AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Local 100, S.E.I.U.

and

Adelphi University

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OPINION AND AWARD

Case #1330-1776-75

The stipulated issue is:

Was there just cause for the discharge of Benico Gonzales? If not what shall be the remedy?

The hearing was held in the offices of the American Arbitration Association, April 29, 1976 at which time Mr. Gonzales hereinafter referred to as the "grievant" and representatives of the above named Union and University appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharged on October 21, 1975 for refusing to perform certain duties which were a regular part of his job classification and following an earlier warning and disciplinary suspension for similar or related offenses.

The grievant was employed as a fireman in the boiler room. The fundamental job of a fireman is to observe and record readings of meters, gauges and other dials on the boilers and on certain equipment related to the University's swimming pool. In addition
he is assigned other collateral work to provide him with a full work schedule. Such other work involves sweeping and cleaning the work area and other maintenance and mechanical work as set forth in daily written instructions given to him or left for him by his supervisor.

On October 13, 1975 the grievant was warned both orally and in writing that he must "carry out work orders issued to you by either your foreman or supervisor." That warning resulted from his "refusal to follow out work orders given....by (your) foreman." He was expressly warned that "any refusal....to carry out a work order will result in....termination." Shortly thereafter, on October 17, 1975, the grievant was suspended until October 20th for failure to complete a work assignment and was again warned of the requirement "to follow all instructions of your supervisors....failure to do so will result in....immediate discharge without further warnings or suspension."

It is the University's contention that immediately upon his return to work from the suspension he again deliberately refused to perform his required job duties, and that his discharge which followed and which is the subject of this arbitration, was warranted.

Based on the record the University's action in discharging the grievant was for just cause and is upheld.

The grievant is an intelligent man who is fully familiar with the duties of a fireman in the boiler room. His own testimony shows that he has done considerable reading on the subject
of boiler maintenance and safety. Though this is commendable, he has used the knowledge obtained in an exaggerated, insubordinate and improper manner.

I am persuaded by the record that the grievant willfully decided to substitute his own judgement for that of management as to what work a fireman should perform in the boiler room. He decided, contrary to management's instructions and warnings, that a fireman's duties should be confined to observing, checking testing and maintaining the meters, gauges, and other equipment directly connected with the boiler, the boiler systems and the swimming pool. He resisted and refused to perform other collateral duties such as cleanup, routine maintenance, and other relatively unskilled duties as assigned. When he was warned on October 13 and suspended on October 17 it was because he resisted, refused, or failed to complete, within adequate time allowances, these collateral or additional assignments. His position was that safety and proper boiler room procedures required full time attention to the meters, gauges, and mechanical equipment connected to the boiler system and the swimming pool; and that for the job to be done properly and to insure safety, no time was available to perform the collateral work assignments. Or, even if time was available, the collateral assignments took him too far from the boilers and the swimming pool to protect against a precipitate unsafe condition in the event that such condition developed. In this respect the grievant manifestly substituted
his judgement as to what was required of a fireman in the boiler room for that of management and supervision. For, so far as management and his supervisors were concerned, the boiler and swimming pool systems are safe; their safety is ensured without the all consuming attention which the grievant contends is required; and that in any event the grievant was instructed otherwise, and that contrary to those instructions he decided to do it his way. Neither the warning nor suspension were grieved, and hence must be considered as factually correct and disciplinarily proper.

On October 21, 1975 the grievant's action and attitude was equally insubordinate and defiant, though it took a different tack. This time he gave all his attention to the collateral or additional duties and, for the first time in the period of his employment, did not check, read, and record meter, dial and gauge readings and settings which the University, and the grievant up to that point, both construed to be an essential and fundamental duty of the fireman. I reject the grievant's assertion that he carried out all his duties, when he did all those things which were left for him in written instruction form. There is no doubt that he knew, as was the case in the past, that the written instructions involved collateral duties which were to be performed in addition to the fundamental and basic job of reading, checking and recording meters, gauges and dials relating to the boiler and swimming pool systems. He cannot now assert
that the written instructions constituted either his exclusive assignment that day, or a substitute for his principal responsibility. Rather I conclude that this was the grievant's new method of demonstrating and implementing resistance to and defiance of managerial authority. I am persuaded that having been warned and suspended for not performing the collateral assignments the grievant persisted in his rejection of supervisory instruction by shifting to a strategy of planned neglect of his fundamental assignment, while technically complying with the written collateral assignment. This was defiance and insubordination in another form, but defiance and insubordination nonetheless. And it was particularly aggregious because it occurred virtually immediately after the grievant had been warned and suspended for a similar attitude. That proximity supports the conclusion that the grievant planned to continue his defiant attitude.

The grievant's continued intent to resist and reject the instructions of supervision, is further evidenced by his extra contractual resort to the campus newspaper. Instead of utilizing the grievance provisions of the collective bargaining agreement, he gave an interview to the campus newspaper, and claimed that the boilers were being maintained in an unsafe condition. That action, I believe not only demonstrated that he believed his judgement about boiler maintenance and safety was superior to and should prevail over the procedures and
orders given him by management but also that he was not ignorant of management's requirement that he perform both sets of duties. He knew he was expected to perform both his primary functions as well as the assigned collateral duties. What he sought was support for his position that only the primary duties should be required.

In sum I conclude that the grievant knowingly engaged in a planned campaign of defiance and insubordination to call dramatic attention to his views. It is immaterial if his intentions were good and if he sincerely thought, albeit erroneously I believe, that safety required the procedures which he advocated, because he should have utilized instead the prescribed and orderly grievance and arbitration procedures of the contract. His utilization of self-help was impermissible. Because he was warned and suspended previously, and yet refused to heed those actions his subsequent defiance of managerial instructions when the grievance and arbitration provisions of the contract were available to air his complaints, warranted his discharge.

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 just cause for the discharge of Benico Gonzales.

Eric J. Schmertz
Arbitrator
DATED: May 21, 1976
STATE OF New York ) ss.: 
COUNTY OF New York )

On this twenty-first day of May, 1976, 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

Local 518, UAW

and

The Allen Manufacturing Company

OPINION AND AWARD

Case #12 30 0274 75

In accordance with Article X of the collective bargaining agreement dated October 9, 1973 - October 8, 1976 between Local 518, UAW, hereinafter referred to as the "Union", and The Allen Manufacturing Company, hereinafter referred to as the "Company", the Undersigned was designated as the Arbitrator to hear and decide disputes involving the Union's grievances 169, 170, 171, 175, 178, 179, 180, 181, 183, 186.

A hearing was held at the Company plant in Bloomfield, Connecticut on February 12, 1976, at which time 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.

All grievances involve an allegation by the Union that the Company improperly transferred employees to work assignments out of their classification and/or to other departments in violation of Article V Section 21 (particularly the first sentence thereof) and "letter no. 17" (on page 60) of the contract.

The first sentence of Article V Section 21 reads:

Each department shall hire, layoff and recall from layoff independently of other departments.
The portion of "letter no. 17" upon which the Union relies reads:

Memo establishing intent and understanding of temporary transfers

An employee may also be temporarily transferred under the following conditions:

b) To replace an employee who is absent for any reason other than layoff until such time as that employee returns to work.

The gravamen of the Union's complaints is that certain employees were transferred to other classifications and/or other departments when other employees who previously worked in those latter jobs and departments were on layoff. It is the contention of the Union that those transfers or assignments out of classification or into other departments violated the recall rights of certain employees on layoff. The Union points to paragraph b of letter no. 17 and argues that temporary transfers are permitted only to replace an employee who is absent for a reason other than layoff. And that inasmuch as the layoff ranks included employees laid off from the very classifications and departments into which the active employees were transferred, those transfers were barred by the explicit limitation of paragraph b.

The Union's reliance on Article V Section 21, as I understand it, is that jobs of the same classification, but located in different departments, are to be treated independently of each other for purposes of layoff and recall; and therefore a temporary transfer of an employee in a particular classification to a job
assignment within the same classification but in a different department is violative of the independent layoff and recall rights of the employees who occupied both jobs. If, argues the Union, one such employee is assigned to do the work of both jobs inter-departmentally, when the other has been laid off, it is both violative of the independent status of each position as enunciated in Article V Section 21, and in derogation of the rights of the laid off employee to be retained or to be recalled for the available work.

I do not consider the Union's reliance on Article V Section 21 to represent an assertion that any employee was wrongly laid off. The instant grievances neither involve nor protest any layoffs per se. There is no evidence in the record that when this plant experienced a general diminution of work, it laid off employees improperly or in violation of the layoff provisions of the contract.

Accordingly I am satisfied that with regard to Article V Section 21 and paragraph b of letter no. 17, the Union's theory of the case is the same; namely that when employees in particular classifications and/or departments are on layoff, the Company may not temporarily transfer remaining active employees into those different classifications or different departments. Because letter no. 17 deals more specifically with the problem, I deem an answer to the respective rights of the parties under letter no. 17 an adequate answer to the issues involved.
The Company also relies on letter no. 17 but on paragraph d thereof which reads:

When there is a lack of work in a department, employees may be transferred to other departments that are on a forty hour schedule for a period not to exceed four weeks.

The Company defends its actions on the following grounds:

1. The transfers were from one department to another because of lack of work in the original department or classification within the meaning of paragraph d foregoing.

2. Employees were not transferred to replace an employee who was on layoff, but rather were assigned work in a different classification, job, or department to "fill out their work day" instead of sending them home when the diminished quantity of work in their regular job assignment ran out before the end of the work day.

3. The work to which an active employee was transferred was actually work within his regular job assignment and job description and hence did not constitute a transfer at all.

It is evident that the issues are joined over the application and interpretation of letter no. 17, particularly paragraphs b and d thereof. More particularly, the question narrows to whether the Company's action was barred by paragraph b or permitted under paragraph d.

It is a well settled rule of contract law that provisions of an agreement (including a letter memorandum) should be interpreted in harmony rather than in conflict. Paragraphs b and d are independent of each other and are entitled to equal standing and enforcement. Neither should be interpreted to pre-empt or nullify or as an exception to the other unless the memorandum
explicitly so provides, which it does not in this case. Therefore the right to transfer an employee to another department because of a lack of work in his own department should not be restricted by the fact that there are employees laid off from the department to which the transfer is made. By the same token that type of transfer should not be allowed if its purpose is to replace an employee who is on layoff. A rule of reason must be invoked in order to reconcile and make harmonious paragraphs b and d.

As I see it the essential reconciliation is achieved by considering the quantity of work and the amount of time spent by an employee in the department to which he has been transferred when employees who previously worked in that department and job are on layoff. If the quantity of work assigned to the transferee is of sufficient magnitude or duration to warrant recall of a qualified employee from layoff, then the transfer, even if due to a lack of work in the "home" job or department would violate the prohibition on transfers to replace an employee on layoff. On the other hand if the amount of work and the period of time involved in the transfer is minor and realistically insufficient to support the recall of an employee from layoff, then such a transfer to "fill out an active employees work day" would be due to the "lack of work" condition permitted under paragraph d and would not constitute a replacement for an employee on layoff.
With this interpretation a number of the instant grievances may be disposed of. The transfer in grievance no. 171 of a Brown and Sharp Operator in department 85 (1) to the job of Thread and Knurl Operator in department 83, at a time that the Knurl Operator was on layoff, was for five and one-half hours. In grievance 169 the transfer of an electrician in department 62 to the job of repairman in the Maintenance and Repair Department, while a repairman was on layoff, was for one hour and a half. In grievance 181 the transfer of a Set-Up man from department 82 to Machine Operation elsewhere was for less than one shift. Grievances 178 and 179 involving a similar type of transfer of a Set-Up man were approximately for the same period of time. Manifestly all such transfers were for less than four weeks and hence in that regard were in compliance with paragraph d. More relevant however, within the rule of reason formula which I deem applicable, the periods of time involved, and consequently the quantity of "out of classification" work was not enough to warrant the recall of qualified employees from layoff. To have required the Company to recall an employee for a quantity of work and for periods of time measured in hours, and less than one day is administratively and operationally unsound, and I believe, not required by the recall provisions of the contract, nor intended by the restrictions of paragraph b. Therefore I deem the transfers in those grievances to have been due to "lack of work in a department" within the meaning of paragraph d, and not as a replacement for
an employee on layoff. Accordingly those grievances are denied.

