company points out that only three employees of the eight who
attended the arbitration hearing testified. The five others "just
sat there." This, argues the Company resulted in an unnecessary
loss of production. It insists it did not try to deny the Union "access to the collective bargaining process", rather, it's objection was to the simultaneous presence of all witnesses at the hearing. It sought only to accommodate its production needs with the arbitration hearing, and did not seek to preclude any testimony by any witness. The seven employees other than the grievant were given disciplinary warnings which the Union did not grieve.

The Union contends that there is a history of anti-union animus on the part of the Company and that the Company has committed unfair labor practices on previous occasions. The Union stresses that this is a new Local that has negotiated its first collective bargaining agreement and that this disciplinary suspension prompted the first grievance filed and the first arbitration between the parties under that contract.

The Union argues that it must have the right and the ability to process arbitration cases as a means of settling grievances, and that how it plans its case and particularly which witnesses are needed are matters exclusively for the Union to determine. As the Union's attorney concluded that it was necessary to have eight employees as witnesses present at the hearing, the Union insists that any limitation by the Company on the right of the Union to call those witnesses and have them present even during working hours unreasonably impedes the traditional use of the grievance procedure. The Union points out that the Company did not order the employees personally or individually not to attend the hearing.
as a group, but instead held the grievant, as president of the Local, responsible.

In the Union's view the time frame during which the Company informed the grievant regarding the limits on the number of witnesses to be present at the hearing, is significant. The Union maintains that the Company first approached the grievant as late as five minutes before quitting time the day before the hearing, and failed to contact the Union's international representative, John R. Giamette about the matter. By that time the Union states, the eight employees who were directly involved in the grievance to be arbitrated or who had attended the negotiation sessions regarding the disputed contract language of that grievance had been interviewed by Union counsel, selected as witnesses, and told by the Union to be present at the hearing. The Union claims that the Company's effort to restrict the number of witnesses to be present at the hearing came too late and that the Union did not intend to impair production or otherwise harm the Company.

The facts of the case indicate that at approximately five minutes before quitting time on January 14, 1980 the Personnel Director, Wayne Rigney, approached the grievant and stated that the absences of eight employees from the plant simultaneously would adversely affect productivity; that management could authorize two employees to be absent at a time; and that when additional witnesses were needed they could be brought to the site of the hearing, approximately five minutes from the plant. Rigney
testified that the grievant rejected this suggestion, saying, "go to hell, your're not going to tell us what to do." Rigney subsequently stated that, "If all eight employees go, there may be disciplinary action." The grievant then warned that if there were disciplinary action he would close the plant down. The events that preceded this exchange are important. Ambrose testified that he and Union Representative John R. Giamette, decided who would be needed at the hearing two or three days earlier. A meeting between the selected employees, and the Union's attorney, Joseph Garrison, was planned for 3:30 PM on January 14, 1980. At 9:00 AM on January 14 Giamette asked Rigney to release those eight employees for the meeting. Rigney was to respond to this request but did not do so. Giamette was unable to reach Mr. Rigney to obtain permission for the release of the employees from work for the planned meeting on January 14, so as a result Giamette rescheduled the preliminary meeting for 7:00 PM. Ambrose notified the employees and also told them to attend the arbitration hearing at 10:00 AM the following morning.

The conflicting interests of the parties are obvious, and both interests are legitimate. The Union was properly concerned with the adequate preparation and presentation of its arbitration case. The Company sought to minimize the impact on its production. The Company has established as a matter of evidence that the absence of the eight employees from the plant during working hours diminished productivity that day. The Union was not unmindful or insensitive to the Company's production needs. Thus, it changed its original prehearing conference between its attorney and the
prospective witnesses from the afternoon of January 14 to 7 PM that day after working hours, when consent for them to leave the plant at the earlier hour was not forthcoming. I conclude that the Company did not seek to unreasonably interfere with the Union's arbitration rights, but only sought to establish a sequence of witnesses who could be shuttled from the plant to the hearing site at a minimum loss of their respective working time.

It is well settled that employees and union officials must carry out the instructions of management exercising managerial authority even if those instructions are violative of the collective bargaining agreement, subject to certain special exceptions not present in this case, and subject to the right of the union to grieve and arbitrate. However, based on the factual circumstances of this case, Rigney's instruction to the grievant about the attendance of the eight employees at the hearing did not constitute an "exercise of management authority" within the traditional employer-employee relationship to which this rule applies. The exchange between them did not primarily involve a work assignment or the carrying out of the Company's right to direct the work force in the manufacturing and/or service activities of the Company. Rather and primarily, it related to the institutional labor-management relationship between the parties and particularly the implementation of the terminal step of the grievance procedure. In that respect, and restricted to that situation I deem that the Union President was on an equal footing with management. He was not required, virtually at the "eleventh hour", to accede to the Company's procedure for the conduct of the Union's case at the
arbitration, especially where as here the methods planned by the
Union were neither unusual or unreasonable as a matter of arbitra-
tion practice. Nor, as the Company apparently tried to do here, is
the Union president the Company's "agent" in delivering messages
to other employees who are union members regarding the manner in
which they were to give testimony on behalf of the Union at the
arbitration hearing, especially when as here, that "message" was
at variance with the usual method for the exercise of a union's
arbitration rights. In short, despite the Company's legitimate
objective, it had no proper basis under the circumstances of this
case to treat as insubordination the Union president's refusal to
alter the way Union representatives and counsel planned the Union's
arbitration case. The grievant's argumentative or even threaten-
ing language to Rigney, though not condoned, was in my view an
angry response to the late effort by the Company to cast the way
the Union was to present its arbitration case, and inasmuch as
there is no evidence of any plan or action to "shut-down the
plant", the bare language used by the grievant was within the
bounds of zealous union representation.

