In The Matter of The Arbitration between
New York Lithographers and Photo Engravers' Union, Local 1P, GAIU AFL-CIO
and
Long Island Daily Press Publishing Co.:

The stipulated issue is:

Is Jirair Kalenderian entitled to holiday pay under the collective bargaining agreement for Lincoln's and Washington's birthdays, 1976?

A hearing was held on July 27, 1976 at which time representatives of the above named Union and Publisher appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties waived the contractual tripartite Board of Arbitration, agreeing instead to submit the dispute to the Undersigned as the sole arbitrator. The Arbitrator's Oath was also waived.

The essential facts are undisputed. Mr. Kalenderian, a regular situation holder, and hereinafter referred to as the "grievant," was ill and did not work from May 31, 1975 through February 29, 1976. During that period the contract holidays of Lincoln's and Washington's birthdays fell, as did other contract holidays. Conceding that the grievant was not contractually entitled to holiday pay for any of the other holidays the Union contends he is entitled to holiday pay for Lincoln's birthday and Washington's birthday for the year 1976 under Section 12(d) of the contract. Said Section reads:
(d) However, no provision of this section shall deny to a regular situation holder who does not work on Lincoln's Birthday or Washington's Birthday, a single shift's pay at straight time rates provided his job is covered by a substitute. Said substitute, who shall receive no less than two (2) days pay for the shift worked, may work in accordance with the hours provision of Section 2.

There is no dispute that the grievant's job was "covered by a substitute" within the meaning of the foregoing contract provision.

The Company asserts that Section 12(d) upon which the Union relies is only supplemental to and conditioned upon other provisions of Section 12 specifically Sections 12(b) and 12(c). It argues that the payment of holiday pay when an employee is ill or disabled is fully covered by those two sections and that Section 12(d) is applicable to circumstances other than when an employee is out ill or disabled. Put another way it is the Company's position that 12(d) does not cover the absence of an employee on Lincoln's birthday or Washington's birthday due to illness or disability but rather, presumably to absences on those days for other reasons; and that Sections 12(b) and 12(c) are fully dispositive of an employee's right to any holiday pay when ill or disabled.

Sections 12(b) and 12(c) read in pertinent part:

(b) A regular situation holder who has worked at least once in the fiscal week in which a holiday occurs shall receive a single shift's pay at straight-time rates under the following conditions:

(c) When a regular, full-time employee covered by this Agreement is absent because of illness or accident subject to the provisions of the Workmen's Compensation Law, including the Disability Benefits Law, and when a holiday falls within the first 90
days of that period of absence, that employee will receive a single shift's pay for the holiday in addition to the compensation or disability payment required by Law.

Based on the foregoing argument, the Publisher asserts that the grievant is not entitled to holiday pay for Lincoln's birthday and Washington's birthday during the year 1976 because those holidays did not fall within the first ninety days of the grievant's absence, as required by Section 12(c).

Moreover the Publisher contends that to grant the Union's grievance would produce an unreasonable and unintended result. It would mean the Publisher points out that an employee who was ill or disabled for an extended period of time, including a period of years, would continue to be paid each year for Lincoln's birthday and Washington's birthday despite the fact that he had not worked at all for that extended period of time.

The Publisher's argument that Section 12(d) is supplemental to, restricted by or conditioned on Sections 12(b) and 12(c) is rebutted by the clear and unconditional introductory language of Section 12(d). That language reads:

"However, no provision of this section shall deny to a regular situation holder...."(emphasis added)

Obviously the phrase "no provision of this section" means, that Section 12(d) stands alone irrespective of and unrestricted by any of the other provisions of Section 12. It follows therefore that Section 12(d) cannot be interpreted as merely supplemental to or conditioned on Section 12(c). Therefore a regular situation
holder is entitled to holiday pay for Lincoln's birthday and Washington's birthday if he does not work on those days even if his absence is due to illness or disability. In other words, Sections 12(b) and 12(c) are not the only Sections which cover the question of holiday pay when an employee is absent because of illness or disability. Rather Section 12(d) accords holiday pay for Lincoln's birthday and Washington's birthday apart from and irrespective of the application of any other provision of Section 12. Moreover Section 12(d) does not place a limitation on the reasons for an employee's absence on the two holidays in question. Instead it guarantees pay for those two days with only two provisos; first that the employee be a regular situation holder and second that his job be covered by a substitute. The grievant, and his absence in the instant case, meet those requirements.

With regard to the Publisher's claim that to grant the grievance is to create an unreasonable or inequitable interpretation of the contract, the answer is that such interpretation by this Arbitrator is merely a reflection of the contract bargain entered into by the parties when they negotiated Section 12(d), with its introductory language. Hence, if an unreasonable or inequitable result is produced thereby it must be changed by collective bargaining not arbitration. In this regard it should be noted that Counsel for the Union gratuitously observed that it might well be unfair and unreasonable to grant an employee pay for Lincoln's birthday and Washington's birthday a second
consecutive year, when his illness or disability kept him out of work that amount of time. Absent a negotiated change, I would agree with his stated "rule of reason."

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

Jirair Kalenderian is entitled under the collective bargaining agreement to holiday pay for Lincoln's birthday and Washington's birthday, 1976.

DATED: August 26, 1976
STATE OF New York )
COUNTY OF New York )

On this twenty-sixth day of August, 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
Voluntary Labor Arbitration Tribunal
In The Matter of The Arbitration between
United Federation of College Teachers: Local 1460, AFT
and
Long Island University (The Brooklyn Center)

During the hearing of the above matter on February 11, 1976 the parties reached an agreement for the present disposition of this case. At their request I make that agreement a CONSENT AWARD, as follows:

Without deciding the merits of the Markovich grievance in case #1330 1214 75, and without prejudice to the positions of both sides in that matter, the parties agree that prospectively from the date of this AWARD:

1. The parties agree and recognize that Article 18 of the collective bargaining agreement dated September 1, 1974 and past practices shall determine the proper formulation of teaching schedules.

2. The Undersigned retains jurisdiction for the application and implementation of this AWARD, relating to future teaching schedules of Dr. Michael Markovich.

Eric J. Schmertz
Arbitrator

DATED: February 17, 1976
STATE OF New York )ss.:
COUNTY OF New York )

On this seventeenth day of February, 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 the grievant, Richard Weeks, improperly denied the job of Progressive Tool Setter Operator under the provisions of the labor agreement, and if so what shall be the remedy?

A hearing was held in Waterbury, Connecticut on May 26, 1976 at which time the grievant and representatives of the above named Union and Company appeared. All were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Company filed a post hearing brief.