However the amount of time and hence the quantity of work involved in the transfers in grievances 186, 170, 175 and 183 were of such magnitude as to constitute available work in a job classification from which employees had been laid off, warranting recalls. In grievance 186 a department 88 Operator-Set Up-In Feed-Centerless Grinder was transferred to the job of Inspector in department 73 and worked for a period of twelve days at a time when an Inspector was on layoff. Grievances 170 and 175 are companion to each other and involve the same incident. The Company expanded the assignment of a departmental clerk to encompass the same clerical duties in an additional department following the layoff of the clerk in that latter location. This assignment is continuing and undisputedly has exceeded four weeks. In grievance 183 a Set-Up Men in department 85(2) was transferred to the second shift not only to perform Set-Up work but also to work as a Machine Operator at a time when the second shift operator was on layoff. This assignment is continuing, has exceed four weeks and involves approximately eight hours work each day.

I find each of these transfers for lack of work in a department. With regard to grievances 170 and 175 the record is not precise as to how much clerical work is available in the department which was added to the duties of the encumbent,
active clerk(s). I recognize and understand the practical reasons why the Company decided it needed two rather than three departmental clerks to handle the available clerical work in view of the diminution of business. But as a continuing situation I find a presumption in favor of a conclusion that the additional or expanded assignment which is concededly inter-departmental, not only exceeded the four week limitation set forth in paragraph b, but was and is of a quantity which runs afoul of the prohibition in paragraph b on replacements of layoffs. In short, though the practical considerations may support the Company's action, the explicit limitations and prohibitions in letter no. 17 bar the Company's action absent the Union's consent or cooperation. The twelve days involved in grievance 186 though not in excess of four weeks, is nevertheless enough to warrant the recall of an Inspector from layoff and consequently I construe that transfer more as a replacement for an employee on layoff than a transfer for lack of work within a department. That the transfer in grievance 183 was "voluntarily agreed to", is immaterial. The fact is that the Company transferred the Set-Up man from the first to the second shift so that he could perform not only set-up duties but also take over Machine Operations previously performed by a second shift machine operator who had been laid off. The transferred employee is working a full second shift, and the Company has not demonstrated that the machine operator work he performs is a minor or negligible part of his second
shift operation. Again, though the Company argues that the arrangement was made to "fill up" the transferee's work day, it cannot be denied that a significant purpose was also to replace a machine operator who was laid off. On balance I construe the transfer and its affect more as a replacement for an employee laid off than because of lack of work in the department.

Accordingly Union grievances 170, 175, 183 and 186 are granted.

Grievance no. 180 is the only grievance in which the basic facts are in dispute. The Union contends that a department 89 Heat Treater was assigned work in the classification of a Grade 1 Tool Hardener in department 77(1) at a time that a Grade 1 Tool Hardener was on layoff. The Company asserts that the work involved was properly within the Heat Treater classification and therefore did not constitute a transfer. The evidence as to which classification covers the disputed work is conflicting and off-setting. The job description seems to suggest that the Heat-Treater classification includes Tool Hardening. On the other hand the practice over the years has been for the Heat Treater to perform the work in dispute only when the Tool Hardener was ill, on vacation or otherwise absent; and under those circumstances, prior to an up-grade, the Heat Treater received a pay differential. Additionally there is some evidence that performance of Tool Hardening work by the Heat Treater was based on a mutual agreement.
between the Company and the Union, which may have been consistent with or a variation from the job classifications involved. Also there is some evidence that the second shift Heat Treater performs the same work as the first shift Tool Hardener. Determinative under the circumstances, where the evidence on which classification covers the disputed work is inconclusive, is the quantity of Tool Hardening work available. The undisputed testimony is that it does not exceed twelve hours a week. That quantity is not sufficient to warrant the recall of the Tool Hardener from layoff, for if recalled he would have only about two and one-half hours of work a day. Inasmuch as the Union has not shown that the disputed work belongs in a classification different from the Heat Treater, I cannot conclude that this grievance involves a transfer, and therefore the four week limitation referred to in paragraph d does not apply. Accordingly grievance 130 is denied.

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

1. Grievances 169, 171, 178, 179, 180, 181 are denied.

2. Grievances 170, 175, 183, 186 are granted.

The Company shall cease and desist from making or continuing the transfers in these grievances. The Company shall pay the senior qualified employees on layoff for the periods of times transferees performed jobs for which the laid off employees should have been recalled. If the work proscribed to the
transferees is to be performed, the Company shall effectuate recalls from layoff, unless other mutually satisfactory arrangements with the Union are made.

Eric J. Schmertz
Arbitrator

DATED: April 7, 1976
STATE OF New York )ss.:
COUNTY OF New York)

On this seventh day of April, 1976, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
NEW YORK STATE BOARD OF MEDIATION, ADMINISTRATOR

In The Matter of The Arbitration:
between

Allied Maintenance (Co-op City):

and

Local 32E SEIU

OPINION AND AWARD
Case #A76-727

The stipulated issue is:

Did Alexander Vargas commit the offense alleged by the Company on November 3, 1975?

A hearing was held at the offices of the New York State Board of Mediation on August 19, 1976 at which time Mr. Vargas hereinafter referred to as the "grievant" appeared. Counsel and representatives of the above named Company also appeared. With the consent of the above named Union, the grievant was represented at the hearing and throughout this proceeding by counsel from the Bronx Legal Services Corporation. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. With the agreement of the parties and in their presence the Arbitrator made a visitation on August 31, 1976 to the location at Co-op City, to observe part of what was testified to. The Arbitrator's Oath was expressly waived, and both sides filed post-hearing briefs.

The grievant was employed by the Company to perform janitorial and maintenance services at Co-op City in the Bronx. The Company charges him with the theft of a quantity of plastic trash bags belonging to Co-op City. That charge is the explicit
subject of the stipulated issue. Implicit as part of the issue in this arbitration is the propriety of the Company's action in discharging the grievant for that alleged offense. It is acknowledged that if the Arbitrator finds the grievant did not commit the offense charged, he is to be reinstated and made whole for his losses. If the Arbitrator finds that the grievant committed the theft, the parties have authorized the Arbitrator either to fashion a penalty (which the Company contends should be to uphold the discharge) or to hold a subsequent hearing on the question of what penalty should be imposed.

As a discharge case, where the offense charged parallels a crime, this Arbitrator, while not holding the Company to the standard of proof in criminal cases, nonetheless requires that the grievant's culpability be established by clear and convincing evidence. The burden to do so is on the Company.

Based on the entire record before me the probative evidence falls short of meeting that burden and standard.

The Company's case is based primarily on the testimony of Co-op City security guard Cornetheus Williams. At the hearing Mr. Williams testified that while he was positioned on a walkway near building 28 across the street from a back alley he saw a man, later identified as the grievant, walking along the back alley off which various stores including Snack City are located. (The rear door of Snack City was located off that alley.) On direct examination and again on cross-examination he stated
expressly and unequivocally that he saw the grievant carrying a
dlarge package; that he saw him walk to the back door of Snack
City and leave the package there; watched him leave the rear
door of Snack City and proceed back to the alley and around
another building of the development toward the front door of
Snack City. He stated that at that point he followed the
grievant into Snack City through its front door. Thereafter, he
testified he found a package of plastic bags in the kitchen of
Snack City, opened the package, saw it was marked "Co-op City",
and recognized the plastic bags as those used by the maintenance
force at the development. He further testified that an employee
of Snack City named "Mike" told him that the grievant asked that
the bags be kept there until he, the grievant, could return
with his car to pick them up. Williams stated that he then left
Snack City to report the incident to his superiors, and when he
returned the package of plastic bags was gone.

On the visitation to the site, Williams changed his
testimony in two critical areas. He stated that he was not
positioned on a walkway near building 28 when he first saw the
grievant but rather was located in the middle of a Co-op City
roadway and was walking across the street away from the alley
when he first saw the grievant rounding the corner of the alley,
some distance away, walking in his direction. He said that he
continued walking across the street in a direction away from
the grievant towards building 28, and then for the first time
positioned himself at the building 28 location to observe what the grievant did. At the hearing he was firm and unequivocal in stating that he saw the grievant walk to the rear door of Snack City and explicit in his testimony that he saw the grievant deposit a package at that location. But at the site it was obvious to the Arbitrator as well as to counsel for both sides that from the position at which Williams stated he was located, it is physically impossible to see the back door location of Snack City. Williams could have only seen the grievant walking down the alley and up a ramp towards the back door location. Part way up the ramp the grievant was out of the line of sight. Thereafter the grievant could not have again been seen until he descended down a ramp back into the alley.

So, despite William's insistence both on direct and cross-examination that he saw the grievant all the way to the rear door of Snack City and saw him deposit a package at that location, that testimony cannot be accurate. With the burden of proof on the Company I am not prepared to gloss over Williams' changed testimony regarding where he was located when he first saw the grievant, or the discovery upon the visitation of the impossibility of observing the grievant at the Snack City rear door, as inadvertence, or investigatory inexperience or mere conclusionary license, Williams is an experienced security guard who had full opportunity at the hearing to accurately explain his location at the time of the alleged incident.
Because he was asked explicitly and sharply on direct and cross-examination he had full opportunity to accurately recite what was in his line of vision and what was not. I find no satisfactory explanation for these changes and inaccuracies in his testimony. The fact is that he did not see what he originally stated he had seen, and that inaccuracy is on a highly important, if not critical point.

Moreover, if he first saw the grievant from what he later testified was his position in the middle of the road, and he was suspicious about the package which he claims the grievant was carrying, I fail to see why he would have continued in a direction away from the grievant to a location from which he could not see him at all times. It seems to me that the logical, almost automatic reaction of a security guard would have been to proceed towards the grievant, watch him from a shorter distance to clearly ascertain what he was carrying and what he did with the package or question him about it, and apprehend him with the package in his possession, or at least retrieve it from the rear door location.

Williams' testimony upon which the Company's case rests, is not corroborated by any other witness. Though that type of corroboration is not essential in a disciplinary proceeding, the aforementioned noted frailties and inconsistencies raise serious doubts regarding the probative conclusiveness of his testimony. Further, he stated that after he went in to Snack City he observed
the rear door and saw Snack City employee "Mike" open the back
door and bring in a package which Williams contends he later
identified as the Co-op City plastic bags. Corroboration of
that part of Williams' testimony could have been achieved by the
testimony of Mike. For not only did Williams state that Mike
brought the bags in to Snack City from the rear door, but that
Mike told him the grievant asked that the bags be kept there
until he could get his car and pick them up. Yet Mike was not
called as a witness and there is no explanation in the record why
he was not called. Hence in the face of equivocal and inaccurate
testimony by Williams regarding one critical phase of the in-
cident which could not be corroborated because there were no
other witnesses, another phase of his testimony which could have
been corroborated by a person allegedly involved was not, and
the record is devoid of why that was not done.

In short, Williams' testimony turns out to be changed and
questionable, and hence unreliable on essential points (i.e.
what he actually saw and from where ), and therefore those
essential elements of the allegation of theft have not been
adequately established to my satisfaction. For the Company's
case to rest on that testimony, is for it to suffer from the
same weaknesses.

Of course there are facts which are adverse to the grievant.
He denies the charge, testifying that he went to Snack City by
way of the back door, carrying nothing. Yet his explanation
that he traveled that route from his place of work because it was the "shorter" way to get to Snack City is unpersuasive because the distance is longer. Also there is no evidence in the record that Williams would misrepresent what he saw or that he would bear false witness against the grievant. These factors raise suspicions and even speculative inferences regarding the grievant's guilt. However in this type of case, suspicions, inferences and questionable explanations are not enough to conclude that the grievant is culpable of the offense charged, where the Company's case falls short of establishing that culpability clearly and convincingly. I am not prepared to hold that the grievant did not commit the offense charged. The issue is not whether he has established his innocence. Rather it is whether the Company, by the traditional standards required in such cases, namely by clear and convincing evidence, has established his culpability to the satisfaction of this Arbitrator. The Company's case does not do so, and lingering suspicions, inferences or surmise are not enough to cure the inadequacy.

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:
The Company has not met its burden of establishing by clear and convincing evidence that Alexander Vargas committed the offense alleged by the Company on November 3, 1975. Mr. Vargas shall be reinstated and made whole for wages lost less any earnings he received from gainful employment during the period of his discharge.

DATED: September 29, 1976
STATE OF New York )
COUNTY OF New York )

On this twenty-ninth day of September, 1976, 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 two day disciplinary suspensions imposed on W. Knox, F. Lyons and G. Ziminsky proper? If not what shall be the remedy?

A hearing was held on May 5, 1976 at the offices of the Company 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 expressly waived.