The rules of the American Arbitration Association which by
contract are binding on the parties at the arbitration level are
supportive of the Union's case herein. Rule 22 of the Voluntary
Labor Arbitration Rules provides:

Attendance at Hearings--Persons having a direct
interest in the arbitration are entitled to
attend hearings. The Arbitrator shall have the
power to require the retirement of any witness
or witnesses during the testimony of other wit-
nesses. It shall be discretionary with the
Arbitrator to determine the propriety of the
attendance of any other persons.
That Rule is incorporated into the Agreement negotiated by the parties under Article XI - Arbitration. That Article states: "Arbitration shall be conducted under the Voluntary Labor Arbitration Rules then obtaining of the American Arbitration Association." Thus, any person having a "direct interest" in the arbitration has a right to attend the hearing.

In addition, Rule 28 of the Voluntary Labor Arbitration Rules provides in pertinent part:

Evidence—The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party....

It is therefore clear that at the January 15, 1980 hearing both parties had the right to produce whatever evidence and testimony deemed by the Arbitrator to be relevant and material to the dispute and that persons having a direct interest in the arbitration were entitled to attend the hearing.

Article XI, Section 3 of the Agreement specifically envisions that employees will attend arbitration hearings during working hours. Section 3 provides in pertinent part that: "All lost time, wages or expenses of witnesses or other participants called by the Union shall be paid by the Union and all of the same expenses incurred by the Company shall be paid by the Company." It is noteworthy that the Agreement is silent with respect to any further guidelines for the attendance of witnesses to arbitration hearings. Under these circumstances in which the Agreement is silent, a
reasonable standard must be presumed to apply.

To hold the grievant responsible for the action he took in his role as union president would be unreasonable under those circumstances. In view of the foregoing Rules of the American Arbitration Association, the explicit incorporation of those Rules in the collective bargaining agreement and the Company's delay until virtually the last minute to set forth its position regarding the attendance of witnesses at the hearing, the grievant's action, in his capacity as president of the Union was neither surprising, illogical or unreasonable. So far as this case is concerned he was not insubordinate. I find he acted primarily on the determinations of Union counsel who had decided that all eight employees were needed to testify and should be present at the hearing as a group. Considering the traditional arbitration hearing, which often involves many witnesses and where more often than not all witnesses are present at the same time, I cannot find the plan of Union counsel to be unorthodox or unreasonable. And the grievant's implementation of that plan, as the Union official responsible for the processing of the grievance through arbitration, was a reasonable reflection of what the Union thought was necessary to properly present its case. Though only three of the eight employees actually testified is not evidence of bad faith. It is not unusual to have persons in attendance who are planned as witnesses but who subsequently or in the course of the hearing are not called. There is no evidence that the grievant knew that some of them would not be used as witnesses the next day,
when on January 14th at 5:20 PM he resisted management's directive to stagger the appearance and testimony of the Union's witnesses.

Accordingly the grievant was not guilty of insubordination and his three day suspension is reversed.

The Alleged Unfair Labor Practice

CONTENTIONS OF THE UNION

The Union argues that the Company violated Section 8(a)(3) of the National Labor Relations Act, as amended, when the Company suspended Ambrose. The Union claims that the employer's action coerced and intimidated the employees under Section 7 of the Act with respect to their exercise of concerted activity by disciplining eight employees for participating in the grievance procedure. The instant arbitration only concerns Ambrose. The Union further argues that the Company has a history of anti-union animus.

CONTENTIONS OF THE COMPANY

The Company denies the claim that it committed an unfair labor practice. It contends that the disciplinary action was not taken for union activity but rather for insubordination. The Company maintains that the grievant's action did not constitute protected activity within the meaning of the Act but was instead designed to usurp the authority of the Company.

DISCUSSION

The National Labor Relations Act, as amended, provides in Section 8(a) that:

It shall be an unfair labor practice for an employer--
by discrimination in regard to hire or
tenure of employment or any term or condi-
tion of employment to encourage or discourage
membership in any labor organization....

The parties expressly stipulated that this Arbitrator should
determine whether the suspension of Ambrose violated the above-
quoted provision.

Section 8(a)(3) specifically requires that discrimination and
a resulting discouragement of union membership be found. American
Ship Building Co. v. Labor Board, 380 U.S. 300, 311 (1965). Al-
though Ambrose was President of the Union, I am of the view that
for purposes of the discipline meted out to him this status was
immaterial to the Company. Rather, the Company would have disci-
plined any employee regardless of his status who had instructed
other employees not to report for work.