The grievant is a Lead Person in the Powdered Metals Department. In late 1975 he was denied a bid to the job set forth in the stipulated issue. He was the only bidder. Had his bid been granted the move from one job to the other would have been lateral, within labor grade 13, but between two different departments. The relevant contract provision is Article VI Section 13, the pertinent parts of which read:

1. When a new job is created or a permanent vacancy occurs within the Bargaining Unit a notice concerning the job shall be posed for a period of two working days on the time clocks. After this time, no further request will be accepted for such vacancy and no grievance alleging that seniority has been violated shall
be considered if the employee has not made application within the specified time. The Union Chairman and Department Steward will be given a copy of each posting.

3. The filling of the vacancy will be carried out on a seniority basis from the eligible applicants having the necessary skill and ability to do the required work.

The Company denied the grievant's bid on the grounds that he lacked the "skill and ability to do the required work." The Company contends that the grievant's job of Lead Person in the Powdered Metals Department (Department 42) is not relevant, in terms of experience and duties, to the job of High Speed Progressive Tool Setter in the Press Department (Department 27); that the contract does not require the Company to train a bidder in the job he seeks; and that the production needs of the Company required that the job be filled by an employee who could perform the duties without extensive training.

The Union asserts that the grievant possesses the requisite skill and ability, primarily because of his experience in the Powdered Metals Department; that he could have performed the job after a short break-in period; and that alternatively, based on practice, the Company should have afforded him a reasonable training period to learn the job as needed.

I find that I need not resolve the foregoing disputed contentions because, based on the particular facts in this case, I conclude that the grievant, by his own act, waived his right to the job he sought.

It is well settled that an employer may utilize a test or
some testing method as a factor in determining an employee's skill and ability, provided the test is relevant to the job in question and further provided that it is uniformly and non-discriminatorily administered to the bidders. In the instant case the Company gave the grievant a trial set-up as a test to determine his ability, skill and familiarization with the duties of the job he sought. This trial set-up met the foregoing requirements. The grievant had never before performed the job in question; the Company questioned his ability to do so; the set up which he was asked to make was representative of some of the less complicated set-ups he would be required to perform; and he was accorded a sufficient amount of time to complete it. Under those circumstances I conclude that both the Company's requirement that he undergo a test in the form of a trial set-up and the content and scope of that test were reasonable and appropriate.

The grievant did not complete the trial set-up to the Company's satisfaction. The Company then offered him a second opportunity to perform a trial set-up, with the Union time study representative in attendance. By doing so the Company obviously had not yet excluded the grievant from consideration. Had the grievant done so successfully he might have established his qualifications for the job without question. Had he attempted the second set-up and again failed in the Company's estimate, he, and the Union on his behalf, still had the right to grieve the Company's decision to reject his bid. But the grievant
declined to accept the second opportunity. He refused to attempt the second trial set-up. Considering the propriety of that test as previously indicated, and considering the grievant's unsatisfactory or at best inconclusive performance in the first trial set-up, I deem his refusal to do a second trial set-up as a de facto or constructive abandonment of his job bid. With his refusal to comply with the Company's request that he perform a second trial set-up, a reasonable threshold condition in evaluating ability and skill, he waived any right he had to further consideration for appointment to the job, and lost his right to complain when and how thereafter the job was assigned to someone else.

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:

Richard Weeks was not improperly denied the job of Progressive Tool Setter Operator under the provisions of the labor agreement.

Eric J. Schmertz
Arbitrator

DATED: September 7, 1976
STATE OF New York )
COUNTY OF New York )ss.: On this 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 Disciplinary Proceeding between Transit Supervisors Benevolent Association On Behalf of Michael McGrath and Manhattan and Bronx Surface Transit Operating Authority

This proceeding is an appeal under Article 6 Paragraph 2-b of the collective bargaining agreement between the above named parties to review the Recommendation below that Michael McGrath be suspended for ten (10) working days without pay for improper performance of duty.

The hearing was held on April 26, 1976 at which time Mr. McGrath, 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 charge against the grievant as set forth in the Notice of Charges dated July 8, 1975 is:

You are charged with the improper performance of your duties in failing to require Foreman R. Johnson to maintain proper records and controls. The proper performance of your duties would have prevented the occurrences set forth in the charges addressed to Foreman Johnson and Body Maintainer Ryan....

The "occurrences" referred to aforementioned was the theft of a farebox or the money therein from a bus by Ryan. Ryan was discharged. Johnson, who was Ryan's direct supervisor was discharged but was reinstated without back pay by
Arbitrator Theodore W. Kheel. The grievant who was Johnson's immediate superior is appealing a ten day suspension in the instant proceeding. Mr. Nicholas Canosa an Assistant Superintendent and the Depot Administrator, who was the grievant's superior was suspended ten days without pay. He is not represented by an employee organization, and did not appeal.

The Employer's action against the grievant is based on its policy of requiring accountability from supervising employees for poor performance, misconduct or other failings of other employees under their direct or indirect supervision. I agree with Mr. Kheel that this is a commendable policy. However, as I have stated in Trial Board recommendations, I do not believe it means that a supervisory employee is an "absolute guarantor" of the proper conduct, good performance and efficiency of all those whom he supervises. Rather some proximate or causal relationship must be shown between what the supervisory employee did or failed to do as part of his duties and the improper act, unsatisfactory performance or other unsatisfactory condition attributed to or engaged in by an employee whom he supervises.

In the instant case the Employer has not established anything that the grievant did or failed to do as the cause, either directly or indirectly of the theft of the farebox by Ryan. Based on the evidence and particularly the testimony of the Depot Administrator, the "records and controls" which the grievant allegedly failed to properly maintain had nothing whatsoever to do with the theft of the farebox. Based on the record
it cannot be concluded, as a logical or reasonable possibility, that the farebox would not have been stolen had those records and controls been properly maintained.

The Employer's case in this regard is argument and at best speculative. It asserts that the grievant's failure to maintain proper records and controls or to see to it that Foreman Johnson did so "created an atmosphere" which tempted Ryan to commit the theft. There is no evidence in support of this proposition. The records and controls involved, concerned the initialling by the grievant of a "pinball sheet" prepared by Johnson, and which listed jobs assigned and the time that each job was completed. It had nothing to do with fareboxes, and there is no evidence that Ryan knew, or even would have known in the normal course of his duties that the grievant did not initial those records on a regular basis. In short, I find no connection between the grievant's failure to initial those reports, or even any omissions by Foreman Johnson in connection with the maintenance of those reports, and Ryan's theft of the farebox.

Indeed if an "atmosphere conducive to theft" existed, it was much more because of the Employer's then existing practice to leave fareboxes with money in them, inside unattended buses in the depot. This practice has now changed, but at the time I think that that is what tempted Ryan to take an unattended bus out of the depot for the purpose of stealing the contents of the farebox.
Accordingly I Recommend dismissal of that portion of the Charge which alleges that the grievant's "proper performance of...duties would have prevented the occurrences...."