On May 9, 1975, Messrs. Knox, Lyons and Ziminsky, herewith referred to as the "grievants" refused to perform a work assignment involving the replacement of dust collector bags in Building 94. They contended, as they had done the day before when the assignment was first made, that the job was unsafe.

Upon their refusal on May 9th, they were sent home for the balance of that day, and in addition were penalized with the two day suspensions which are the subject of the stipulated issue.

The Company contends that the grievants' refusal to perform the work assignment constituted a "failure to carry out instructions or orders...." within the meaning of Rule No. 18 of the
Company's Working Rules, for which a penalty of a "warning notice or 1-5 days off" is set forth for the first offense.

The Union asserts that with regard to the instant dispute, Rule No. 18 of the Company's unilaterally promulgated Working Rules is preempted by the bilaterally negotiated provisions of Section 6.5 of the collective bargaining agreement. The pertinent part of that Section reads:

If an employee feels a job assignment cannot be done safely, the Shop Steward shall be called immediately by the Supervisor. If after discussion with the Shop Steward and Supervisor, the employee still feels he cannot do the job safely, the Supervisor will make an effort to give him another job assignment or may send him home for the balance of the shift, to return to his regular work the next scheduled day. Should it be determined that an employee was sent home unjustly, he shall not suffer loss of pay for the hours not worked.

The Union argues that the extent of the penalty that may be imposed on an employee "who feels he cannot do the job safely" is to be sent "home for the balance of the shift", thereby depriving him of pay only for that period of time.

The parties have stipulated that the question of whether or not the job assignment was safe is not before this Arbitrator. Rather the question is, assuming arguendo without so agreeing or conceding, that the job was safe, and therefore that the grievants were wrong in their "feeling" that it was unsafe, were they subject to a two day disciplinary suspension in addition to being sent home for the balance of their shift? In short, the contractual propriety of the two day disciplinary suspensions
is all this Arbitrator is asked to decide.

It is well settled that an employer has the right to unilaterally promulgate working rules, and that those rules are enforceable even if not agreed to by or negotiated with the Union, if adequately disseminated, uniformly and consistently applied and if they are reasonable. Obviously, implicit in the matter of reasonableness is that they not be in conflict with any bilaterally negotiated part of the collective agreement.

I find that Rule No. 18, insofar as it may be applied to a refusal of an employee to perform a work assignment which he "feels" is unsafe, is in conflict with Section 6.5 of the contract. Section 6.5 is clear. It specifies what shall be done if an employee considers a job unsafe and, for that reason, declines to perform it. It limits the Company's action to "making an effort to give him another job assignment" or to "send(ing) him home for the balance of the shift." Having expressly dealt with the problem of conflicts over alleged unsafe job assignments the question of discipline beyond the loss of the balance of the shift was well within the contemplation of the parties, and should have been included as part of Section 6.5 had the parties intended that such further discipline was appropriate and proper. By not doing so, but rather by jointly agreeing to the present language of Section 6.5, the Company waived any right it may have had to invoke Rule No. 18 and to impose a greater penalty than Section 6.5 provides, in the situations covered by that Section. Indeed, Section 6.5 also provides that after being sent home for
the balance of the shift the employee "shall return to his regular work the next scheduled day" (emphasis added). I fail to see how the parties would have agreed to that sequence if an intervening disciplinary suspension was also possible or contemplated. For, as here, a disciplinary suspension following being sent home would make impossible the return to regular work "the next scheduled day", and that explicit part of Section 6.5 could not be complied with.

In sum, in the absence of a past practice otherwise, I accept the Union's argument that the explicit limitations set forth in Section 6.5, as a bilaterally negotiated part of the contract, takes precedent over the Company's unilaterally promulgated Rule 18 under the facts in the instant case.

There has been no past practice one way or the other. The Company acknowledges that there have been no prior instances in which employees have been disciplined beyond being sent home for the balance of the shift, for failure or refusal to perform a work assignment they felt was unsafe. But that acknowledgement is based on its undisputed assertion that no employee, following an initial refusal persisted in refusing to perform the work assignment when reassigned to it the next day. (Which distinguishes those situations from the instant case, the Company argues, because here the grievants debated the safety of the job on May 8th and did not perform it, and again refused to perform it on May 9th). So the present implementation of Rule 18 under the factual situation covered by Section 6.5 of the contract is one of first
impression. In that circumstance the clear and explicit language of Section 6.5 must prevail, and the Company's right to send the employees home must be construed not only as a penalty, but as a penalty bilaterally agreed to, to the exclusion of something more severe or extensive.

However, the Union is cautioned that this decision may not be used as a license for wide-spread or irresponsible refusals by employees to perform work assignments because they "feel" the job is unsafe. If Section 6.5 is so utilized, by an employee, groups of employees, or the Union as their representa-tive, this Arbitrator would consider that an abuse of what was agreed to under Section 6.5 and an improper and impermissible application of that Section, warranting further disciplinary penalties.

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 two disciplinary suspensions imposed on W. Knox, F. Lyons and G. Ziminsky were not proper. The suspensions are reversed and those employees shall be made whole for the time lost.

Dated: May 12, 1976

STATE OF New York )
COUNTY OF New York )

On this twelfth day of May, 1976 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Writer's Guild of America, East, Inc.: and

American Broadcasting Company

In accordance with Article XX of the collective bargaining agreement dated February 14, 1973 between Writer's Guild of America, East, Inc., hereinafter referred to as the "Union" and American Broadcasting Company, hereinafter referred to as the "Company", the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

1. Is the grievance of Willie Suggs arbitrable?

2. If so, is Willie Suggs entitled under Article IV Paragraph C of the contract to $56 a week for the period September 12, 1974 to September 12, 1975 for certain work she performed in connection with "Americans All"?

3. If so, under Article IX of the contract is Willie Suggs entitled to credit as "Produced and Written By" or "Written and Produced By" for the period of September 12, 1974 to September 12, 1975 for certain work she performed in connection with "Americans All"?

Hearings were held at the offices of the American
Arbitration Association on July 21 and December 14, 1976 at which time Ms. Suggs, hereinafter referred to as the "grievant", and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The two aforementioned hearings were confined to the issue of arbitrability. At the conclusion of the second hearing the arbitrator ruled that he would first determine that issue.

Article XX Paragraph B of the contract provides in pertinent part that a grievance which cannot be settled by the parties through the grievance machinery may be submitted to arbitration to the American Arbitration Association, provided that if such grievance has not been submitted to arbitration within six (6) months after such grievance arose, such grievance shall be deemed to have been abandoned.

The grievance was filed with the American Arbitration Association on March 5, 1976. Based on the record before me I conclude that the "grievance arose" within the meaning of Article XX Paragraph B sometime in September, 1974. Issue no. 2 of the stipulated issues so indicates, by making a claim for both pay and credit for a period of time commencing September 12, 1974. More importantly, the grievant, acknowledged that in September of 1974 she felt she was performing work of a higher classification and that she was entitled to additional pay and additional credit for those services. There is no
question that she knew of the problem as early as September 1974, because at or about that time she initiated discussions with representatives of the Company in an effort to obtain "credit" for work which she considered to be of a Producer or Associate Producer classification. Hence from any determinative standpoint, i.e. the meaning of when a grievance "arose" under Article XX Paragraph B; the interpretation of that wording in the arbitration award of Arbitrator Benjamin C. Roberts of October 22, 1976; and when the grievant knew of a condition giving rise to a grievance, the instant grievance "arose" in September 1974.

The grievance was not filed for arbitration within the prescribed six months, but rather was submitted to the American Arbitration Association almost a year and a half after it arose. Counsel for the Union argues that the arbitrator should disregard the contract time limit for submission of grievances for arbitration on equitable grounds, and because the Company would not be prejudiced if the case were heard and determined on the merits. The well settled and traditional view is to the contrary. The arbitrator is bound to the terms of the contract as negotiated and written by the parties including explicit time limits for the filing of grievances to the arbitration forum. Here the time limit is both explicit and unambiguous. If the grievance is not submitted to arbitration within six months after it arose, it is deemed to have been abandoned. That is a classical "statute of limitation" which
the arbitrator may not ignore, and is binding on the parties which negotiated it unless there has been an express or implied waiver. For the arbitrator to disregard what the parties mutually negotiated in such explicit terms would be to modify or vary the terms of the contract. I do not totally reject the possibility that there may be occasions when because of extraordinary and compelling circumstances a time limit of this type should not be strictly enforced. However the instant case does not present any such extraordinary or compelling circumstances; nor is there any evidence in the record of any waiver of the time limit by the Company, either expressly, by implication, by conduct or practice.

That the grievant believed that her individual discussions with Company representatives after September of 1974 would produce a satisfactory resolution of her complaint, and her assertion that from September 1974 to September 1975 (the latter date was when the Union first represented her in discussions with the Company) she was unaware of her rights under the collective bargaining agreement, are not explanations which toll the running of any specific time limit of the submission of a grievance to arbitration. During the relevant period she was a member of the Union, but chose not to appeal to the Union for advice or assistance, which if she had done would have disclosed her grievance rights and the time limits thereon. Though she might have thought that her
individual discussions with Company representatives would resolve her complaint, there is no evidence whatsoever that the Company agreed to waive any of the contract time limits either for the filing of a grievance or for its submission to arbitration. It is well settled that meetings to discuss a grievance, a willingness to attempt resolution, or any other settlement discussions do not in and of themselves constitute waivers of time limits. A waiver must be explicit or implied from conduct or practice. Here it was not explicit and I find nothing about the Company's actions in dealing with the grievant individually or with her grievance which could be construed as an implied waiver of the six month time requirement.

Nor is this a continuing grievance. That the alleged problem persisted over a one year period does not make it "a continuing grievance," any more than an employee who is discharged has a "continuing grievance" to seek his reinstatement by arbitration any time beyond six months after his dismissal. In the instant case the alleged problem arose once, on or about September 12, 1974 and persisted unchanged thereafter. It did not reoccur again and again nor was it reimposed on the grievant by the Company at regular intervals during the year. Hence the characteristics and conditions of a continuing grievance are not present in this case. Therefore the six month time period prescribed in Article XX Paragraph B commenced to run on or about September 12, 1974, and there are
no circumstances in the record before me which suspended the running of that period.

I find that neither the grievant, nor the Union on her behalf, filed her grievance within the contractual time limit required under Article XX Paragraph B, and therefore the grievance is not arbitrable.

Based on the foregoing it is unnecessary for me to decide whether the grievance was settled substantively at the meeting between the parties on September 12, 1975. And because the grievance is time barred from arbitration, the Arbitrator is without jurisdiction to hear or determine stipulated Issues no. 2 and no. 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 grievance of Willie Suggs is not arbitrable.

Eric J. Schmertz  
Arbitrator  

DATED: December 16, 1976  
STATE OF New York ) ss.:  
COUNTY OF New York )

On this sixteenth day of December, 1976 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 VIII of the collective bargaining agreement dated October 8, 1974 between the above named Union and Company the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Whether the Company violated the Plant Rules and/or the disciplinary procedures in those Plant Rules when it terminated the employment of Albert Bartz? If so what shall be the remedy?

A hearing was held in Edison, New Jersey on March 11, 1976 at which time Mr. Bartz, hereinafter referred to as the "grievant" and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived. The Company filed a post-hearing brief.

The pertinent sections of the Plant Rules read:

Regular attendance, careful attention to work and decent personal conduct is expected of every employee as an essential element to the operation of the plant. Offenses in these respects will result in disciplinary action proportionate to the seriousness and frequency of the offense. The following listing indicates the disciplinary action that will be taken for the first offense in the group in which the offense occurs. Subsequent offenses of the
same nature will result in more severe disciplinary action. Written warnings or notices covering offenses of plant rules will be removed from the employee's personnel file one (1) year from date of offense.

Group 1.

The first offense will result in a verbal warning given by supervisor in presence of a member of Union Committee. Note of incident will be sent to personnel file. Repeated offenses will result in written warning, layoff or discharge successively.

1. Failure to notify the Company of absence within three hours after the time scheduled for work and produce reasons satisfactory to the Company as to why permission was not obtained in advance of the time scheduled for work. (A message to the switchboard, guard, paymaster or immediate supervisor is considered adequate notice.)

2. Unauthorized absence or lateness for work in excess of twoworking days per month. However, absence due to illness which is substantiated by a certificate from a medical doctor is not to be considered as unauthorized absence. Lateness reported, which is excused by the Company, shall not be considered a violation.