With respect to the necessity of proving that there was a
resulting discouragement of union membership, a three day disci-
plinary suspension in my opinion would have such an effect assum-
ing, of course, that the discipline was due to the grievant's
position as President of the Union.

The critical aspect of the Section 8(a)(3) charge in the
instant case, however, is whether the Company harbored an anti-
union motive, intent, or animus. The Company sought to discipline
Ambrose for his "act of insubordination including the advising of
employees to take time off without authorization." Accordingly,
the Company asserts that it acted for the legitimate business
reason of maintaining control over employee attendance, whereas
the Union argues that reason was pretextual and that the real
reason for disciplining the grievant was its anti-union animus.

I conclude that the case of NLRB v. Great Dane Trailers, Inc. 388 U.S. 26 (1967), is controlling. The Court in Great Dane summarized several principles that furnish the rubric for determining whether the elements for a Section 8(a)(3) charge are proved when an employer alleges that legitimate business reasons formed the basis for the employer's conduct:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.


In applying these standards to the instant case, it is clear to me that the sole motivating factor for the Company's action was a belief that the grievant had acted insubordinately in advising certain employees to take time off from work to attend the arbitration hearing. The underlying reason for this action was the Company's concern about minimizing loss of productivity due
to the absence of the employees. In my view this belief constituted a legitimate business objective even though the Company's interpretation and application of the collective bargaining agreement was erroneous. That the Company sustained its burden of proof is based on the following facts. First, the Company had sought to limit the number of employees who would be absent from the plant at any one time. Second, the Company proved at the instant hearing that the absence of eight employees would adversely affect production at the plant. Third, the Company's Personnel Manager had sought to confer with the International Union Representative to enter into a mutually acceptable arrangement. Fourth, there was no proof of any instance of anti-union animus on the part of the Company beyond the Union's general assertion to that effect. Based upon the totality of these circumstances, it is my opinion that the Company's action, albeit erroneous, was predicated on a good faith belief that the grievant had acted insubordinately.

A case that has considered an analogous situation is Service Employees International Union, Local 250, AFL-CIO v. NLRB, 600 F.2d 930 (D.C. Cir. 1978). In that case, the District of Columbia Circuit overruled the NLRB by sustaining an employer's discharge of 13 employees who attended an NLRB representation hearing during working hours despite the express orders of the employer to remain at work. The court reasoned:

Bearing in mind that "working time is for work" we agree with the dissent (Members Penello and Walther of the NLRB) that, absent any subpoena or call from the Board to attend a hearing "unless employees can demonstrate substantial reasons for attending a Board hearing, unless
there are compelling reasons urging their attendance, the employer's right to maintain normal operations should, and does, take precedence over the employees' right to leave work during regular working hours for such attendance or for any other purpose except that of legitimate strike activity excluding, of course, an emergency with which we are not concerned in this case.

Id. at 938. After distinguishing the Service Employees case from Great Dane—since the former involved a Section 8(a)(4) charge and the latter concerned a Section 8(a)(3) charge—the District of Columbia Circuit reached an important conclusion that in my judgement applies to the Ambrose situation:

Bearing in mind that the employer in the present case had volunteered to permit one representative to attend the hearing, and considering the nature of a Board representation hearing with its flexible alternatives with respect to a witness testifying, it is indeed difficult to find that the resulting harm is anything more than de minimus. Assuredly, the employer's conduct was prima facie lawful and, we feel, convincingly so.

Id. at 939.

In the instant case I view the Company's offer to permit two employees to attend the arbitration hearing, with the proviso that additional employees would be shuttled to the hearing as needed, as being analogous to the Service Employees case. Thus the harm to the rights of the employees did not even rise to the level of "comparative slight."

Insofar as the Company's business interest is concerned, the opinion of the District of Columbia Circuit, which adopted the language of the dissenting NLRB Members, is particularly noteworthy:
"The successful functioning of a business enterprise requires, rather obviously, the presence of employees on the job during working hours. It would also seem equally evident that employee absence is inherently disruptive and unexcused absence has, of course, usually been considered, absent a legitimate strike, proper grounds for discharge."

Id. at 940. It is therefore my opinion that the Company's action in disciplining Ambrose lacked an anti-union motive but was predicated upon a desire to maintain control over employee attendance.

Finally, the Second Circuit recently decided a Section 8(a)(3) case that considers some of the problems that arise with respect to motivation when a union activist is involved. In Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90 (2d Cir 1978), the court initially noted that: "It is well established that employees who are active in union affairs do not thereby obtain a special immunity from ordinary employment decisions." Id. at 97. The court thereafter continued by citing language from Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 285-86 (1977), to wit:

"A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decisions."

Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2d Cir. 1978).
Based upon the Waterbury case I consider it beyond question that standing alone, Ambrose's status as President of the Union is not enough upon which to find that the Company violated Section 8(a)(3) of the National Labor Relations Act, as amended. Accordingly, based upon my view of the applicable law, it is my determination that the Company did not violate Section 8(a)(3) of the National Labor Relations Act, as amended, when it imposed a three day suspension on Ambrose for his alleged "act of insubordination including the advising of employees to take time off without authorization." As Article V Section 4(g) of the contract tracks the aforementioned section of the National Labor Relations Act, this determination is substantively dispositive of the Union's claim that the suspension violated that contract provision.

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

Alger Ambrose was not insubordinate. To the extent that the Company misconstrued his legitimate role as the Union's President regarding the method for presentation of the Union's case in an arbitration, it violated the Preamble of the Collective Bargaining Agreement. The suspension is reversed and Ambrose shall be made whole for the three days loss of pay. However, the Company's action neither violated Article V Section 4(g) of the contract nor Section 8(a)(3) of the National Labor Relations Act, as amended.

DATED: August 12, 1980

Eric J. Schmertz
Arbitrator
System Board of Adjustment
Trans World Airlines, Inc.,
and
International Association of Machinists and Aerospace Workers,
Mechanics and Related Employees:

AWARD
G-2-5/3-13A

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

The parties bilaterally agreed on a "four hour rule" which constitutes an enforceable "side agreement" applicable to the circumstances of the instant case.

The layoffs of the mechanics at Louisville, Kentucky did not violate the contract.

DATED: February 1, 1980
STATE OF New York )
COUNTY OF New York )

On this first day of February, 1980, 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.

Nicholas Zinevich
Concurring
DATED: February 1980
STATE OF
COUNTY OF

On this day of February, 1980 before me personally came and appeared Frank Score 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 14, 1980

Herbert Prashker, Esq.
Poletti Freidin Prashker
Feldman & Gartner
1185 Avenue of The Americas
New York, New York 10036

William Jolley, Esq.
Jolley, Moran, Walsh,
Hager & Gordon
1300 Trader's National Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106

RE: General Grievance
TWA - IAM
(Louisville Mechanics)

Gentlemen:

I regret that I have been unable to meet the January 15th date for rendition of the Award in the above matter.

May I have your agreement to an extension until February 1, 1980?

Very truly yours,

Eric J. Schmertz
Arbitrator

EJS:hls
cc: Mr. Frank Score
Union Member, TWA-IAM System Board of Adjustment and General Chairman
IAM District 142
400 N.E. East 32nd Street
Kansas City, Missouri 64116

Mr. Nicholas Zinevich, Company Member
TWA-IAM System Board of Adjustment and Director Technical Services
Kansas City, Missouri 64195
The Undersigned, duly designated as the Arbitrators, and having duly heard the proofs and allegations of the above named parties make the following AWARD.

The parties bilaterally agreed on a "four hour rule" which constitutes an enforceable "side agreement" applicable to the circumstances of the instant case.

The layoffs of the mechanics at Louisville, Kentucky did not violate the contract.

DATED: February 1, 1980
STATE OF New York ) ss:
COUNTY OF New York )

On this first day of February, 1980, 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.

MARSHA L. STEINHARDT
Notary Public, State of New York
No. 24-4554975
Qualified in Erie County
Commission Expires: 12/31/80

DATED: February 1980
STATE OF
COUNTY OF

Nicholas Zinevich
Concurring

On this day of February, 1980, before me personally came and appeared Nicholas Zinevich 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: February 1980
STATE OF
COUNTY OF

On this day of February, 1980 before me personally came and appeared Frank Score 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.

Frank Score
Dissenting
The stipulated issue is:

Did United Press International violate Article VIII, Article IX, Article X Section 2, Article XVIII Section 6 and Article XX Section 2 of the contract by compensating in cash employees with holiday time owed at pro rata or overtime salary rates lower than their current salaries? If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in New York City on December 6, 1979 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing briefs.

Article XX Section 2 provides in pertinent part:

An employee required to work on a holiday (or the day officially observed), shall be compensated at the overtime rate (as provided in Article VII, Overtime) in addition to her or his regular weekly pay, or by mutual agreement between the Employer and the employee by time off at the rate of time and one-half.

If the latter procedure is followed, namely the utilization of time off at the rate of time and one-half, it is referred to
as "banking" the holiday for future time off.

This latter procedure, when applied to employees who are actively employed on and after the "time off" is taken may result in payment for the time off at time and one-half calculated on a salary greater than the pay rate in existence at the time the holiday actually took place. This would happen when, between the actual holiday and the later date when the employee takes time off, there had been a general contractual wage increase. In that event the employee who elected and was granted the time off at a time subsequent to the general wage increase would receive time and one-half pay for that time off calculated on his higher regular rate of pay resulting from the wage increase. This circumstance, as it applies and has been applied to "continuing" employees is undisputed by and acceptable to the Union.