As to that portion of the Charge alleging that the grievant failed to require Johnson to maintain proper records and controls the Employer has not shown just what it is that Johnson did not do properly for which the grievant, as his supervisor might be held responsible. The record does show, undisputedly, that the grievant may not have examined the "pinball sheets" as regularly as required, because he failed to initial them. By failing to do that, I suppose it can be argued that the grievant thereby failed to be certain that Johnson prepared the "pinball sheet" properly, and that may have led Johnson to believe that he could be lax in the preparation of those sheets and reports. However there is no evidence that the pinball sheets were not filled out or completed properly, but only that the grievant failed to initial them as required. So that if the grievant did not discharge his duties fully, there is no evidence, as to those sheets and reports, that it created laxity, poor performance, or inefficiency on Johnson's part. Therefore it is recommended that the Charge as it relates to the allegation that the grievant failed to require Foreman Johnson to maintain proper records and controls, be dismissed.

Moreover, the testimony indicates that the grievant's failure to initial the sheets as required may have been...
technical omission on his part. Depot Administrator Canosa testified that overtime worked by employees is obtained from the "pinball sheets", and that the responsibility for reporting overtime work was among the grievant's duties. He further testified that the grievant must have looked at the "pinball sheets" regularly as required because he properly reported the overtime worked and must have obtained the information from the "pinball sheets."

Based on the foregoing the only charge against the grievant that has been proved is his technical failure to initial the "pinball sheets." To that extent the charge is sustained.

The grievant has already served three days of the ten day suspension Recommended below. I am satisfied that that is an adequate penalty for that portion of the charge which the Employer has proved. If initialling the "pinball sheets" is a required duty, it must be performed. Failure to do so warrants discipline. It is not for me to judge the relative importance or unimportance of a required duty.

Accordingly it is Recommended that the Recommendation that Michael McGrath be suspended for ten days, be modified and reduced to a three day suspension.

Eric J. Schmertz
Hearing Officer
In The Matter of A Disciplinary Appeal
between
Transit Supervisors Benevolent Association:
and
Manhattan and Bronx Transit Operating Authority

In accordance with Section (2) Paragraph (b) of the Agreement between the Manhattan and Bronx Transit Operating Authority hereinafter referred to as the "Operating Authority", and the Transit Supervisors Benevolent Association hereinafter referred to as the "Union", the Undersigned is authorized to hear appeals from disciplinary decisions of the Director of Labor Relations and Personnel and "shall have the authority to recommend to the Executive Officer, Labor Relations and Personnel, that the decision of the Director of Labor Relations and Personnel be sustained, overruled or modified."

The instant proceeding is such an appeal. The Operating Authority and the Union, hereinafter referred to jointly as the "parties", stipulated the issue to be decided as follows:

Should the decision of the Acting Director of Labor Relations and Personnel to discharge Senior Dispatcher Albert LaMarch be sustained, overruled or modified?

Hearings were held at 370 Jay Street, Brooklyn, New York on November 4, November 21 and December 9, 1975 at which time Mr. LaMarch hereinafter referred to as the "grievant" and representatives of the parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.
The charge against the grievant is "misconduct, in that he mishandled revenue and wrongfully appropriated Operating Authority property on Saturday, November 2, 1974."

Preliminarily the parties are reminded that this is a disciplinary proceeding, not a criminal case. Although the charge, no matter how euphemistically phrased, parallels the crime of "theft", and the standard of proof which the Operating Authority must meet is higher than what would be required in other types of disciplinary cases, it does not rise to the level required to prove a criminal charge.

It is well settled that circumstantial evidence of adequate quality and quantum may be supportive of a criminal charge. Accordingly a disciplinary charge may be sustained on circumstantial evidence which meets the requisite evidentiary standards of a disciplinary proceeding.

At the hearing I concluded that for disciplinary purposes, the Operating Authority had met its burden of establishing a prima facie case in support of the charge. Therefore I denied the grievant's motion to dismiss the charge at the conclusion of the Operating Authority's direct case, and required the grievant to present his defenses.

Based on the entire record before me I now hold that the charge has been proved by the requisite standard and quantum of proof required in such cases.
The Operating Authority established that for a period of time including November 1-2, 1974, there were unexplained losses of bus revenues at the 100th street depot where the grievant worked. The amount of missing revenue for that day (i.e. the working day of November 1 continuing into the morning of November 2) was $859.97.

On November 2, 1974 at approximately 2:30 to 2:45 A.M. after the grievant finished a 4 P.M. to midnight tour he was involved in an automobile accident. At the scene of the accident the police found in and about the grievant's car, various denominations of coins totalling $207.74 in value, including 156 tokens. The grievant acknowledged that these coins and tokens were in his car and in his possession at the time of the accident. (Specifically the police retrieved 156 tokens, 371 quarters, 455 dimes, 278 nickels, 99 pennies).

It is reasonable to assume that because the coins were scattered about the street as well as in the car, not all the coins originally in the grievant's possession were recovered.

The foregoing facts, particularly the grievant's possession of so many tokens, and the established revenue losses at the 100th street depot over a period of time encompassing November 1-2 makes out a prima facie case in support of the Operating Authority's charge that the grievant "mishandled and appropriated Operating Authority's revenue", requiring an explanation on his behalf.

The grievant's explanation and the other testimony and evidence offered in support thereof, are not credible or
believable.

I cannot believe that the coins and the tokens came from piggy banks which the grievant and Mrs. Commons kept in their apartment. Why were so many tokens placed in and commingled with coins in one or two piggy banks? The grievant's and Mrs. Commons explanations are implausible, illogical and unsatisfactory. The first explanation is that each evening they would empty their loose change into the piggy banks. If so, I fail to see any logical reason why tokens would be included. The grievant has a transit pass and does not use tokens. Mrs. Commons testified that she regularly purchased tokens in advance for herself and for her two sons so that the three of them would have an adequate supply to tokens for some period of time ahead. If that was true I am persuaded that the tokens would not be put into a piggy bank where they would be inaccessible or difficult to retrieve for regular and continued use. Rather, the normal procedure would be to segregate the tokens from the rest of the change, placing the former in some location other than in the piggy bank, especially when, as Mrs. Commons stated, her two sons constantly needed tokens as well as money. The other explanation advanced is that a quantity of tokens was maintained in a separate bowl where they were accessible for use; and that only when Mrs. Commons went to the hospital were those segregated tokens placed in the piggy banks. The latter explanation is not believable because Mrs.
Coinmons' two sons remained at home and obviously, based on her own testimony, needed tokens while she was away. I doubt that she or the grievant would have deprived them of the available tokens (even though the testimony is that that was their intent) or would have changed the alleged procedure regarding the accumulation of tokens, merely because she went to the hospital. Moreover I think it highly improbable that the grievant and Mrs. Commons would accumulate a large number of tokens in advance. He had a transit pass. Her income was relatively limited. She aided her sons financially. By her own testimony she made no contribution to the token supply while she was in the hospital. It follows, based on her own story, that a quantity of more than 156 tokens must have been accumulated at the time she entered the hospital, diminished by her sons' use during her period of hospitalization. I simply do not believe that that happened, and hence cannot credit the testimony in that regard.