It is undisputed that within the aforementioned one year period the grievant committed various offenses for which he was verbally warned, warned in writing and suspended pursuant to the "progressive discipline" procedure set forth in the foregoing Rules. The Union does not challenge the validity or propriety of those prior disciplinary penalties nor does it dispute the grievant's prior disciplinary record.

Accordingly, the more precise question in the instant proceeding is whether the grievant committed additional offenses
proscribed by the Plant Rules which in accordance with the mandate of those Rules, warrant his dismissal.

The Company charges that the grievant was absent without authority in excess of two working days during the month of September, 1974, within the meaning of Group 1, Paragraph 2 of the Plant Rules, and that those unauthorized absences were unexcused. It asserts that as "repeated offenses" within the same one year period subsequent to warnings and a disciplinary suspension, the grievant's discharge automatically follows under the penalty sequence explicitly provided in the Plant Rules.

Specifically the Company contends that the grievant was absent without authority on September 2, 26, 29 and 30 and that his explanations for each and all of these absences did not constitute acceptable excuses.

The grievant, and the Union on his behalf contend that he was sick on September 2 and 26; that he was unable to come to work on September 29 and 30 because, returning from a religious retreat, his car broke down around New Haven, Connecticut and that a full day elapsed before it could be repaired. And that thereafter following the drive to New Jersey, it was too late for him to report to work. The Union argues that in each instance the grievant notified the Company that he would be absent or instructed someone else to so notify the Company; that such notice was in compliance with Group 1 Paragraph 1 of the Rules and should have been accepted by the Company as an excuse for the grievant's absence. Alternatively, and particularly
with reference to September 29 and 30, the Union contends that
the grievant adequately substantiated the breakdown of his car,
and that explanation should have been accepted by the Company
as an excuse for those absences.

I must reject the Union's argument that bare notice to the
Company of an absence in accordance with the provisions of
Group 1 Paragraph 1 constitutes an excused absence. If that
were the case Paragraph 2 would be unnecessary and rendered
meaningless. Obviously an employee who is absent has two duties
under the Rules. First to notify the Company of his absence
and second, to provide the Company with an acceptable excuse
for the absence. That the grievant may have complied with
Paragraph 1 does not mean he met his obligations under Para-
graph 2.

Considering the grievant's prior disciplinary record with-
in the relevant one year period, and particularly the fact that
all disciplinary steps prior to discharge had been imposed on
him for previous violations of the Plant Rules, it was not un-
reasonable for the Company to require that he specifically
substantiate the reasons for his absences on September 2, 26,
29 and 30. Indeed Paragraph 2 expressly provides for such
substantiation. It permits the Company to require a medical
certificate in case of an absence with illness. Impliedly,
in my judgement it authorizes the Company to require satisfactory
substantiation of other reasons for absences as well, especially
here, in view of the grievant's disciplinary status at the time.
The grievant did not provide adequate substantiation. He did not substantiate his alleged illnesses of September 2 and 26 with a medical certificate, though he was afforded the opportunity to do so. Regarding the breakdown of his car he was asked to produce receipts for towing or repairs or other documentation which would confirm the difficulty with his car and the extended time allegedly required to make repairs. All that he produced was a statement from a friend to the effect that the grievant had car trouble and stayed over at the friend's house in New Haven until the car was repaired. Considering the many questionable aspects of the grievant's story of the car breakdown and the documents the Company requested, this statement was not adequate. The grievant did not explain why it took almost twenty-four hours until a mechanic began the repairs on his car. The grievant did not explain satisfactorily what was really wrong with the car, except that it was a "minor transmission problem." Without further substantiation it is difficult to believe that the mechanic performed the work without charge and that all the grievant paid was a small amount for a part and a tip. The grievant did not adequately explain why after spending more than a full day at his friend's house it took him an hour after repairs were made to begin the trip back to New Jersey and why he could not have made a better effort to report for work on September 30th. Without more substantiation, and considering the grievant's past record, it is not surprising that the Company was
suspicious of the fact that his car broke down near the home of a friend with whom the grievant also did business in a private capacity. The grievant was offered an opportunity to provide additional information and documentation in support of his story, including the opportunity to have other passengers who were with him in the car come forward and support his story or to testify for him in this arbitration proceeding. He did not take that opportunity. For all these reasons I do not consider it unfair or unreasonable for the Company to have concluded that the grievant's absences on September 29 and 30 remained inadequately explained and therefore unexcused. Coupled with his unsubstantiated illnesses of September 2 and 26, the grievant was absent on an unexcused basis more than two days within a month as proscribed by Paragraph 2, Group 1 of the Plant Rules.

Accordingly I do not find that the Company violated the Rules or the disciplinary procedures in those Rules when it imposed on the grievant the last step penalty (discharge) as prescribed therein.

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 did not violate the Plant Rules and/or the disciplinary procedures in those Rules when it terminated the employment of Albert Bartz.

Eric J. Schmertz
Arbitrator
DATED: April 29, 1976
STATE OF New York ) ss.:
COUNTY OF New York )

On this twenty ninth day of April, 1976, 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 threshold issue is whether the grievance is arbitrable.

Hearings were held on February 5 and April 22, 1976 in Bridgeport, Connecticut at which time representatives of the Bridgeport Education Association, hereinafter referred to as the "Association" and the Bridgeport Board of Education, hereinafter referred to as the "Board" appeared. Both sides were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived.

The grievance presented by the Association in the instant case is that the Board violated the contract by discontinuing a $10.00 monthly expense allowance, previously granted to psychological examiners, for travel inside the school district.

The problem with the Union's effort to arbitrate that complaint, is that the written grievance dated July 2, 1975, and the dispute which was processed through the grievance procedure, is substantively different than the Association's claim herein. The written grievance claims a contract violation by the Board's action in discontinuing expenses and compensation for psychological
examiners traveling outside the school system. This is not simply a technical or semantic distinction. The fact is that the Union's grievance of July 2, 1975 was granted by the Board. In response to that grievance the Board guaranteed, as it did again in the course of the instant hearings, that it would continue to pay travel expenses and allowances to psychological examiners when and if they traveled outside the system to perform work assignments. It is also not simply a technical or semantic distinction, because the Board did not discontinue the payment of travel expenses to psychological examiners traveling outside the system until two months later, early in September, 1975.

Therefore the Union's grievance of July 2, 1975 cannot be construed to cover a subsequent event, unless by the later action of the parties it was understood that the earlier filed grievance encompassed the subsequent action as well. Based on the record I do not find this to be so. A grievance does not arise, or become a justiciable issue, until a contract provision has been breached. The Board took no action which could be deemed a contract breach with regard to the discontinuance of travel allowances inside the system, until September, 1975. While it is true that in the course of the processing of the grievance complaining about the elimination of travel expenses for travel outside the system, a representative of the Board did express the view that the contract did not require the Board to pay for travel inside the system. But those were speculative views, at most collateral to the grievance then being discussed,
and cannot be transformed into a contract breach unless and until implemented into action. What the Union complained about at that time was the Board's action in terminating payment of travel expenses for travel outside the system. That complaint was then a justiciable issue and ripe for the grievance procedure. But speculative talk about whether or not the Board was obliged to continue paying travel expenses for travel inside the system, would not and did not ripen into a grievance until the Board acted to terminate that particular benefit, and the Board did not do so until two months later. Nor is there anything in the record which would indicate that the Association was foreclosed from filing an appropriate grievance in September when the Board terminated the payment of travel allowance for travel inside the system. Clearly the Association could have grieved at that time but did not do so. Nor is there evidence to support a contention that the Association was either assured by the Board, or led to believe by the Board that the earlier filed grievance over a different benefit could be utilized or be deemed expanded to include the dispute which arose on and after early September. In other words, the Association's present contention that the July 2, 1975 grievance operates to include the termination of the payment of travel expenses to psychological examiners traveling inside the system, is self-serving and not supported by any evidence of agreement or acquiescence by the Board.

In short, I find no reason, contractual or otherwise, why the Association should believe that its July 2, 1975 grievance,
which was granted by the Board in the Association's favor, could thereafter be utilized to cover an action by the Board which first occurred in September. The Association should have grieved in September when what had been simply a speculative possibility became, for the first time, an alleged breach of the contract. Representatives of the Association have readily conceded that they could have done so, and it is my ruling that they should have done so in order to preserve the arbitrability of that allegation.

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:

The Union's claim of a breach of contract by the Board's discontinuance on September 8, 1975 of the payment of travel expenses to psychological examiners when traveling inside the system is not covered by its grievance dated July 2, 1975 and hence is not arbitrable in this proceeding.

DATED: June 7, 1976
STATE OF New York ) ss.
COUNTY OF New York )

On this seventh day of June, 1976 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 Board of Education violate Article VI Section N of the collective bargaining agreement by failing to pay psychological examiners/school psychologists the expenses set forth therein for the months March through June, 1976? If so what shall be the remedy?

A hearing was held in Stratford, Connecticut at which time representatives of the Board and the Association appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

Article VI Section N of the contract reads:

Supervisory personnel
Supervisory personnel shall be compensated for car expense at the rate of $10 per month for 10 month school year in lieu of gasoline for travel within the school system and throughout the State for professional meetings.

After granting psychological examiners/school psychologists the car expense allowance referred to above since at least 1968, the Board unilaterally terminated the allowance sometime after September, 1975.

The Board's position is that psychological examiners/school
psychologists are not "supervisory personnel"; that they do not meet the traditional legal requirements of supervisory status; that the practice of paying the car allowance for a period of years was an error; and as a practice inconsistent with the language of the contract it may be unilaterally terminated by the Board upon appropriate notice.

The Association's position is that psychological examiners/school psychologists are "supervisory personnel" within the meaning of the contract and that the long standing practice of paying the expense allowance is conclusive evidence of the mutual recognition and understanding of the parties that employees so classified fell within supervisory categories. The Association argues that the Board may not now make a unilateral change in what has been a bilaterally negotiated and bilaterally implemented condition of employment.

In my judgement there are two theories applicable to this case, both of which are supportive of the Association's grievance. One is to treat the phrase "supervisory personnel" as insufficiently clear or ambiguous as to its application to psychological examiners/school psychologists. And the other is to adopt the Board's argument that employees so classified are not supervisory as a matter of law or within the meaning of this contract.

My own view is that the phrase "supervisory personnel" in Article VI Section N of the contract is ambiguous as it relates to psychological examiners/school psychologists. What is of consequence is not whether employees in those classifications
meet the legal test of supervisory status but whether they are
deemed supervisory within the meaning and confines of this
particular collective bargaining agreement. The contract does
not define "supervisory personnel." Yet for pay purposes school
psychologists/psychological examiners are grouped with Elementary
Principal and Department Head and other Group V "Administrators."
It would appear that the classifications with which the psycho-
logical examiners/school psychologists are grouped are super-
visory, and a logical inference may be drawn that the parties
intended, by that grouping to treat psychological examiners/
school psychologists also as supervisory personnel. Juxtaposed
with the legal fact that psychological examiners/school psycholo-
 gist do not possess the traditional requisites or authorities
of supervisory personnel (for example they neither hire or fire
nor make effective recommendations thereon) gives rise to a
contractual ambiguity as to whether "supervisory personnel"
referred to in Article VI Section N, include psychological
examiners/school psychologists. It is well settled that in the
event of a contractual ambiguity, clarification as to the parties
intent and the meaning of the contract is found in past practice.
Here the consistent and extensive past practice since at least
1968 has been to accord the expense allowance to psychological
examiner/school psychologist thereby making Article VI Section
N applicable to employees in those classifications. And under
that circumstance that practice is binding on both parties as
both evidence and a tangible expression of how they intended to contractually treat psychological examiners/school psychologists.

Alternatively, under the Board's theory of the case the grievance must also be granted. The Board is correct in stating that a past practice which is inconsistent with the clear language of the contract may be unilaterally stopped at any time upon appropriate notice. Assuming arguendo that psychological examiners/school psychologists are not "supervisory personnel" the Board has the right to unilaterally terminate the car expense allowance even though it has paid that allowance for an extended number of years. Where the clear language of the contract and a past practice are mutually inconsistent either side, upon appropriate notice, may require return and resort to the contract language. However in doing so, and assuming the applicability of this rule to this case, the Board must apply the contract uniformly, even handedly and non-discriminatorily to all employees similarly situated. In this case the Board failed to do that.