This dispute is limited to the circumstance where an employee has worked on a holiday, has not been compensated for the holiday at the overtime rate, has apparently deferred or planned to defer payment to a later period when he would take time off, but before the time off has been agreed upon or granted, or taken, that employee is terminated or otherwise permanently leaves his job. In that circumstance, where there had been a general wage increase between the date of the holiday and the date of the employee's termination or cessation of employment, the Employer has compensated that employee for working the holiday at the overtime rate
based on the employee's regular rate of pay in existence at the time the holiday occurred. This is what the Union objects to. It contends that under this circumstance the terminated employee or the employee who otherwise ceases his employment should receive compensation for having worked the holiday at the overtime rate based on his regular rate of pay which obtains at the time of his termination or cessation of employment, in the same manner as it would be paid to a "continuing" employee whose employment neither terminated nor ceased. The Union asserts that the Employer's disparate methods of compensation between continuing employees on one hand and those whose employment terminated on the other, is to set up different pay scales for employees similarly situated (in that both had worked the holiday and had deferred payment therefore until a later period when they would take time off) and that such disparity is unjustified and untenable.

The fact that the Union does not object to a different pay arrangement between the employee who is compensated for working the holiday on or shortly after the holiday occurs, and the employee who defers such compensation until he can take time off later, under the circumstance where a general wage increase has intervened, persuades me that the compensation involved is for and attaches to two different events. The former is payment for the holiday worked; the latter is payment for time off. Had both been intended to be compensation only for the holiday worked, the
same amount of money should be accorded to the employee in both circumstances, no matter when payment for working the holiday was made, regardless of any intervening wage increase.

What then is the status of the employee who worked a holiday, who chose not to take pay for working the holiday on or shortly thereafter, and who is thereafter terminated or ceases his employment? It is apparent to me that unless before his termination he had worked out a mutual agreement with the Employer for certain specified time off, his termination or cessation of employment ended any opportunity for further working time which he could "take off" and for which he could be compensated based on his then current rate of pay. The contract requires that under the "banking" option, the employee may receive the subsequent time off by mutual agreement between the Employer and the employee. Upon termination or other cessation of employment it becomes impossible for the Employer and employee to mutually agree on a subsequent time off. Also, with the end of the employee's employment status, there is no further work time available to him during which he can take time off, let alone reach that mutual agreement.

However, because he worked the holiday, and because he was not compensated for that work, the Employer remains obligated to provide him with compensation for the holiday worked, but not for any subsequent, (and unavailable) time off. What the Employer has done in that circumstance, and what I find not to be a violation
of the contract, is to pay that employee the holiday pay which he would have received for working the holiday.

Inasmuch as Article XX Section 2 does not specifically deal with the instant disputed circumstance where a wage increase takes place between the holiday worked and the date of an employee's termination or cessation of employment, the well settled approach is to look at the past practice. Here, though the practice has not been entirely uniform, it has been more consistently supportive of the Employer's position than that of the Union. I accept the Union's assertion that it has been unaware of that practice until recently, and that its recent awareness resulted in this grievance. The point is however, that with the contract silent on what is to be done under the disputed circumstance, and with the burden on the Union to prove its grievance, the practice if not fully supportive of the Employer's action, is certainly not determinative in the Union's favor. Hence the Union's grievance must fail.

With the foregoing holding I do not find that the Employer violated Article X Section 2 of the contract, or any of the other Articles and Sections set forth in the stipulated issue.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:
United Press International did not violate any of the provisions of the contract by compensating in cash employees with holiday time owed at pro rata or overtime salary rates lower than their current salaries.

DATED: March 27, 1980
STATE OF New York ) ss.
COUNTY OF New York )

On this 27th day of March, 1980 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:

Is the grievance arbitrable? If so what shall be the disposition of the Union's grievance dated November 26, 1979, marked as Joint Exhibit #7 in the record?

A hearing was held at the University on August 12, 1980 at which time the grievant, Robert Loheyde, and representatives of the above named University and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was duly administered. The parties filed post-hearing briefs.

The Union claims violations of various provisions of Article 6 of the contract. The subject matter of the grievance has an arguable and reasonable relationship to certain sections of Article 6, and disposition of the grievance requires interpretation of those sections. Accordingly, under well settled rules, the grievance is arbitrable.

The basic facts are not in dispute. The grievant was employed as a probationary employee for a pre-determined one year period December 27, 1978 through December 26, 1979. His employ-
ment was not renewed at the end of that period. By determination of the University, and over his objections, the grievant was required to take his accumulated vacation during November and December of 1979, the last two months of his employment term. He claims he should have been permitted to take his vacation after December 26, 1979; that under Article 6 he had the right to receive that vacation entitlement subsequent to his one year employment term in the form of a cash payment; that the University's refusal to permit him to do so was violative of cited sections of Article 6 of the contract. As a remedy he now seeks pay equivalent to the amount of his accumulated vacation.

The University asserts that in accordance with its managerial authority it may schedule an employee's vacation in its discretion; that it selected the period during the grievant's last two months of his employment because it was a slow time for his department; that the dispute is substantively mooted because the grievant received and was paid for his vacation during his employment and that to grant him the remedy he seeks would accord him a second vacation payment as well as extend his employment term beyond his one year contract.