Nor can I believe Mrs. Commons' testimony or that of the grievant that the piggy banks were emptied by the grievant to obtain money to pay possible medical and hospital bills, and other incidental expenses attendant to Mrs. Commons' hospital stay, for and in anticipation of her release from the hospital, and to buy food and pay the apartment expenses upon her return.
from the hospital. I find no reason why there was a need to obtain the coins, convert them into bills, and take money to the hospital for any of those purposes. Mrs. Commons had medical insurance which covered virtually all of her doctor and hospital expenses. She is a licensed practical nurse, and knows I believe, that most of her bills were or would be paid by medical insurance and that there is no requirement to pay outstanding doctor bills, if any, in order to be released from the hospital. As it turned out, and I believe Mrs. Commons knew it, her total bill upon release from the hospital was only about $26, for telephone and television. Manifestly there was no need at all to take money to the hospital to pay for such non-hospital expenses as apartment rent, telephone or food. For those items the money should be at her home, to be used for those purposes when she returned from the hospital.

Additionally, the grievant's story regarding the arrangements to convert the coins into cash is bizarre. In that regard I cannot believe him, Mrs. Commons or Mrs. Commons' brother. The coins which purportedly were obtained from the piggy banks after midnight following the conclusion of the grievant's shift, were to be taken by the grievant to Mrs. Commons' brother who would convert them to bills "because he could always use coins in his business." But the transaction was arranged to take place in the early hours of the morning,
not at her brother's home or place of business, but at a public bar. And it was not planned that the brother would provide the grievant with the equivalent in bills that very night or morning. Under that circumstance, I fail to see the urgency of the transaction at that hour, nor can I understand why it was to take place at that locale. Also, the grievant testified that he did not know how much money the total quantity of coins was worth. He and Mrs. Commons "trusted" her brother. I cannot accept this explanation because I think it abnormal for the grievant, who had not previously actively engaged in such a transaction with the brother, not to have counted the coins or make a reasonably accurate estimate of their value before traveling to turn them over. The grievant stated that he did not have time to make such a count. Yet by his own testimony before he went to the apartment to empty the piggy banks he spent some time in a different bar following completion of his shift. So he did have time to make a count, and I am constrained to conclude that he would have done so, had he needed the money for the purposes alleged and had the coins actually come from that source. Moreover, as he emptied the coins from the piggy banks into bags, he certainly would have noticed tokens among them, if it is true that tokens were commingled with the coins. He would have I believe, as a matter of normal course, removed the tokens from the balance of the coins before turning the coins over
for conversion to bills. The grievant's case on this point is lame. It is not that Mrs. Commons' brother was expected to convert tokens but that he would return them. Why have him do that needless act when it could have been easily obviated by the grievant removing the tokens initially.

In separate parts and as a totality, the grievant's defense is unpersuasive and unbelievable, and fails entirely to rebut the Operating Authority's case. Because I cannot believe his defense, I must conclude that it is untrue, and that he acquired the coins and the tokens in the manner alleged by the Operating Authority. I hold therefore that he is culpable of "misconduct" in that he "mishandled revenue and wrongfully appropriated Operating Authority property" within the meaning of the charge and allegations against him.

For all the foregoing reasons the Undersigned makes the following RECOMMENDATION:

The decision of the Acting Director of Labor Relations and Personnel to discharge Albert LaMarch should be sustained.

February 9, 1976
The stipulated issue is:

Did the Company violate the Agreement by refusing to bump out John E. Combs (an employee on the Schedule B 2% list) in favor of Charles Zimbowski?

A hearing was held in Hartford, Connecticut on June 3, 1976 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived.

Combs is the incumbent on the Duplex Grinder with Setup. His seniority date is May 16, 1973. Zimbowski, with experience as both a Notch Grinder and a Slot Grinder, and with a seniority date of March 24, 1959 was denied the opportunity to bump Combs out of the Duplex Grinder job, at the time of a layoff.

The Company contends that Combs is immune from the bump by virtue of being on the Schedule B 2% list pursuant to Section 14.4.2 of the Agreement which reads:

The Company shall be entitled to hire or retain any employee irrespective of seniority who possesses exceptional value to the operation of the Company by reason of special knowledge, training, or ability to perform a particular kind of work provided that this
exception shall not have effect in cases involving common labor, not to exceed two per cent (2%) of the total number of employees in one (1) year. The names of such employees shall be listed under Schedule B which will be given to the Chairman of the Committee each six (6) months. The Union shall have six (6) working days after receipt of such listing to question the assignments.

The Union's right to challenge the propriety of Combs' inclusion on the 2% list was expressly reserved in the Company's fourth step answer dated October 27, 1975. The Company stated:

Since the Company has the right to establish such a list and the Union the right to question the list, the real test of the validity of assignments to the list will come when an employee with seniority makes a request to "bump" an employee on the list.

Zimbowski's effort to bump Combs is the first such test.

As I see it, this case is not so much a question of whether the incumbent on the Duplex Grinder is properly included on the 2% list by reason of "exceptional value to the operation of the Company. . . . (because) of special knowledge, training, or ability to perform a particular kind of work. . . . ", but rather whether Zimbowski possesses the threshold ability and qualifications to assume the Duplex Grinder duties.

The Union argues that the 2% list should be confined to very special circumstances and employees with exceptional
talents, not replaceable by other employees; that the list was intended to be both small and unique; that the Duplex Grinder position does not meet that test; and that Zimbowski, based on his prior work experience, especially as a Notch Grinder, was qualified to work as a Duplex Grinder and should have been allowed to bump Combs who was substantially junior in seniority.

Though the Union has shown several instances in which the Company deleted employees from the 27o list upon the Union's objection, it obviously does not follow that a mere objection by the Union invalidates the inclusion of an employee or a job classification on the 27o list. Where the Company agreed with the Union, the employee or the job was removed. Where the Company did not agree with the Union, it then becomes a grievable issue. Therefore the Union's mere objection to Combs' inclusion, or to the inclusion of the Duplex Grinder, did not invalidate those listings, but rather, as previously stated, preserved the Union's right to challenge the Combs incumbency when a layoff occurred and an employee such as Zimbowski sought to bump into the Duplex Grinder job.

Section 14.3.1 of the Agreement provides in pertinent part, that in the event of a layoff, "affected employees will be placed on work as follows:"

(c) Work they have the ability to perform, at labor grade equal to or lower than their current labor grade.
It follows therefore that unless Zimbowski is qualified to work as a Duplex Grinder, or possesses the requisite threshold qualifications which would entitle him to a reasonable period on that job to demonstrate his skill in performing his duties, there is no valid challenge in this case to the inclusion of Combs and the Duplex Grinder on the Schedule B 2% list. In short, unless Zimbowski's abilities and qualifications are established, this is not the case to challenge Combs' inclusion on the special 2% list.