By letter dated September, 1975 the Acting Superintendent of Schools notified the Association that psychological examiners/school psychologists and social workers were not entitled to the expense allowance set forth in Article VI Section N and that payment would be discontinued. The Board discontinued payment to the psychological examiners/school
psychologists but did not discontinue paying the expense allowance to social workers. In short though the Board deemed that both groups of employees had been paid the expense allowance in error and contrary to the contract and that payment would be discontinued for both groups, only one group lost the benefit and the other continued to receive it. At the hearing the Board could offer no reasonable or justifiable explanation for its failure to apply this determination to both groups equally as it said it would in its letter to the Association September 8, 1975. Obviously the Board's inconsistent application of its determination constitutes discrimination against the psychological examiners/school psychologists. A discriminatory termination of a past practice, even where the practice is inconsistent with the clear language of the contract, cannot be sustained.

Accordingly for the foregoing reasons the Association's grievance is granted.

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 Board of Education violated Article VI Section N of the collective bargaining agreement by failing to pay psychological examiners/school psychologists the expenses set forth therein for the months March through June, 1976. The Board is directed to make those payments.

[Signature]
Eric J. Schmertz
Arbitrator
DATED: November 22, 1976
STATE OF New York ) ss.:
COUNTY OF New York )

On this twenty-second day of November, 1976, 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

City National Printing Company
East

and

Central Connecticut Printing
Pressman, Assistants' And Offset
Workers' Union, No. 401

The stipulated issue is:

Was there just cause for the discharge
of Keith Dubay? If not what shall be
the remedy?

A hearing was held at the Company plant in Bristol,
Connecticut on May 6, 1976 at which time Mr. Dubay hereinafter
referred to as the "grievant", 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. The Arbitrator's Oath, and the
contractual tripartite arbitration board were waived.

The grievant's act of tearing up a warning notice in front
of the foreman who gave it to him, and in the presence of other
employees was a seriously improper act, and cannot be excused.
It constituted defiance of managerial authority and could be
construed as insubordination. However I am persuaded that the
grievant did it in a moment of anger and because he thought the
issuance of a written warning (for some alleged offence of the
previous day) was unwarranted. I am satisfied that the grievant,
who is a young man and who other than this and a few other
attitudinal problems has been a good worker, now recognizes that
his act was wrong and impermissible, and that any problems he may have on the job must be referred to the Union and handled under the grievance procedures of the contract. Under those circumstances I believe he should be given another chance to show that his conduct can comport with his abilities, and that he can maintain a satisfactory record of work, attitude and conduct. I believe and expect that a disciplinary suspension rather than discharge, will adequately serve that end. It sustains the supervisory authority of the foreman; it penalizes the grievant for his misconduct; and it places him on express notice that future misconduct would be grounds for dismissal.

Accordingly 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 Keith Dubay is reduced to a disciplinary suspension. He shall be reinstated without back pay. The period of time between his discharge and his restoration to work, a period of about four months, shall be deemed the disciplinary suspension and so noted in his employment record. He is expressly warned that future acts of misconduct or other violations would be grounds for dismissal. For that reason this Arbitrator retains jurisdiction in this matter.

Eric J. Schmertz
Arbitrator

DATED: May 10, 1976
STATE OF New York )
COUNTY OF New York )

On this tenth day of May, 1976 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 V of the collective bargaining agreement dated January 7, 1974 between the above named parties the Undersigned was designated to hear and decide a dispute relating to the grievance of Chester Young.

A hearing was held at the Company offices in West Hartford, Connecticut on December 16, 1975 at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Union contends that Mr. Young, hereinafter referred to as the "grievant", was denied a promotional bid to the job Inspector-Salvage-Rework, though he was the senior bidder. The Company awarded the job to Joseph Bouchard who is junior to the grievant by almost eighteen years. The Union charges a violation of Article VII Section 14 of the contract, the pertinent parts of which read:

"The Company will fill...vacancies first from among those applicants actively in the employ of the Company who have the
ability to do the work required, on the basis of seniority first within the Department, then within the Company,.....(Ability to perform the work required shall be construed to mean that the employee has the ability and skills to meet the job requirements when assigned to them)."

The Union contends that the grievant also had the ability to do the work of the job for which he bid within the meaning of the foregoing contract provision. Alternatively the Union argues that if the grievant did not possess the requisite ability, neither did Bouchard, and that the Company's award of the job to the latter violated the seniority provisions of the foregoing contract clause.

The Company's position is that both the grievant and Bouchard lacked the ability to perform the work. (Indeed, after finally posting the job for bids, which the Company concedes it did tardily, it officially denied the bids of the grievant and Bouchard on the grounds that both lacked the ability required.) It is the Company's position that it has no obligation to the senior bidder if that bidder lacks the requisite ability, and if, as here, there were no bidders qualified or possessed of the required ability, the Company has no further contractual obligations either to the Union or to the bidders, and could fill the job any way it wished. Under that circumstance the Company asserts, it could have filled the job with a new hire, or anyone of its present employees, including Bouchard,
irrespective of seniority, without violating the contract. In short the Company argues that if the senior bidder and all other bidders lack the requisite ability, neither they nor the Union may complain how or with whom the job vacancy is filled.

I will not substitute my judgement for that of the Company with regard to its determination that both the grievant and Bouchard lacked the ability to perform the job. (Therefore it is unnecessary for me to consider the "on the job experience" which Bouchard obtained during the period of time he was assigned the duties, when the Company should have but failed to post the job for bids). However I do not agree with the Company that it is free to fill the job with a junior unqualified bidder merely because the senior bidder is also unqualified.

There are instances in which a particular act by an employer may not be precisely violative of the explicit contract language, and yet be violative of the purpose and spirit of that language. That is the case here. The intent of Section 14 is to make available to senior employees promotional opportunities or job vacancies provided they have the requisite ability. The other side of the coin is that junior employees are not entitled to promotional opportunities or to fill vacancies over senior employees unless they have the ability to do the work and the senior applicants do not. Clearly Section 14 sets up a priority in favor of those with seniority; permitting a junior employee to progress ahead of an employee with greater seniority only
where the junior employee alone has the ability. Implicit, in my judgement, is a prohibition on promoting a junior employee over a senior employee when the junior employee does not possess the required ability as in the instant case. For Bouchard to preempt the grievant's bid and to gain a higher level position, when, by the Company's own determination, he lacked the ability for that promotion, is simply incongruous with and unjustified under the explicit and implicit priority structure negotiated by the parties in Section 14 of the contract.

I agree with the late Arbitrator I. Robert Feinberg who stated in his decision on grievance no. 67-300, dated June 18, 1969; (under contract language materially similar)

"If none of the applicants possess demonstrated ability as defined in Section 14 of Article VII, it does not follow that seniority may be disregarded. The agreement, in essence, provides two tests, one of demonstrated ability and one of seniority. If the applicants are equal with respect to 'demonstrated ability' or lack of it, and the Company fills the job nevertheless, seniority must be applied...." (Emphasis added).

In the instant case the Company could have legitimately refused to fill the job with either the grievant or Bouchard, inasmuch as both lacked ability. It could have filled it instead with some other employee or even a new hire who possessed ability. But the moment it selected Bouchard, it violated the seniority rights of the grievant and the seniority provisions
of Section 14 of Article VII. As between those two employees neither had a claim on the job based on ability, but clearly the grievant had a greater contractual claim or right to the promotion, based on seniority.

The appropriate remedy in my view under the circumstances where the Company had no original obligation to fill the job with either the grievant or Bouchard, is to give the Company some options. It may remove Bouchard, and replace him with an employee who possesses ability. It may remove Bouchard and leave the job vacant. Or it may remove Bouchard and replace him with the grievant. But, unless the parties are in mutual agreement, Bouchard may not remain in the job so long as the grievant seeks it. Under the particular circumstances of this case I conclude that a retroactive pay increase to the grievant if he replaces Bouchard is not appropriate. Rather, if the grievant is placed on the job, he shall receive the rate of pay of that job from the date he assumes it.

The Undersigned, duly designated as the Arbitrator under the arbitration provisions of the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD:
The Company violated Article VII, Section 14 of the contract when it awarded the job of Inspector-Salvage-Rework to the junior employee Joseph Bouchard whom the Company had deemed did not possess the ability to do the work required. The Company shall remove Bouchard from the position and replace him, if it fills the job, either with the grievant, Chester Young, or with some other employee who possesses the ability to do the work required. There shall be no retroactive pay adjustment.

Eric J. Schmertz
Arbitrator

DATED: January 5, 1976
STATE OF New York )ss.:  
COUNTY OF New York)

On this fifth day of January, 1976, 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 good cause for the discharge of Lauren Rose, Dorothy Becktold and JoAnn Wahl? If not what shall be the remedy?

A hearing was held on December 11, 1975 at which time the three aforementioned individuals 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. I see no useful purpose to an Opinion in this matter.

Accordingly, based on the record before me and having duly considered the proofs and allegations of the parties and having been duly sworn, the Undersigned, duly designated as the Arbitrator, makes the following AWARD:

There was good cause for the discharge of Lauren Rose and Dorothy Becktold.

There was not good cause for the discharge of JoAnn Wahl. Miss Wahl shall
be reinstated with back pay, less unemployment insurance she received, and earnings, if any, that she received from other employment during the period of her discharge.

DATED: January 5, 1976
STATE OF New York ) ss.
COUNTY OF New York)

On this fifth day of January, 1976, 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 instant case the Union contends that the reference to "40 hours" in Article 29 (a) and 30 (a) of the Collective Bargaining Agreement includes overtime hours worked as well as straight time hours worked up to 40 hours worked in a week, for payment of Welfare and Pension contributions to Motion Picture Laboratory Technicians, Local 702 Pension Fund and Motion Picture Laboratory Technicians Local 702 Welfare Fund.

The Company does not dispute that contention. Therefore, in this proceeding, there is no issue before the Arbitrator over the interpretation of the foregoing contract provisions.

Pursuant to the foregoing, the Company has offered to make payments to said Funds retroactive to May 1, 1975, and thereafter.

The Undersigned, as Permanent Arbitrator, refers the foregoing Company offer to the Trustees of both Funds, and retains jurisdiction pending word of action by the Trustees.
In accordance with Article IV of the collective bargaining agreement dated June 1, 1975 between the Connecticut Light and Power Company, hereinafter referred to as the "Company", and Local 420, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "Union", the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was there just cause to impose on June 3, 1975 the penalty of discharge upon employees Robert Cullen and Albert W. Lebel? If not what should the remedy be?

A hearing was held in Meriden, Connecticut on December 1, 1975 at which time Messrs. Cullen and Lebel, 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. The Arbitrator's Oath was waived. Post-hearing briefs were filed.
The essential facts are not in dispute. A group of some twenty-three Company employees, including the grievants, were found to be tampering with their electric and/or gas meters, thereby reducing their respective utility bills. All but the grievants were penalized with disciplinary suspensions of eight weeks and a requirement to make restitution. The grievants were discharged.

The grievants admit the offense. The Union does not contend, generally, that meter tampering is not a discharge offense. Rather, in the instant case, it relies on the fundamental rule of "even-handed discipline", asserting that for the same offense, the grievants should not have been punished to any greater extent than the others.

The Company's case is based on its contention that the grievants were not "similarly situated" to the other employees who engaged in meter tampering. It distinguishes the grievants from the others by a prior "act of dishonesty", which each grievant committed and for which each was disciplined. The other approximately twenty-one employees, argues the Company had no prior disciplinary offenses involving "dishonesty".

It is well settled that where a group of employees commit the same offense, some may be more severely disciplined than others, if that latter offense is part of a more egregious or unsatisfactory prior disciplinary record. Thus where a greater
disciplinary penalty is imposed on the employee with the more unsatisfactory employment record, the rule requiring even-handed discipline for the same offense is not breached.

In the instant case I accept the distinction which the Company makes. I do not consider it particularly material to examine the magnitude or extent of the prior acts of alleged dishonesty committed by each of the grievants. (Cullen siphoned some gasoline from a Company vehicle for his own use, and a fire resulted destroying the Company vehicle. Lebel misused the Company's finance and payroll deduction plan.) What is material is that each was disciplined for those respective offenses, Cullen by an eighteen and one-half day suspension and Lebel by payment of certain carrying charges on his purchase and a ban on his use of the payroll deduction plan for one year, and neither grieved the charge or the disciplinary penalty imposed. What is more significantly material is the fact that as part of the discipline each received a letter which inter alia advised that "further violations of Company practice....policies and procedures could result in discharge."