I am not persuaded that any of the cited sections of Article 6 are applicable to or dispositive of this dispute. Section 6.1a sets forth the number of days which a twelve month employee may accumulate for vacation, but does not prescribe when that vacation may be taken or be scheduled. Section 6.1c provides for the use of vacation accumulations "during departmental
slow times ...." However that section pertains to "large vacation accumulations" which I deem to be in excess of what the grievant accumulated during or attendant to his one year employment. Also Section 6.1c contemplates the use of vacation entitlement as actual time off from work. In the instant case the issue is not whether the grievant is now entitled to additional time off but whether he should receive payment in liquidation of his vacation rights. Section 6.1e gives a priority for the selection of the vacation period to the employee. But again, in my view, it deals with a period of time away from active employment. That is why it accords a preference to the employee's choice of vacation period "to the extent possible, consistent with a department's work load." In the instant case the grievant is not seeking a vacation period; he is not seeking additional time off subsequent to the end of his active employment term, but rather pay in lieu thereof. Hence I do not find Section 6.1e applicable. Section 6.1f appears more relevant to the instant circumstances. It reads:

If an employee's service is terminated for any reason, the employee (or the employee's estate if deceased) shall be entitled to receive full pay for each unused vacation day up to 44 days.

However upon a closer reading, I conclude that this section is also inapplicable. The grievant's service was not terminated. On the contrary it was fully completed, i.e. he completed and fulfilled his one year assignment in accordance with the period of employment agreed to when he was hired. In my opinion the word "terminated" in 6.1f applies to an unexpected, precipitous, end to or shortening of what otherwise would have been a longer
period of employment. Hence the example referred to, namely an employee's death and the consequent entitlement of his estate. It would also apply if an employee was discharged or if his employment term was involuntarily shortened for other comparable reasons. But that is not the facts in the instant case.

For the foregoing reasons I conclude that none of the cited or relied upon provisions of Article 6 provide an answer to the instant grievance. Under that circumstance what remains as applicable and dispositive is Article 3 (Board Prerogatives). In pertinent part Section 3.2 provides:

The ability to determine, to make rules for, or to approve such things as... vacations... shall be under the sole jurisdiction of the Board of Trustees; and

Section 3.3 provides in pertinent part:

These rights, responsibilities and prerogatives .... shall not be exercised in a manner inconsistent or in violation of any of the specific terms and provisions of this Agreement ....

As I have concluded that none of the cited sections of Article 6 are applicable to the facts in the instant case, there is no specific term or provision of the Agreement which was violated when the University scheduled the grievant to take his vacation during the last two months of his one year period of employment. Therefore that determination or requirement by the University was an exercise of its right "to determine and make rules for vacations" in accordance with its stipulated prerogatives under Article 3.
The Undersigned, duly designated as the Arbitrator and having been duly sworn and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The Union's grievance dated November 26, 1979 is arbitrable. The grievance is denied.

DATED: October 31, 1980

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In The Matter of the Arbitration
between

The University of New Haven Board of Faculty Welfare, Local 3956
American Federation of Teachers

and

The University of New Haven

In accordance with Article 19 of the collective bargaining agreement effective September 1, 1976 between the above named Union and University, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the University violate the collective bargaining agreement (Article 5(a) and By-law (3) by notifying Mr. Edwin Pearson that his 1979-1980 contract was a terminal contract?

A hearing was held at the University in West Haven, Connecticut on February 25, 1980 at which time representatives of the Union and University appeared and were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was taken.

PERTINENT CONTRACT PROVISIONS

The pertinent contractual provisions are:

Article 5: LETTERS OF NON-REAPPOINTMENT
LETTERS OF INTENT, AND CONTRACT LETTERS

Annual Letters of Non-Reappointment
(a) Annual letters of non-Reappointment for each contract year shall be sent to the faculty according to the schedule provided for in Bylaw 3 on Tenure and Promotion of the Faculty Constitution in effect June 1975-1976*
Bylaw (3) three: Tenure and Promotion provides, p.3 that Letters of Non-Reappointment shall be sent out according to the following schedule:

"First year Faculty shall be notified of reappointment status no later than March 1.

After one year of service reappointment status shall be made known by December 1.

After two years of service, any decision not to reappoint shall be communicated a full calendar year in advance of appointment expiration."

CONTENTIONS OF THE UNION

The University notified Mr. Edwin Pearson, hereinafter referred to as the grievant, in a letter dated May 9, 1979, that his contract for the academic year 1979-1980 would be a terminal contract. The Union contends that the grievant who had served in excess of two years did not receive notification of non-reappointment a full calendar year in advance of appointment expiration. The Union argues that a full calendar year referred to in the contract is synonymous with the dictionary meaning, namely from January through December. As a result, the Union asserts that the University should have notified the grievant prior to December 31, 1978 of his non-reappointment.