It is on this latter point that the Union's case founders. Based on the entire record in this proceeding I cannot conclude that Zimbowski possesses the requisite ability or qualifications to make the lateral move from Labor Grade 7 Notch Grinder to Labor Grade 7 Duplex Grinder and to assume and perform the duties of the latter job. The evidence and testimony on the comparability or applicability of the Notch Grinder job to the Duplex Grinder is sharply conflicting and controverted. The Union witnesses assert that the jobs are reasonably similar and that Zimbowski's experience as a Notch Grinder qualifies him for Duplex Grinding, or at least gives him sufficient experience to be able to perform the Duplex Grinder duties satisfactorily within a short period of time. The Company witnesses testify otherwise. They assert that the jobs are dissimilar; that the skills are not transferable; and that from six to fifteen months would be necessary before Zimbowski was capable of
performing the job to a level of minimal acceptability. I consider this respective evidence and testimony to be off-setting and hence indeterminative. Left that way, Zimbowski's qualifications and abilities to work as a Duplex Grinder remain in question, especially in view of the fact that Zimbowski did not testify and therefore did not give direct evidence of his experience, his skills and the nature of the work which he has performed. Contrary-wise Combs did testify about the work he does, the difficulties he experienced in becoming proficient and the length of time required to train him to a level of competence. On balance, the testimony produced by the Union is second hand. It represents the views of those who think that the Notch Grinder job contains duties transferrable to the Duplex Grinder, and the views of others concerning Zimbowski's ability and experience. On the other hand the Company offered testimony of persons more directly familiar with the duties of the Duplex Grinder, the duties of the Notch Grinder, and the time and complexities involved in training a Notch Grinder to assume and perform the work of a Duplex Grinder. Additionally, the Company witnesses testified without refutation, that the business needs of the Company, at the time of the grievance and presently, require a competent and experienced Duplex Grinder, and that the Company cannot afford the time and reduced productivity
which would be attendant to the training of a new Duplex Grinder, whether Zimbowski or anyone else, replacing Combs. The Company pointed out, again without refutation, that the business needs of the Company were not so acute or demanding during the time that Combs was being trained. The contract does not require the Company to accord an employee a training period on a job into which he bumps and I do not find arbitrary or unreasonable the Company's conclusion that a lengthy training period would have been required to develop Zimbowski's capabilities on the Duplex Grinder. I hold therefore that Combs possessed the special knowledge, training or ability to perform the work of the Duplex Grinder and that Zimbowski did not. As such whether he belongs on the 27 list or not, Combs is immune from a bump by Zimbowski.

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 did not violate the Agreement by refusing to bump out John E. Combs in favor of Charles Zimbowski.

DATED: July 19, 1976
STATE Of New York ss.: COUNTY OF New York ss.:

On this nineteenth 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 accordance with Article 13 of the collective bargaining agreement dated December 1, 1974 between the National Union of Hospital & Health Care Employees, District 1199 E, hereinafter referred to as the "Union", and Maryland General Hospital, hereinafter referred to as the "Hospital", the Undersigned was selected as the Arbitrator to hear and decide a dispute relating to the Union's grievance #131 dated August 1, 1975.

A hearing was held in Baltimore, Maryland on January 14, 1976 at which time representatives of the Union and Hospital 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 parties could not agree on a stipulated issue. Therefore I deem the issue to be the Union's grievance as filed, and as processed through the grievance procedure, together with the Hospital's answer.

The grievance reads:

"Hospital is unreasonably denying employees vacations."
The Hospital's answer reads:

"The Hospital is in no way unreasonably denying the Employees vacations. Vacations are being granted according to the contract."

More specifically the Union asserts that due to staff layoffs in the Nursing Services, remaining employees were not accorded the same "pattern" of vacation during the more desirable vacation months of June, July and August of 1975 as was followed in prior years. The Union contends that some thirteen employees in the Nursing Services were denied their first and in some cases also their second choices of vacation periods. In general the Union challenges the right of the Hospital, as a consequence of staff reductions, to unreasonably change the practices and "patterns" of vacation scheduling, from what had obtained in prior vacation years. Acknowledging the Hospital's right to effectuate layoffs, the Union nonetheless maintains that staff reductions may not unreasonably encroach on the rights of employees to select and take vacation periods of their choosing, even if it means that the Hospital must hire or recall temporary staff to maintain nursing services during vacations.

The Hospital denies that it changed vacation "patterns" during the summer of 1975. It contends that in 1975 as in prior years, the same number of employees were granted their first choice for vacations, and that other employees were scheduled for vacations pursuant to their seniority and in accordance with Article 8 (Section 8.3) of the collective bargaining agreement.
It argues that even if more employees in 1975 had to select alternative vacation periods because of reductions in staff, the Hospital nonetheless maintained the same vacation "pattern" by granting the same number of vacations on the day and night shifts during the summer months in 1975 as it granted in prior vacation years.

The Hospital denies any contractual obligation to hire or call in temporary staff during the vacation periods, so as to accord the full-time employees their full vacation preferences.

It is undisputed that all employees entitled to vacations including the thirteen previously referred to, received and completed the vacation to which they were entitled sometime during the 1975 vacation year.

I am in general agreement with the Union that the Hospital is not permitted to unreasonably diminish or vitiate the vacation rights of employees under Section 8.3 as a result of staff reductions. For example, the Hospital would not be permitted to eliminate entirely or postpone into a subsequent vacation year accrued vacation entitlements merely because it didn't have enough staff. But the facts and evidence in this case do not establish an unreasonable denial of vacations to employees during 1975, nor an unreasonable encroachment on the vacation rights of the employees in violation of Section 8.3 of the contract.

The Union's assertion that thirteen employees were unreasonably or unfairly denied their first and/or second choice of vacation period is mere allegation. None of the thirteen employees
appeared or testified, so I am unable to determine based on probative evidence, how they were treated and why. Additionally Section 8.3 does not require the Hospital to grant an employee his preference for vacation but rather that:

"Each employee's vacation period shall be designated by the Hospital to meet the requirement of operating conditions, provided however that the period preferable to the employee on a classification seniority basis shall be selected whenever possible. (Underscoring supplied).

In the absence of more direct evidence from the Union, I cannot conclude that the Hospital did not meet the foregoing requisites of Section 8.3. It scheduled vacations pursuant to its "operating conditions" (which included some reduction in staff); and yet apparently maintained the same number on vacation on the day and night shift during the three desirable months of 1975, as had been the case in the prior years. Also those employees who were not granted their preference were preempted for that particular vacation period only because of greater "classification seniority" of employees who were given that time off. In both the foregoing situations the Hospital appears to have met the explicit contractual conditions, and hence no contract violation has been shown.