It has been established by concession, admission or by the undisputed evidence, that at the time both grievants were disciplined for their prior offenses, and at the time that they received their respective letters warning them about the consequences of further violations, they were tampering with
their meters. Though expressly informed that their jobs were in jeopardy if they committed future violations, they continued the tampering and continued to draw the illegal benefits therefrom. This blatant disregard of an express warning; to continue to pursue a course of misconduct as serious as meter tampering despite the prior discipline and warning, is an act of defiance which legitimately distinguishes the grievants from the other twenty-one employees. And this distinction is substantively adequate and significant to justify the more severe penalty. Inasmuch as meter tampering generally would be a discharge offense, irrespective of an employee's prior record, I cannot fault the Company's decision to discharge the grievants while tempering that penalty for those whose prior records were either clear or not as serious.

That there may have been one or two other employees within the group who had committed a prior disciplinary offense, does not change the foregoing conclusion. The prior offenses of that or those employees were not as serious or relevant as the prior offenses of the grievants. But even if otherwise, it would mean only that the Company could have discharged one or two others, not that the grievants would thereby be entitled to or qualify for the lesser penalty.

One final word of a purely advisory nature. Now that the Company's distinction has been accepted and its right to
discharge the grievants upheld (and the Arbitrator has expressed the view that meter tampering is a discharge offense regardless of past record), it may wish to give consideration to the grievants' long service (over twenty years) with the Company as a possible mitigating factor. In its sole discretion, and not part of my Award in this case, the Company may wish to give the grievants one final chance, by reducing the discharges to long term suspensions (in excess of the eight weeks imposed on the others) plus restitution. I would recommend that the Company consider that action.

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 just cause to impose on June 3, 1975 the penalty of discharge upon Robert Cullen and Albert W. Lebel.

Eric J. Schmertz
Arbitrator

DATE: January 5, 1976
STATE OF New York )ss.: 
COUNTY OF New York)

On this fifth day of January, 1976, 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 Theodore Rothke? If not, what shall be the remedy?

A hearing was held on December 30, 1975 at which time Mr. Rothke, 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 grievant is charged with "Dishonesty" within the meaning of Section 13A of the contract. The Employer's allegation is based on what its security officer testified he saw the grievant do during the early morning hours (about 4:45 AM) of September 12, 1975.

Absent direct corroborating evidence, or other evidence in support of the security officer's testimony, I am not prepared to conclude that his testimony is any more probative than that of the grievant, who has been employed by this Employer for almost five years and who, based on the record before me, has had no prior formal disciplinary difficulties.

It is possible that the security officer was mistaken as to what he saw in the darkness of that morning, and mistook certain products for others when he removed what he thought were
"extra" Half and Half cases from the grievant's truck. Therefore the relevant evidence is not only conflicting but offsetting, and hence indeterminative one way or the other.

The instant record does not establish the grievant's innocence. But that is neither the issue nor the burden in this case. Rather, the Employer has not established the grievant's culpability by the requisite standard of clear and convincing evidence, and therefore has not met the burden required to sustain the disciplinary action.

In view of the foregoing, it is unnecessary for me to deal with the procedural requirements of the last paragraph of Section 13.

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:

Just cause has not been established for the discharge of Theodore Rothke. He shall be reinstated with full benefits and back pay, less earnings, if any, from other employment during the period of his discharge.

DATED: January 13, 1976
STATE OF New York
COUNTY OF New York

On this thirteenth day of January, 1976 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Arbitrator
In accordance with Article 9 of the collective bargaining agreement effective June 1, 1974 between Glass Bottle Blowers Association of the United States and Canada hereinafter referred to as the "Union" and Continental Can Company, Plastic Container Division, hereinafter referred to as the "Company", the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was there just cause for the discharge of Collie Sparrow, and if not what shall be the remedy?

A hearing was held in Baltimore, Maryland on July 29, 1976 at which time Mr. Sparrow, hereinafter referred to as the "grievant", and representatives of the Union and Company, appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Company filed a post-hearing brief.

The Company's charge is that on December 10, 1975 the grievant insubordinately and profanely refused to comply with an
order from his supervisor that he close a plant overhead door.
The Company contends that this act of insubordination, together
with the grievant's prior disciplinary record during the same year,
which included other violations of Company rules, warranted his
dismissal.

The grievant denies the charge. The Union on his behalf
argues that he did not refuse to carry out the order but rather
was unable to comply because he did not have a piece of equipment
necessary to close the overhead door, and that in any event the
door was justifiably opened and left open by the grievant in
compliance with the request of certain employees who complained
of the presence of fumes from a heat-treat fire on the bottle
line which had taken place earlier.

The only non-hearsay evidence regarding the events of
December 10, 1975 is the testimony of the grievant and his super-
visor Bobby Kennard. The balance of the testimony is by witnesses
who were not present at and did not have personal knowledge of the
incident. The Union did not offer testimony by any of the
employees working that day who, it is contended, asked the
grievant to open the door because of lingering fumes from the
fire on the bottle line nor were any of them called to corroborate
the grievant's version. The hearsay testimony cannot be deemed
determinative, and the grievant's assertions regarding why the
door was opened, his argument in apparent justification for leav-
ing it open, and his allegation that he didn't refuse, but couldn't
close the door without a fork lift, are not supported by testimony
from witnesses who either were available to testify but were not called, or whose unavailability was not explained.

As between the testimony of Kennard and that of the grievant, I accept the former as the accurate version. I find no reason in the record why the supervisor would misrepresent what took place or falsely testify. His testimony at the arbitration hearing was forthright, precise, and unequivocal. Contrary-wise the testimony of the grievant was unsure, imprecise and hence unpersuasive.

Based on the probative evidence in the record I conclude that the grievant refused to carry out the order of his supervisor to close an overhead door; that his refusal included his abusive and disrespectful use of profanity to the supervisor that went beyond the bounds of "shop talk"; that there was no realistic or legitimate safety reason why the overhead door should remain open; and even if some fumes were still present from the fire it did not justify his refusal to do what he was instructed to do.

Standing alone, the foregoing act, though obviously insubordination, might not be sufficient to impose the ultimate penalty of discharge on an employee with twelve and one-half years of service. But this offense does not stand alone. During the same year the grievant had been previously "talked to" and officially disciplined with a warning for other serious violations of plant rules including a prior act of insubordination which neither he nor the Union grieved. In view of the contract
provision vitiating disciplinary penalties which are more than one year old, the grievant's prior disciplinary offenses within the same year and hence inside of the one year period, are relevant and must be considered in determining whether the penalty of dismissal was proper. Considering the events of December 10, 1975 and the grievant's prior disciplinary offenses in that year, I am constrained to hold that the Company's decision to impose the penalty of discharge was neither excessive nor improper. For the Arbitrator to consider a lesser penalty under the circumstances would be for him to substitute his judgement for the judgement of the Company, reasonably exercised.

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 discharge of Collie Sparrow was for just cause.

Eric J. Schmertz
Arbitrator

DATED: October 5, 1976
STATE OF New York )
COUNTY OF New York ) ss.:

On this fifth day of October, 1976 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 my Award dated December 18, 1969 between the above named parties I upheld the Union's grievance and directed that "the complement of the Gevachrome machine shall be three (3) men."

The question now posed is how the machine should be operated if it runs continuously through regular meal and break periods. The Union contends that the Company must obtain another operator to relieve any of the regular operators during meals or break periods to ensure a three-man complement at all times. The Company contends that for meals and break periods the assigned crew members should individually relieve each other, and that the machine may be run during those periods with only two operators present.

My Award of December 18, 1969 does not deal explicitly with the instant question, and the contract is silent on this particular problem.

The Union relies principally on "past practice", asserting that the practice has been for each member of the crew to be relieved for meals and break periods by an operator obtained from outside the crew, and that when the machine operated through those
periods there were three operators present at all times. The Company disputes this "past practice", contending that until recently the machine was shut down during meal and break periods and that the dispute arose only recently when the Company decided to operate the machine continuously through meal and break periods as well as during regular operating hours.

The testimony on "past practice" is sharply conflicting, offsetting and hence indeterminative of the issue presented. The Union offered testimony that for some time the machine has been operated through meal and break periods and that a fourth operator was obtained from elsewhere to replace whichever member of the regular crew was at a meal or taking a break. On the other hand the Company offered equally probative testimony that the machine has been shut-down during meal and break periods; or that there was not enough work to run the machine through the meal period; or that occasionally if the machine ran through the meal and break periods the regular three man crew remained on and the Company paid overtime for work performed through those periods.

Accordingly, based on the testimony in the record, I am unable to decide whether there was a consistent practice relevant to the issue before me, and therefore I am unable to direct, pursuant to Section 17(b), that the "present method of operation .... continue without change."

However I am persuaded that the issue may be resolved by a logical, and proper, albeit inferential interpretation of my Opinion accompanying the aforementioned Award of December 18, 1969,
together with a practice that is undisputed. In that case the Union sought manning comparability between the Gevachrome machine and developing machines #1, 2 and 3. In establishing manning comparability between the Gevachrome machine and developing machines #1, 2 and 3, I stated:

The Gevachrome machine is a color developing or processing machine with an attached applicator. It is undisputed by the Company that other color developing machines with applicators in the Laboratory, namely developing machines #1, #2 and #3, are run with a crew of three when one strand is developed and with a crew of five for two strands. The testimony of Messrs. Vitello and Kaufman, of the Union and Company respectively, coincide on one crucial point, and that is that by agreement between the parties, color developing machines with applicators are and have been run with a crew of no less than three men.

As I see it the question before me is whether this latter referred to agreement applies to the Gevachrome machine, on which the applicator is utilized only infrequently. I conclude that it does. (Emphasis added).

In other words, in that Opinion, I determined that the manning of the Gevachrome machine should be the same as the manning on developing machines #1, #2 and #3. In the instant case, there is one past practice which is undisputed, and that is that developing machines #1, #2 and #3 operate through meal and break periods and the operators of developing machines #1, #2 and #3 relieve each other during those times, thereby reducing the complement on those machines by one member during those periods. The import and intent of my prior Award was to treat the Gevachrome machine and developing machines #1, 2 and 3
similarly for purposes of manning. To grant the Union's grievance in the instant case would be to change that similarity, by according the operators of the Gevachrome, and the Union on their behalf, a greater right or benefit than has been extended to the operators of developing machines #1, #2 and #3 by practice and under my prior Award. As indicated, I find no contractual or "past practice" basis to support a distinction between the way the Gevachrome machine is operated continuously during meal and break periods and the way machines #1, #2 and #3 are operated during similar periods. Therefore the similarity or "parity" of manning which was established by my Award of December 18, 1969 shall continue to obtain, and the manning of the Gevachrome machine during meal and break periods shall be handled in the same manner as has been done on developing machines #1, #2 and #3.

For the foregoing reasons, the Undersigned, Permanent Arbitrator 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:

The Union's grievance is denied. When a member of the three-man complement of the Gevachrome machine takes a meal or break period, he shall be relieved during those periods by the remaining members of the crew. The Company is not obligated to obtain a replacement from another location.
The Arbitrator's fee shall be borne by the Union.

DATED: November 29, 1976
STATE OF New York )ss.:
COUNTY OF New York )

On this twenty-ninth day of November, 1976 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

International Union of Electrical Radio and Machine Workers, Local 119:
AFL-CIO

and

General Electric Company

The stipulated issue is:

Was there just cause for the discharge of John C. Endres? If not what shall be the remedy?

Mr. Endres, hereinafter referred to as the "grievant", was discharged after receiving a fourth written warning notice within a twelve month period. The Company rules provide that an employee is subject to discharge under that circumstance.

The Union does not dispute the propriety of the Company's rule nor its dissemination to and among the employees including the grievant. Nor does the Union challenge the grievant's first three warning notices within the undisputed twelve month period. The issue is simply whether the fourth warning notice was proper. If so the grievant's discharge must be upheld.

The fourth warning notice for "gross misconduct" is based on the Company's charge that the grievant left work during his regular shift without notice to and permission of supervision. I accept as accurate the testimony of the foremen involved who deny that the grievant informed them of a toothache and his
necessity to go to the dentist. I do not accept as credible the grievant's assertion that he informed his foremen of his condition and either expressly or tacitly obtained their permission to leave work before the end of the shift to go to the dentist. Where as here, credibility is involved, the grievant's prior record, which includes the three aforementioned warning notices for "failing to follow instructions", "abusive language to supervision", "absent from work station without permission" is not supportive of the truth of his version of the incident leading to the fourth warning notice. Also, I find no reason why foremen Friddell and Piazi would falsely testify that the grievant did not advise them of his dental problem or seek their permission to leave work early. Finally and perhaps most determinative is that I cannot accept the grievant's testimony regarding his need to go to the dentist. Considering his statement that he was in extreme pain and could not continue at work (and indeed did not even want to come to work that day at all) I do not think it reasonable or believable that, as he testified, he went to the dentist, but seeing the dentist occupied with a single patient, left, and went home without informing the dentist of his problem or leaving word that he was there despite his admission that no other patients were waiting for treatment.