CONTENTIONS OF THE UNIVERSITY

The University's position is that a "calendar year" within the meaning of the contract is a twelve-month period of time but that it need not conform to the period January through December. Instead, the University maintains that it fulfilled the requirements of the collective bargaining agreement by notifying the
grievant of the non-reappointment one full year prior to the end of the grievant's academic year. Specifically, the University stresses the fact that the grievant received notice more than a year early, in a letter dated May 9, 1979. This is consistent with the University's interpretation of the agreement which is that May 31, 1979 was the cut-off date for providing timely notice of non-reappointment to an academic year commencing after May 31, 1980. With respect to the measurement of time to be applied, the University stated that in academia, employment runs from September to May although monetary payments are made over the twelve-month period from September to August. It argues that the Union's position does not make sense because notice of non-reappointment by the December 31 date would result in terminations effective on December 31 a date which coincides with the middle of the academic year. And that that would be operationally impractical, unfair to the employee involved because other teaching jobs are unavailable at that time of year, and therefore was not intended.

The University presented documents concerning five cases that it asserts constitute evidence of a past practice under which one calendar year is shown to mean a twelve-month period.

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<thead>
<tr>
<th>Exhibit Number</th>
<th>Name of Employee</th>
<th>Date of Notification</th>
<th>Last Academic Year to be Worked</th>
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<td>5(a)</td>
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<td>5(c)</td>
<td>Sandman</td>
<td>December 23, 1976</td>
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DISCUSSION

The arbitrator is bound to the clear language of the collective bargaining agreement. I find the instant disputed language to be clear. If the parties had intended to establish the May 31 date as the last day for notification, they could have so specified by reciting the May 31 date or by providing: "any decision not to reappoint shall be communicated twelve months (or an academic year) in advance of appointment expiration."

The parties did not do so. Rather, they used the term "calendar year." Significantly the parties took pains to define "academic year" and "contract year" in Article 4 of the contract and hence knew how to use those phrases when and if they wished or intended to do so. Indeed in Article 5, the parties set forth specific dates by which notices of intent to reappoint and annual contracts are to be sent. Significantly, "first year faculty" are to be notified of reappointment status "no later than March 1st" and "after one year of service reappointment status shall be made known by December 1." (emphasis added) So the parties knew well how to use the terms "academic year", "contract year" and how to use specific cut-off dates. Yet, in the disputed clause, they used none of these, but rather chose "calendar year." I conclude not only that they knew the plain or traditional meaning of "calendar year" when they used it, but under the circumstances meant it to carry that traditional meaning.

That the effect of this conclusion is that faculty members
who are not reappointed will be informed of the decision at least 17 months in advance is a reflection of the contract bargained, and there is nothing about it which is unenforceable. In fact such a lengthy notice period is justified in the language of By-law 3 referred to in Article 5(a). The Bylaws state that "any delay in notification of Non-Reappointment works a severe hardship on faculty members, sometimes resulting in a full year of unemployment." Thus, the difficulty in securing another position after notice of termination is an underlying rationale for as much notice of non-reappointment as possible. If, from the University's standpoint this was not intended, or if more than 12 months is too long a period of notice, a change is for collective bargaining, not arbitration.

Requiring notice to be given by December 31 will not result in terminations becoming effective during the middle of the academic year. Although the University raised this conclusion as the logical consequence of the Union's position, basic contract law does not support it. Each faculty member has an individual employment contract that coincides with the academic year, running until May 31st. That employment contract is legally effective for that time period irrespective of when notice of non-reappointment is given. Hence, notice by December 31st would not disturb or shorten an employment contract, which by its terms continued until the following May 31st.

As to the contention of the University that a past practice
exists that establishes May 31 as the cut-off date, I am unable to find support in the evidence that the University presented. First, the December 23, 1976 letter provides that: "University policy on notification requires that I remind you that the contract for the academic year 1977-1978 will be a terminal contract." The timing of December 23 coupled with the language concerning "University policy" suggests that December 31 is the key date. Second, the January 8, 1980 letter cannot be accorded probative value as it arose during the pendency of if not after the instant case and the Union's claim that it is unaware of this letter stands unrefuted. Third, the May 28, 1976 letter predates the existence of the collective bargaining relationship between the parties, and therefore, its substance and procedure cannot be imputed to or deemed prejudicial to the Union. There remain two letters dated April 28, 1978 and April 18, 1978 respectively. Even if I were to reject the Union's argument that (a) the April 28 letter is meaningless because the individual to whom it is directed is still employed by the University; and (b) the April 18 letter is not a letter of non-reappointment, two letters are neither sufficient in quantity nor do they represent an unvaried course of conduct over an extended period of time to meet the definition of a "past practice."

The Union states that it does not seek any remedy in this case other than an interpretation of the disputed contract provisions. Accordingly, based upon the foregoing reasons the
contract language "calendar year" means the period January 1 to December 31.

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

The University violated the collective bargaining agreement (Article 5(a) and Bylaw (3) by notifying Mr. Edwin Pearson that his 1979-1980 contract was a terminal contract.

 Eric J. Schmertz
Arbitrator

DATED: March 3, 1980
STATE OF New York )
COUNTY OF New York )

On this third day of March, 1980 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.
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Windsor Education Association and

Windsor Board of Education

OPINION AND AWARD

Case #12 39 0011 80

The stipulated issue is:

Is the grievance arbitrable? If so, did the Board of Education violate the applicable provisions of the collective bargaining agreement when it assigned Ms. Judith Bleiler to a unit II position at the Roger Walcott School? If so what shall be the remedy?