Though the Hospital could have called in temporary employees to cover during the vacation period (as apparently it has done as a matter of practice in the Dietary Department) I find no contractual requirement that it do so, and there has been no practice of having done so previously with the Nursing Services.

Additionally it should be noted that the Nursing Service has approximately two hundred employees. If there are grievants in this case they are the thirteen whom the Union claims were
were not granted their vacation preferences. Presumably therefore, the remaining one hundred eighty-seven either received the vacation periods they sought, or some satisfactory alternative, or did not feel that they were unreasonably denied vacation rights during the 1975 vacation year. I do not think that thirteen out of two hundred constitutes an unreasonable or otherwise improper implementation of Section 8.3 of the contract, especially under the explicit conditions set forth therein.

In summary, though the critical positions of both sides have been presented to me principally by allegation, unsupported by direct or otherwise probative evidence, the burden is on the Union to establish the elements of its grievance; not on the Hospital in the absence of a prima facie contract breach to prove its contractual compliance. In this case, especially without the testimony of any of the thirteen grievants, and without any evidentiary showing that the Hospital substantially or unreasonably changed the 1975 vacation patterns from the practices of prior years, the Union has not met that burden.

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

The Union's grievance #131 dated August 1, 1975 is denied.

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

On this twenty-sixth 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 accordance with Article XVII of the collective bargaining agreement dated April 24, 1974 between the New Castle Police Benevolent Association, Inc., hereinafter referred to as the "Association" and the Town of New Castle, hereinafter referred to as the "Town" the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Did the Town, through its Police Department, violate Article XVI Section 2 of the contract in connection with duty schedules with respect to Thanksgiving Day and Christmas Day, 1975? If so what shall be the remedy?

A hearing was held on July 28, 1976 at which time representatives of the Town 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 essential facts are undisputed. Within two or three weeks of the two holidays referred to in the stipulated issue, the Police Chief changed the duty schedule for those dates by reducing the number of patrolmen scheduled to work and by notifying certain patrolmen who had been scheduled to work that they would be off either or both of those days. The Police Chief had two reasons for doing so. First, it was determined that because
of the absence of many citizens from the community during those holidays, and a diminution in crime on those days, fewer police officers were required to be on duty; and second, the Town's Board of Supervisors had directed the Police Department to "reduce its budget, consistent with public safety", in other words "to save money."

The Association asserts that the Town may not change a posted duty schedule inside of six months of its applicability. It relies on Article XVII Section 2 which reads:

A minimum of six (6) months duty schedule shall be posted and maintained at all times.

It also points to Article IV (Work Periods) Section 4 which reads:

All shift assignments and duty schedules shall be posted in accordance with Article XVI Sections 1 and 2 hereof. The preparation of said schedule and assignments shall be on an equal rotating basis among all members herein unless specifically altered by voluntary agreement of the Association, the affected employee, and the Chief......

The Association's argument is that under Article XVI Section 2, as reinforced by Article IV Section 4, the Police Chief lacked the contractual authority to unilaterally change the posted work schedule for Thanksgiving Day and Christmas Day, 1975, two to three weeks prior to those holidays. To do so, with less than six months notice argues the Association, requires mutual agreement of the parties including the agreement of the affected employee.
The Town relies on Section I of Article XVI and particularly the last part thereof which I have underscored, as follows:

There shall be equal posting of duty schedule and equal and consecutive days off for Lieutenants, Sergeants, Detectives and Patrolmen, subject to the needs of the department as determined by the Chief of Police.

The Town contends that the action of the Chief of Police in reducing the number of employees to work on the two holidays in question was an exercise of his contractual authority to schedule Patrolmen "subject to the needs of the department." The Town asserts that its factual determination that fewer crimes took place on Thanksgiving Day and Christmas Day together with the absence of citizens from the community on those days, reasonably justified the decision of the Chief of Police to reduce the work force consistent with public safety, and that the undisputed fiscal constraints of the budget further legitimated his action.

It is a well settled rule of contract law that specific provisions of a contract preempt those provisions which are either general or ambiguous. The language relied upon by the Town, namely Section I Article XVI is both general and ambiguous. The phrase "subject to the needs of the department as determined by the Chief of Police" is a general pronouncement. It is ambiguous because it is not clear whether the "needs of the department" relate to the "equal posting" and "equal and consecutive days off" for the Patrolmen and Officers, or whether it is a condition applicable to the subsequent sections in Article XVI, namely,
and particularly in this case, to the six month provision of Section 2. The Town argues the latter, but the former interpretation is equally logical and reasonable.

On the other hand Section 2 of Article XVII and Section 4 of Article IV are more specific and clearer. The former requires the posting of duty schedules at least six months in advance of their applicability and requires, unconditionally, that those schedules be "maintained at all times." The latter mandates that the preparation of the schedules and assignments (on an equal rotating basis) may be specifically altered only by the joint agreement of the Association, the affected employee and the Chief of Police.

To my mind the latter two explicit contract provisions must be given preeminence over the language relied upon by the Town. Accordingly, general and routine changes in posted and scheduled work assignments may not be made unilaterally by the Chief of Police inside of six months of the date those schedules are applicable.

However this is not to say that there are no circumstances under which the Chief of Police may make changes in work assignments unilaterally within the six month period. The Police Department is an emergency force, and the Police Chief must maintain the authority and flexibility to meet emergencies and other unforeseen or unforeseeable conditions requiring police action. In an emergency, where the incidence of crimes unexpectedly increases; where there is a precipitous flareup of criminal
activity or other breaches of the peace; or where unexpected and unforeseen circumstances arise requiring an immediate or different police response (including not only the increase in the work force but also its decrease), the Police Chief must retain the authority, explicit or implicit under this contract, to change work assignments to meet those "needs of the department."

However the instant circumstances do not meet those tests. The survey showing a reduction in crime and fewer citizens in the community during the two holidays in question does not represent an emergency or an unforeseen or unforeseeable condition warranting a change in the work schedules on short notice. The same is true of the Town's fiscal condition, which, in my judgement was not and is not so precipitous, unforeseen or unpredicatable as to warrant an exception to the six months notice requirement set forth in Article XVI Section 2, and incorporated by reference in Article IV Section 4 of the contract. Accordingly the changes in the work schedule of patrolmen because of a diminution of crime on Thanksgiving Day and Christmas Day, because of temporary reduced population, and/or because of budget restrictions is something which can be planned six months or more in advance and incorporated into the schedule of work assignments then posted.