Considering the grievant's prior relevant disciplinary record, the testimony of the two foremen involved, the grievant's illogical testimony regarding his visit to the dentist, I am
constrained to conclude that he left work on his own initiative without proper notice to supervision and without obtaining the requisite permission. Accordingly the fourth warning notice was proper. Under the Company's working rules, his receipt of a fourth warning notice within a twelve month period, justifies his dismissal.

The Undersigned duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD in accordance with the expedited provisions of Article XV of the collective bargaining agreement:

The discharge of John C. Endres was for just cause.

Eric J. Schmertz
Arbitrator

DATED: December 17, 1976
In accordance with Article V Paragraph C of the collective bargaining agreement dated May 13, 1976 between Hartford Principals' and Supervisors' Association, Local 22, AFL-CIO, hereinafter referred to as the "Association" and The Board of Education of The City of Hartford, hereinafter referred to as the "Board", the Undersigned was selected as the Arbitrator to hear and decide a dispute between the Association and the Board involving the grievance of Mr. Richard Morris.

A hearing was held at the offices of the Board on December 20, 1976 at which time Mr. Morris, hereinafter referred to as the "grievant" and representatives of the Association and the Board appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The pertinent section of Article V (Grievance Procedures) reads:

A grievance shall mean a complaint by an employee that he/she has been subjected to arbitrary, capricious or discriminatory policy or practice....
The Association contends that the Board's refusal or failure to change the grievant's title from Acting District Chairperson, Social Studies, Weaver High School-Middle School District to District Chairperson, Social Studies, Weaver High School-Middle School District after he met the statutory requirements for the latter position was "arbitrary, capricious or discriminatory" within the meaning of the foregoing contractual definition of a grievance.

The Association has made out a case of arbitrariness which was not adequately rebutted by the Board.

The dictionary definition of "arbitrary" is unreasonable, unsupported, without adequate notice and treatment on a basis other than individual merit (The Random House Dictionary of The English Language: Unabridged Edition.)

The grievant was appointed Acting District Chairperson effective October 1, 1974. It is undisputed that the only reason the job title was conditioned by the word "Acting" was because at that time he had not yet completed his fifth teaching year, a statutory requirement for permanent appointment as an Administrator. The Association contends that sometime in May of 1975 the grievant was promised by Mr. Henderson Duval the Assistant Administrator for Personnel and Labor Relations that the appointment would be made permanent and the word "Acting" dropped from the title when the grievant had completed his fifth teaching year. Duval concedes he told the grievant that upon
completion of the fifth teaching year a recommendation would be made to the Board that he be appointed permanently to the District Chairperson position. I view these two versions as distinctions without a difference. I am persuaded that Duval's statement to the grievant was authoritative and that though he may have lacked the technical authority to assure a change in title he possessed the apparent authority to do so. Based on practice, Duval's assurance, whether a direct promise to give the grievant the permanent title or to make a recommendation to the Board through the Superintendent of Schools, amounted to the same thing. Duval candidly testified that at the time, recommendations which he drafted for the Superintendent of Schools for submission to the Board were regularly accepted by the Superintendent and invariably acted upon affirmatively by the Board. Indeed, it is undisputed that another employee, similarly situated as to job assignment, but who possessed all of the statutory requirements for appointment as a chairperson was recommended and approved for that appointment at the time that the grievant was made an Acting Chairperson. In short, it is clear, and indeed it was conceded, that had the grievant met the statutory requirements in October of 1974, he also would have been recommended for and would have been appointed to his District Chairperson job unconditionally. Consequently, based upon the practices and circumstances in effect in October of 1974 and May of 1975, I conclude that an assurance by Duval
that the grievant would be recommended for full appointment when he acquired his fifth teaching year was synonymous with an assurance that the grievant would receive that appointment when he met that condition.

Thereafter, in June of 1975 the grievant completed his fifth teaching year. But from that date to the present he has not been appointed as Chairperson, but has remained Acting District Chairperson. This is so despite written recommendations from Duval to the Administrator of Personnel for Labor Relations and the written recommendation of the Principal of the Middle School that the word "Acting" be dropped from the grievant's title. Also it is so despite the fact that the grievant has bid for the District Chairperson's job, which he has held all along on an Acting basis, in response to job postings of June 28, September 27, November 12 and 16 of 1976, under Article VII Paragraph B No. 4 of the contract.

It is significant that the grievant's bids in response to each of these postings were not rejected. Rather his applications were deferred, and re-postings of the job opening were ordered by the Superintendent of Schools. The grievant's bids were not rejected because he lacked qualifications for the job or on other substantive grounds. Nor is there any evidence in the record that his capabilities to perform the full job are in any way challenged. The sole explanation of the Board for not acting upon the grievant's job bid, was that the Superintendent
of Schools sought to obtain a greater number of applicants for consideration. And hence, rather than acting upon the grievant's bid (together with the one or two others who also bid,) ordered subsequent and renewed postings for the job. Nor is it the Board's position that it did not act upon the grievant's bids because it decided not to fill the job on a permanent basis. On the contrary, representatives of the Board conceded that the Board wished and intended to appoint a District Chairperson. The various job postings in the year 1976, subsequent to the grievant's acquisition of a fifth teaching year, are evidence of that intent.

I conclude therefore that the sole reason the grievant has not been appointed as the District Chairperson with the word "Acting" deleted from his title, is that the Superintendent of Schools has wanted more candidates to respond to the job posting. I do not consider this to be a fair, reasonable, or justifiable reason to deny the grievant a job which he has been satisfactorily performing since 1974 on an acting basis, and which, since June of 1975 he is statutorily qualified to assume. For the Superintendent of Schools to unilaterally defer evaluating and acting upon bids submitted under the bidding provisions of the contract, and to instead unilaterally direct subsequent and re-postings of the same job vacancy in order to get a greater number of candidates, could constructively frustrate the purpose and intent of the posting and bidding procedures of Article VII
of the contract. It would mean that the Superintendent of Schools could unilaterally bypass a qualified bidder merely because he wished to examine the qualifications of more candidates, even though there were not multiple bids. I consider that unreasonable and potentially discriminatory, so far as any qualified bidder is concerned, and, in my judgement, inconsistent with the purpose and intent of the posting and bidding provisions of the contract.

The aforementioned memoranda recommending and requesting the deletion of the word "Acting" from the grievant's title were also not dealt with in a reasonable or justifiable manner. The Superintendent of Schools responded that the requests could not be granted because only the Board had the power to make a permanent appointment, and the grievant's name had not been submitted to the Board for that purpose. Obviously those responses beg the question. They do not answer the critical question of why, after June of 1975, the grievant's name was not submitted to the Board for a change in title, in accordance with the assurances given to him by an authoritative representative of the Board. Clearly those responses had nothing to do with the merits of the grievant's application nor do they in any way challenge the satisfactory nature of the job he has been performing in an acting capacity or his substantive qualifications for permanent appointment.

For the foregoing reasons I conclude that the refusal or failure of the Board to delete the word "Acting" from the grievant's title is unreasonable, unsupported by adequate reason
or motive and is treatment on a basis other than merit. In short the Board has been arbitrary.

Remaining is the question of remedy. The Board asserts that under Article II of the contract a permanent appointment of a Chairperson is an exclusive prerogative of the Board and may not be ordered by an Arbitrator. I conclude otherwise. Article II in pertinent part, relating to the prerogatives of the Board states that those:

....prerogatives are not subject to delegation in whole or in part, except that the same shall not be exercised in a manner inconsistent with or in violation of any of the terms and conditions of this Agreement. No action taken by the Board with respect to such.....prerogatives other than as there are specified provisions herein elsewhere contained, shall be subject to the grievance provisions of this Agreement. (Emphasis added.)

Manifestly if the Board has acted "arbitrary, capricious or discriminatorily" within the meaning of Article V of the contract, it has exercised a right, responsibility or prerogative in a manner inconsistent with or in violation of the Agreement. And that action, as it involves a specific provision of the contract, is therefore subject to the grievance provisions.

Under that circumstance, and having found that the Board acted arbitrarily, the Arbitrator is empowered to fashion a remedy that is final and not contingent. Put another way, the Board's exclusive prerogative to make permanent appointments of Chairpersons is lost or waived if the Board acts arbitrarily
in the exercise of a right or prerogative. In that event, the
Arbitrator is empowered by the contract to do what the Board
should have done. In the instant case he may "reform the
circumstances" and put the grievant in the position he would and
should have been in had the Board not acted arbitrarily. So,
though the Arbitrator may order the Superintendent of Schools to
affirmatively recommend to the Board that it appoint the grievant
to the District Chairperson job, the Arbitrator may also insure
the affirmative end result by directly ordering the grievant's
appointment. To guard against further procedural frustrations
of the grievant's substantive and contractual rights I choose
to do the latter.

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:

Robert Morris's job title of Acting
District Chairperson, Social Studies,
Weaver High School-Middle School
District shall be forthwith changed
to District Chairperson, Social Studies,
Weaver High School-Middle School District,
with such benefits as attach thereto.

DATED: December 23, 1976
STATE OF New York ) ss.:
COUNTY OF New York)

On this twenty third day of December, 1976, before me person-
ally came and appeared Eric J. Schmertz to me known and known to
me to be the individual described in and who executed the fore-
going instrument and he acknowledged to me that he executed the
same.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between
Hawthorne Cedar Knolls Federation of Teachers, Local 1169, New York State United Teachers and Hawthorne Cedar Knolls Union Free School District

Case # 1330 1875 75

In accordance with Article VI of the collective bargaining agreement dated 1974-1976 between the Board of Education of Hawthorne Cedar Knolls Union Free School District, hereinafter referred to as the "Employer" and Local 1169 New York State United Teachers, hereinafter referred to as the "Union", the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Has the Employer violated Article II of the collective bargaining agreement by refusing to recognize the Union as the exclusive bargaining agent of the teaching assistants employed in the school? If so what shall be the remedy?

A hearing was held at the offices of the Employer on August 30, 1976 at which time representatives of the Employer and the Union appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Article II (Statement of Recognition) reads:

The Union is recognized as the exclusive bargaining agent of certificated teaching personnel of the District, exclusive of the District Principal, other supervisors and substitutes.
The following facts were stipulated by the parties:

1. The first formal contract between the parties was in 1969. Article II was negotiated in its present form in that contract, repeated without change in the three successive contracts of 1970, 1972 and 1974.

2. In 1969 when Article II first appeared, "certificated teaching personnel" then employed in the District consisted of teachers and administrators. At that time there were employees classified as "teacher aides" who were not "certificated", (nor could they then be certificated under the Education Law).

3. Effective February 1, 1971 amendments were made to the Education Law, which provided, pursuant to regulations promulgated by the State Commissioner of Education, for the certification of "teaching assistants."

4. In negotiations leading to the 1974-1976 contract there was no reference by either side to "teaching assistants." The Union made no demand for bargaining unit coverage for employees in that job classification. Its grievance demanding recognition as the bargaining agent of teaching assistants under Article II was filed in November, 1975.

The Employer presently employs six teaching assistants, five of which were certificated under the amended Education Law in September of 1972. The sixth was certificated in September of 1974.

The Union contends that teaching assistants are "certificated teaching personnel" within the meaning of Article II of the contract, and hence must be included in the bargaining unit by operation of that contract clause. The Union explains that it had no knowledge of the certification of teaching assistants
in September of 1972, and hence made no demand to be recognized as their exclusive bargaining agent in the contract negotiations leading to the 1974-1976 Agreement. It asserts that after making inquiry of the Employer, and within a reasonable time following receipt of specific information regarding the certificated status of the six teaching assistants, it made its demand for bargaining representation, and when that demand was denied filed the instant grievance.