A hearing was held in Windsor, Connecticut on June 10, 1980 at which time Ms. Bleiler, hereinafter referred to as the "grievant" and representatives of the above named Association and Board appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was duly administered.

In the course of the hearing the Arbitrator ruled that the grievance met the contractual time limits and was arbitrable.

The collective bargaining agreement between the parties makes no provision for the type of leave of absence for personal reasons which the grievant requested and was granted in July of 1978 for the 1978-1979 school year. The Board therefore is correct when it asserts that it had no contractual obligation to grant that leave of absence. However it did grant it. Having done so, and as there were no explicit conditions attached to the
grant of that leave, the Board is wrong when it asserts that it has no obligation to reemploy the grievant upon the expiration of the leave or to accord her any rights regarding her teaching assignment upon her return. In the absence of specific conditions, I consider it an implicit part of the leave of absence, on which the grievant had logical and reasonable grounds to rely, that she would have the same rights to reemployment and assignment as any other teacher returning from a leave of absence authorized under the collective bargaining agreement. The Board has not shown to my satisfaction that a contrary "Board policy" was either explicitly promulgated or made known to the Association or the grievant.

The letter of July 31, 1978 from the Superintendent of Schools to the grievant grants the grievant's request for a leave of absence and sets no relevant conditions on that leave. It merely states that she is "required to notify the Superintendent of Schools in writing, no later than April 1, 1979, whether or not you plan to return for the 1979-1980 school year." Although the grievant's reemployment is not at issue in this case, that statement is a clear indication of her right to reemployment provided she gave notice as required. What is significant is that the letter makes no mention whatsoever of the class, level and school to which the grievant would be assigned upon her return from leave. It is that assignment which is in dispute in this case.

Prior to going on leave, the grievant was a unit I teacher in the John Fitch School. While she was on leave the Board
notified her that upon her return she would be assigned to a unit II position at the Roger Walcott School, and over her objection was so assigned for and during the school year 1979-80.

It is my conclusion that under the particular circumstances of this case the grievant was entitled to the same rights and benefits as a teacher returning from sabbatical leave and maternity leave, upon her return from the one year personal leave of absence. Under the contract, (Article 15) a teacher returning from sabbatical leave:

"shall be restored to his teacher position or to a position of like nature insofar as is possible."

Under Article 17 of the contract, a teacher returning from maternity leave of absence shall be reinstated:

"to the original or an equivalent position if available...."

As I have held, in the absence of explicit different conditions, the grievant had the right to believe that her status upon return from personal leave would be no less than that accorded a teacher returning from sabbatical or maternity leave.

At the beginning of the 1979-80 school year the position from which the grievant went on leave was available in the school where she had taught before her leave commenced. A unit I teaching position existed in the John Fitch School. Indeed, the very position which the grievant left was occupied by the teacher who had been assigned that position as her replacement during the grievant's one year leave of absence. I see no reason why the grievant could not have been reassigned to her original position
at her original school, and her replacement transferred to the available teaching position at the Roger Walcott School. Or if the latter transfer was not administratively or pedagogically feasible, other adjustments could and should have been made so that the grievant could have been given the same reassignment rights as an employee returning from a contractual leave of absence. I conclude that her restoration to her original position was "possible" within the meaning of that contract term.

I deem that at the beginning of the 1979-80 school year a unit I position was "available" at the John Fitch School within the meaning of that contract term. I reject the Board's argument that an "available" position is one which is vacant. That interpretation is unreasonable in that it is most unlikely that a teaching position will be left vacant during the year that its prior incumbent is on any kind of a leave, whether it be sabbatical, maternity or personal. Rather, it is to be expected that the position would be filled and covered by a replacement. Therefore, a position that is "available" is a position which exists whether vacant or not. In the instant case the unit I position at the John Fitch School from which the grievant took her leave of absence existed. It was occupied and covered by a replacement and was to be actively worked during that school year. It should have been assigned to the grievant upon her return from her leave of absence.

The Board's failure to grant the grievant reassignment to a unit I position in the John Fitch School for the year 1979-80 cannot of course be retroactively remedied. The proper remedy in
this case is to give her that teaching assignment prospectively for the upcoming school year 1980-81. Though there has been a reduction in the number of available unit I positions at the John Fitch School beginning this coming September, some such positions exist. If the grievant has sufficient seniority she shall be assigned thereto for the upcoming year.

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

The grievance is arbitrable. The Board of Education violated the collective bargaining agreement when it assigned Ms. Judith Bleiler to a unit II position at the Roger Walcott School. Beginning in September 1980, and for the school year 1980-81 Ms. Bleiler shall be assigned to a unit I teaching position at the John Fitch School provided she has sufficient seniority to claim one of such existing positions, even if it means displacing a teacher so assigned who has less seniority.

DATED: July 21, 1980

Eric J. Schmertz
Arbitrator