I do not consider the remedy sought by the Association in this case to be either illogical, unprecedented or unreasonable. It seeks pay for Thanksgiving Day and Christmas Day, 1975
for those patrolmen who were scheduled to work those days but who did not do so because of the change in schedules unilaterally promulgated by the Chief of Police. The Town argues that because employees generally seek holidays off to be with their families, it should not be required to pay patrolmen who were given those days off even though they were previously scheduled to work. The Arbitrator interprets the contract and does not make a psychological judgement on the wishes or predilection of particular employees. It is also true however that employees on occasion, accept and indeed look forward to working on premium pay days in order to gain the additional compensation. Therefore, in the instant case I do not consider it inappropriate to grant the Association the remedy sought, namely pay for Thanksgiving Day and Christmas Day, 1975 to those patrolmen who were scheduled to work but did not do so because of the unilateral order of the Chief of Police, in an amount equal to what they would have earned had they worked those days.

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 Town of New Castle, through its Police Department violated Article XVI Section 2 of the contract in connection with duty schedules with respect to Thanksgiving Day and Christmas Day, 1975. Those patrolmen who were scheduled to work on either or both of those days, and who did not do so because of the unilateral order of the Chief of Police, shall be compensated for either or both of those days as if they had worked.

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

On this day of August, 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
Uniformed Firefighters Association
and
The City of New York (Fire Department):

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD:

1. The layoffs and manning reductions effectuated by the City, and complained of by the Union in this proceeding, did not violate the collective bargaining agreement. The rights of the City to effectuate layoffs and manning reductions under the contract and under Article XXVII thereof have been fully exercised and are now completed as a response to the City's fiscal crisis.

2. The safety of the person and property of the public, and the impact on the firemen as a result of layoffs and manning reductions require, and I therefore direct, that from the present complement of the Department and the present manning levels of the companies, there shall be no further layoffs or manning reductions of bargaining unit firemen for economic reasons.

3. In the event firemen who have been laid-off are recalled and assigned regular firemen duties, and the funds which fiscally support those recalls are not otherwise legally restricted or conditioned as to use or purpose, the manning levels of the relevant contract provisions shall be reactivated and become applicable to those recalls. The recalled firemen shall be assigned to active companies in a manner that reestablishes the contractual manning levels which existed before their layoffs.
4. I retain jurisdiction in this matter to resolve any disputes over the interpretation, application and implementation of this AWARD.

DATED: February 1976
STATE OF New York ss.: COUNTY OF New York

On this day of February, 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

Uniformed Firefighters Association

and

The City of New York (Fire Department):

On or after July 1, 1975 the City laid-off 894 firemen and reduced the minimum number of firemen available for work at the start of each tour of duty from five to four in 162 engine companies, from six to five in 29 ladder companies, from six to five in all squad companies, from six to five in all rescue companies and from ten to nine in three combination fire companies (CFC's).

The Union alleges that the foregoing reductions violate Article XXVII, Section 1, and Articles XXVII-A, Section 3 of the collective bargaining agreement, commonly referred to as the "Five-Man Manning" provisions, and further that those reductions are inimical to the maintenance of public safety.

More specifically the Union contends that Article XXVII Section 1 creates an absolute requirement for the manning of all Fire Department line units, with the exception of those units specifically excluded, with a minimum of five firemen available for work at the beginning of each tour of duty, and that Article XXVII-A, Section 3 creates an absolute requirement for the manning of certain specified units with a minimum of more than five
firemen. Acknowledging the City's right to effectuate layoffs, the Union argues that these manning requirements limit the City's right to effectuate layoffs in the Fire Department, to the elimination of fire companies.

The City responds that such manning requirements are neither absolute nor a guarantee, but rather that the City is relieved of the minimum manning schedules under the conditions set forth in Article XXVII, Section 10. The City asserts that those conditions have been met, specifically by the fiscal crisis with which the City is confronted, and therefore the manning reductions were contractually proper.

In addition to several procedural meetings with representatives of the parties, formal hearings were held on October 13, 28, 29, 30, December 2, 18, 1975, January 5, 12 and 29, 1976, at which time representatives of the City, the Fire Department and the Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

It is obvious that the basic dispute between the parties involves a question of contract interpretation. But that question generates concomitant questions regarding the safety of the public and the limits of safety for firemen which manifestly are of serious concern to all parties involved in this dispute. To the extent indicated, those latter questions are implicit within the collective bargaining agreement and hence fall within my authority to determine. It is undisputed that the personal
safety and welfare of citizens of the City of New York may be fundamentally affected by any contractual relationship between the City and its firemen which deals with the level, availability and quality of fire protection. The contract issue in this case has that affect, making inexorable and proper the consideration of public safety along with any interpretation and application of the contract term.

The pertinent sections of Article XXVII and XXVII-A are:

"ARTICLE XXVII-Five-Man Manning

Until there is a substantial change in firefighting technology, all companies, including the Marine Division (except Marine No. 4 with four men and the satellite boats with two men each) are to be manned by no less than 5 men available to respond at the beginning of each tour, under the following guidelines:

1. The Department may equalize manpower among the companies."....

"10. Notwithstanding the above, the City may exercise its general right to reduce the work force. However, the City agrees that reductions in the work force should not be used as a subterfuge designated to curtail rights set forth above. In the event of a reduction in the work force, a claim that it was used as a subterfuge designed to curtail the above rights, shall be subject to the grievance and arbitration provisions of this Agreement."....

"ARTICLE XXVII-A-Productivity Issues

Section 1. The Union recognizes that the provisions of this Article XXVII are matters concerning which the City has the right to act unilaterally. Notwithstanding the above, the parties agree to the following sections.

Section 2. Flexible Response. The Union recognizes the unilateral right of the City to determine the type and level of response, City-wide.
Section 3. Six and Seven Man Companies.
A. The City shall furnish the Union with a list of Companies which shall be manned by either 6 or 7 men as indicated thereon for the period from January 1, 1972 to July 1, 1972. Those companies so designated as seven-man companies shall require the seventh man only during the applicable Adaptive Response period designated by the Department. At all other times such companies shall be manned by six men. In the even of a vacancy in such seven-man companies, the Department shall obtain the required extra man pursuant to the guidelines set forth in Paragraphs 3, 4 and 5 of Article XXVII of this Agreement.

B. Commencing thereafter, upon ten (10) days notice to the Union, with the right of discussion within the ten (10) days, the City may make changes in the list.

C. At least 6 months shall elapse before a Company which has been changed can be changed again.

D. After September 1, 1972, upon request of the Union the Impartial Chairman may review the foregoing program and may make recommendations."

It is clear that under Section 10 of Article XXVII the City has the right to "reduce the work force", or in other words to effectuate layoffs. Inasmuch as this Section is part of the "five-man manning" clause it follows that the right to reduce the work force applies to the manning level set forth in Article XXVII. Based on the record before me including my knowledge of the negotiations between the parties leading to the foregoing contract provision, I am fully satisfied that the City's "general right to reduce the work force" included the right to reduce the "minimum manning" levels as well as the elimination of fire companies in the event of a genuine fiscal crisis. To limit
the City's right solely to the elimination of companies, and not allow it to reduce manning, constructively prevents any meaningful quantity of layoffs in a fiscal crisis, because of the need to retain most fire companies to maintain service. I am satisfied that such a restriction was not intended.