The Employer does not deny that the teaching assistants are now certificated under the Education Law, but asserts that they are not "certificated teaching personnel" within the intent and meaning of Article II of the collective agreement. The Employer argues that Article II, unchanged in successive contracts since its first inclusion in the 1969 Agreement must be interpreted in accordance with the intent which the parties placed on it when originally negotiated. The Employer asserts that the language, when negotiated, was intended to apply, and indeed did apply, only to teachers and administrators. There were no teaching assistants in 1969, and teaching aides were non-certificated. Therefore, both explicitly and factually, contends the Employer, the parties mutually understood that the phrase "certificated teaching personnel" was limited to only those certificated at the time. The Employer argues that in the absence of any subsequent contract discussions between the parties regarding the language of Article II, together with the
undisputed fact that the 1969 contract language has been perpetuated unvaried in successive contracts, the original meaning and intent should not be expanded by arbitration, irrespective of the fact that since September of 1972 teaching assistants in the District are certificated. The Employer concludes that the question of bargaining rights for teaching assistants, the unit in which they would belong, and the selection of their bargaining agent are all matters for the processes of the New York State Public Employment Relations Board.

From time to time there are arbitration cases, like court cases in which, as the United States Supreme Court has observed, the bare facts

"...may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." (Holy Trinity Church v United States, 143 U.S. 457, 459. National Woodworking Manufacturers Association v NLRB, 386 U.S. 612, 619.)

The instant arbitration is such a case. That teaching assistants are "certificated" is undisputed, and hence would appear prima facie to be "within the letter" of the collective bargaining agreement. However I am satisfied that teaching assistants, albeit now certificated, were not intended by the parties to be included as "certificated teaching personnel" under the provisions of Article II of the collective agreement. And I conclude they should not now, by arbitration, be included
despite the "letter" of the recognition language. It is acknowledged that when Article II was originally negotiated in 1969 it covered only teachers and administrators. Thereafter there were no further discussions whatsoever between the parties regarding any changed meaning or application of that contract language. The fact that teaching assistants became certificated in 1972 does not, in my view, mean that the parties changed the meaning and purpose of the language of Article II. Nor do I believe, absent any discussions between the parties on the subject or demands in the course of contract negotiations, that a change in the Education Law, over which the parties had no control, should bring about a new, expanded and different interpretation of the recognition clause of the collective agreement. In short, where as here, the meaning and intent of Article II, particularly with regard to "certificated teaching personnel" was jointly understood to be limited to teachers and administrators, that intent should continue to be the correct interpretation, unless by subsequent agreement or conduct of the parties a new or different interpretation succeeds it. I find no such agreement or conduct here. On the contrary, it was a change in the Education Law and new rules promulgated by the Education Commissioner which created a new situation not dealt with in contract negotiations. That changed situation, separate from and independent of any agreement or conduct of
the parties cannot provide a basis to infer or impute a new intent to or a different interpretation of Article II.

I find a significant difference between the instant case and a private sector labor dispute in which subsequent to the execution of a collective bargaining agreement an employer adds new job classifications which the Union claims belong within the bargaining unit because they are "production or maintenance" classifications within the meaning of the recognition clause. Obviously, where the recognition clause grants a union exclusive bargaining rights over "production and maintenance" jobs, newly created job classifications or newly filled job assignments which factually fall within "production and maintenance" categories, fall within the bargaining unit under the union's jurisdiction, and the incumbents in those jobs are subject to any union security clause. But in the instant case, unlike the private sector example, the Employer did not unilaterally and discretionarily certificate the teaching assistant. It was not this Employer who "established the new jobs", nor did he have control over or influence in the decision to do so. Consequently, while the private sector employer must assume contractual responsibility for new job classifications which he established, I cannot hold this Employer responsible for what the Education Commissioner and a change in the Education Law did.

For all the foregoing reasons teaching assistants,
though certificated under the Education Law, are not "certificated teaching personnel of the District" within the intention and meaning of Article II of the collective bargaining agreement. It should be clear however that this determination is without prejudice of the rights of the parties in any proceeding on this subject before the New York State Public Employment Relations Board or in any other appropriate forum.

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:

Without prejudice to the rights of the parties in any proceeding before the Public Employment Relations Board or in any other appropriate forum, the Hawthorne Cedar Knolls Union Free School District has not violated Article II of the collective bargaining agreement by refusing to recognize the Union as the exclusive bargaining agent of the teaching assistants employed in the school.

Eric J. Schmertz
Arbitrator

DATED: September 27, 1976
STATE OF New York )ss.: 
COUNTY OF New York )

On this twenty seventh day of September, 1976, 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 Lithographers & Photo-Engravers: Union, Local 1P, GAIU, AFL-CIO
and

Intaglio Service Corp.

By mutual agreement of the parties, the undersigned was designated as arbitrator to resolve a dispute which arose between them. A hearing was held on Tuesday, June 22, 1976 at 250 Broadway.

Issue

The issue before the arbitrator is whether the seniority provision in the labor agreement between the parties (Article XII, Sec. 12.11) shall be applied retroactively with specific reference to the priority of termination in the contemplated layoff to Frank R. Sellitto and Rudolph Leidl.

Award

From the oral testimony adduced at the trial, and particularly the documentary testimony, disclosing that the Union approved a seniority list with no retroactive application, it is clear that the seniority provision involved was intended to be applied on that basis and, in fact was so applied months after the first seniority amendment was agreed upon (April 1, 1972).

I find that the list, as approved, constitutes the priority to be applied in the coming layoffs, less the period of time where the journeymen who broke their service did not perform any work.
Therefore, in the specific instance involved, Mr. Leidl, is deemed to have more seniority than Mr. Sellitto insofar as the layoffs involved are concerned.

Eric J. Schmertz
Arbitrator

DATED: July 14, 1976
STATE OF New York ) ss.:
COUNTY OF New York )

On this fourteenth day of July, 1976, 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:

Watch & Jewelry Workers Union, Local 147 R.W.D.S.U., AFL-CIO:

and:

Jacoby-Bender, Inc.:

In accordance with the arbitration provisions of the collective bargaining agreement effective June 1, 1973 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Were the method changes and/or rate changes established by the Company in the Heavy Link Department a violation of the contract? If so what shall be the remedy?

Hearings were held at the offices of the New York State Board of Mediation and at the offices of the Company on September 16, November 3, 1975 and January 21, 1976 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 expressly waived. The Union and Company filed post-hearing briefs.

Following the installation of certain method changes on certain group incentive jobs in the Heavy Link Department, the Company restudied and changed the incentive rates on those jobs.
The Union does not challenge the Company's right to make method changes. Its grievance, and its position herein, is that the Company did not have the right to make overall, total changes in the incentive rates when the method changes were relatively minor, and when the effect of the new incentive rates was a sharp reduction in the earnings of the affected employees.

Considering the foregoing, the instant dispute involves the rate changes promulgated by the Company not the method changes which preceded them. Therefore the method changes alone did not constitute violations of the contract.

The thrust of the Union's case is that the method changes involved were simply manual, relatively inconsequential when compared to the total job procedure, and that to replace the former incentive rates with new rates affecting the total job was, because it was broader than the method changes, beyond any contract authorization to "change", "revise" or "adjust" rates. In short the Union asserts that the Company utilized relatively insignificant method changes to "destroy or obliterate the incentive rate", thereby improperly and sharply reducing the earnings of the employees.

The Union maintains that accepted incentive plan procedures allow rate changes, revisions or adjustments only as to that part of the rate that bears on the particular method change involved. Applied to this case, the Union argues that the most the Company was allowed to do was to modify only that portion of the rate that previously applied to that portion of the job
method which had been changed, with the balance of the rate - in this case most of it, inviolate.

The contract does not support the Union's contentions and theories and the Arbitrator is bound to the contract terms. Section 10(a) expressly authorizes the Company to "continue its present practices with respect to... amendment of incentive rates and production standards." It goes on to clarify what those practices are, namely so far as the instant case is concerned, to establish "separate rates... for each individual job whether or not that job ever had a rate before...." Clearly that contemplates and provides for the establishment of new incentive rates on jobs which were or are already on incentive. Section 10(a) goes on to grant the Company the right to "change or adjust incentive rates"... at any time during the period of this agreement." That provision is not limited to that part of the job on which there has been a method change nor does it even require a method change or any other restructuring of the job procedures as conditions precedent to changes in the incentive rate.

The Company's authority to make rate changes during the period of the agreement under Section 10(a) is limited only by the Union's right to "request a review of such changed or adjusted incentive rates", and to grieve and submit to arbitration disagreements between the Union and the Company regarding the changed or adjusted incentive rate, within the time limits prescribed. The meaning of that proviso is clear and traditional. It
accords the Union an opportunity to challenge the accuracy, in other words the scientific validity, of the changed or adjusted incentive rate. And if there is no agreement on the correctness or accuracy of the rate or any of its parts, that disagreement may be grieved and settled by arbitration. But that proviso does not restrict the Company's right to unilaterally review, restudy and change or adjust existing incentive rates. Instead, and in short, it permits the Union to challenge the times and production standards embodied in those new rates after the Company has made the changes or modifications.

Moreover, unilateral changes in incentive rates are explicitly contemplated under Section 10(g) of the contract "because of changes in method of production or changes in the construction of tools and dies", subject only to notice by the Company to the Union and in the event of disagreement on the validity of the rate, the Union's right to grieve and arbitrate as provided under Section 10(a). But again, there is no contractual restriction on the Company's right to initiate the "revision" of rates when methods of production have changed, and there is no condition that the revision be limited to just that portion of the job on which a method change has been introduced.

In view of the unrestricted contract language of Sections 10(a) and 10(g) as to changes, modifications and revisions of rates, the limitations which the Union seeks may not be implied, and must be obtained through negotiations, not arbitration.
Based on what I consider to be clear contract language, I am satisfied that the Company had the contractual right under Section 10(a) and 10(g) to change the overall incentive rates on the jobs in question, especially in view of the undisputed fact that method changes had been made. Considering the language of Section 10(a), which accords the Company the right to make changes in incentive rates, irrespective of method changes, and the fact that Section 10(g) provides for rate changes when methods of production have changed, I consider the scope or magnitude of the method changes to be immaterial. Indeed, by allowing incentive rate revisions for "changes in method of production or changes in the construction of tools and dies," Section 10(g) means that rates may be revised because of manual method changes as well as changes in machinery and tools. Hence I must reject the Union's argument that only method changes resulting from changed machinery or tools warrant overall incentive rate revisions.

The Union's reliance on Section 10(c) and 10(d) of the contract is misplaced. Neither of those Sections restrict the Company from making rate changes under Section 10(a). Obviously the former sections cannot be interpreted to nullify the express language of Section 10(a) which authorizes the Company to change, adjust or modify job rates. Rather 10(c) and (d) mean that those incentive rates in effect at the date of the contract, which are not changed thereafter in accordance with Section 10(a) may not be challenged as to validity in arbitration. And a rate
which is installed or changed after the effective date of the contract which has not been challenged under the Section 10(a) proviso, shall be considered an established rate and no longer challengeable as to validity. Neither 10(c) or (d) support the Union in the instant case.

So far as the accuracy or validity of the changed rates are concerned, the Union's challenge is based upon an assertion and evidence that affected employees have been unable to achieve adequate earnings, and that the earnings they have made are markedly less than what they received under the old rates. From this the Union concludes and argues that the rates are "too tight", that they must be inaccurate because they deprive the employees of an opportunity to make adequate incentive, and therefore constitute a "destruction" of the former incentive rate rather than a legitimate rate revision.

The Company sharply disputes the earning figures adduced by the Union, contending instead that on many jobs the employees are doing as well or better than before and that on some jobs they are doing less well. The Company also suggests that employees may be "fighting the rate" to support their contentions in this arbitration proceeding.

I need not decide these factual questions because the earnings of employees under new incentive rates compared with their earnings under prior rates are not the best evidence. Nor, standing alone, are they determinative of the validity or inaccuracy of an incentive rate. The best evidence, and the
well accepted method of attacking the accuracy of an incentive rate, and in my judgement, the method contemplated under Section 10(a) of the contract, is to show that the times attached to the job elements are technically or scientifically incorrect; that the wrong elements were timed or that some elements were wrongly omitted or included; that there was inadequate consideration of job variables; that time was not allotted for fatigue and personal needs; that conditions at the time the study was made were not average; and that other recognized time study and incentive plan methods either were not considered or incorrectly utilized. In this proceeding the Union has not done this. On the contrary, it concedes that it has not checked the technical accuracy of the times or elements involved. Therefore, in this proceeding, the Union has not made out a case to challenge the validity of the rates which the Company installed subsequent to the method changes.

For the foregoing reasons the Union's grievance must be denied.

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 method changes and rate changes established by the Company in the Heavy Link Department were not in violation of the contract.

Eric J. Schmertz
Arbitrator
DATED: April 26, 1976
STATE OF New York ) ss.
COUNTY OF New York )

On this twenty-sixth day of April, 1976, 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 the executed the same.