The explicit limitations on the City's right is that the work force reduction shall not be "used as a subterfuge designed to curtail...." the right to a continuation of the minimum manning level referred to. We shall deal with the meaning of "subterfuge" presently.

Again based on the record before me, including my knowledge of the negotiations leading to the agreement on these contract clauses, I am fully persuaded that the City's right to reduce manning levels in the event of a genuine city-wide fiscal crisis applies with equal force to the minimum manning levels set forth in Article XXVII-A, Section 3, notwithstanding the Union's argument that that Section is located in the contract subsequent to Section 10 of the preceding Article, and arguably, might be construed to immunize it from the "escape clause" relied on by the City. Additionally, in accordance with its managerial rights, the City has disbanded the adaptive response companies referred to in Section 3 of Article XXVII-A. Therefore the manning requirements of those companies are now moot.

I am fully satisfied that I know what the parties meant by the word "subterfuge." It would be a "subterfuge", in derogation of the "right" to maintain five-man manning referred to in Article
XXVII and six or seven-man manning referred to in Section 3 of Article XXVII-A if:

a. the City was not faced with a genuine city-wide fiscal crisis;

b. the City falsified a fiscal crisis or represented that it was confronted with a fiscal crisis when it was not;

c. the City was confronted with a genuine fiscal crisis but a reduction in the manning of fire companies was not necessary to meet it;

d. the Fire Department, under a genuine fiscal crisis, was required to bear the brunt of layoffs and manning reductions unreasonably disproportionate to what was required of other bargaining unit employees of the City, especially the uniformed forces in the Police and Sanitation Departments; and by logical inference

e. the City failed to reactivate the minimum manning schedule which had been deactivated by the fiscal crisis, when the crisis abated to the extent that firemen were recalled from layoffs and assigned regular fireman duties, provided the funds or law under which they were returned to work did not legally restrict or prohibit their use to restore manning levels.

At present, in connection with the layoffs and reductions in the manning levels involved in this case, the City is not guilty of "subterfuge" or of using the reduction in the work force "as a subterfuge designed to curtail the....rights" of the Union or the firemen. The fiscal crisis confronting the City is real and awesome. It is city-wide in its impact. It has necessitated massive reductions in city personnel, and those reductions have been made in all departments. The reductions of bargaining unit personnel in other departments, especially among the other uniformed services is not proportionately less
than what has been required of the Fire Department. (Though I am of the view that more non-essential exempt, provisional and politically appointed employees of the City should have been released, that circumstance is not germane to the definition of "subterfuge" for purposes of deciding this case.)

Accordingly I must deny the Union's contention that the manning provisions of Article XXVII and XXVII-A are minimum guarantees and inviolate. Rather I find present those circumstances set forth in Section 10 of Article XXVII which permit the City to make the reductions it did.

However this is not to say that the contract or the City's managerial prerogatives under the contract may be interpreted to allow the City unlimited reductions in personnel and manning levels even if confronted with a grave fiscal crisis. There is a point below which the Fire Department would be unable to meet its essential and critical obligation to protect the lives and property of the citizens. In my view no clause may be interpreted to permit personnel and manning reductions in such an essential service as the Fire Department, as to reduce the effectiveness of that Department below what is minimally required to meet the needs for which the Department was established. This is particularly true where as here, the service is unique to government, and the citizenry can only look to the government for that particular protection. When the Department is unable to provide the protection for which it was established and for which the government is specially charged, government has defaulted on its mission.
Therefore I deem the City's commitment to maintain the Fire Department at sufficient strength and with sufficient facilities to meet the needs of public safety to be an implicit condition of the collective bargaining agreement between the City and its firemen. The minimum manning provisions of the two foregoing Articles together with the conditions and exemptions therein must be read and interpreted within the frame of the needs of the public.

The New York City Fire Department is still an effective fire fighting force. But its effectiveness could not be more precarious. It has remained effective despite the elimination of some companies, the layoff of firemen and reduced manning, because of the continued dedication of the valiant men who man the vehicles and who respond to an ever increasing number of alarms with a readiness each time to risk their lives to save the lives and property of others. Any stereotype that civil service employees are unproductive, whether true or not with regard to other public employees, is ridiculous in the extreme if applied to firefighters. A significant number of fire companies regularly work at or beyond a level approaching or exceeding the "overwork" standard under the Weighted Response Index which I promulgated a few years ago. A look at the undisputed statistics of alarm increases, structural fire increases, and other fire incidents, compared first with the long time static complement of the fire fighters and then with these recent reductions, belies any such invalid notion.
The continued effectiveness of the Department is also due to the outstanding administrative efficiency of Fire Commissioner John T. O'Hagan, probably the most knowledgeable and productive Commissioner in the Department's history. He has been imaginative, inventive and dedicated to the maintenance of adequate fire service against increasing difficulties. The procedures for exchanges, detailing, adaptive response, relocation, tactical units, rapid water, etc., which he established, have played a significant part in the extraordinarily productive record of the Fire Department in responding to and extinguishing fires with probably less men and companies than would otherwise be necessary.

Moreover the Department has been unstinting in its response to the City's grave fiscal condition. Because of budget restrictions, it began to make economies as early as 1970. That year it disbanded two marine units. In 1971 it disbanded four companies and one marine unit. In 1972 it disbanded eight companies and relocated seven others. In 1974 it disbanded eight companies, two marine units and four support units; and relocated three companies. In 1975 it disbanded eight companies, three divisions and five battalions. Under an Austerity Program as of December, 1974 it eliminated 348 fireman positions and 60 officer positions. Under the Crisis Program as of July 1, 1975 it eliminated 1093 fireman positions and 15 fire officer positions. Under the Crisis Program effective November 1, 1975 it eliminated 333 firemen and 65 fire officers. The Austerity
Program of December, 1974 represented savings of 13.2 million dollars. The Crisis Program of July 1, 1975 represented savings of almost 23 million dollars. The Crisis Program of November, 1975 represented savings of almost 8.2 million dollars.

During that same period, 1970 through 1975, the incidents of fire alarms rose from approximately 260,000 a year to nearly 400,000. During the same period the size of the fireman roster fell from slightly over 11,500 to approximately 9,000. In 1973 and 1974, 64 and 62 companies respectively (approximately 17.3 per cent of all companies in both years) made more than 4,000 runs annually. In 1975, even with the exchange program and other methods to reduce the work load, 80 companies or 22.7 per cent made more than 4,000 runs. Only the percentage of companies reaching the incredible figure of 6,000 runs a year has been reduced over the last two years. Over the same period "serious fires" or "structural fires" have increased from 66.7 per cent to 77.1 per cent, and if compared with the period since 1967 the increase in that type of fire has been 47 per cent. The Department projects for the year 1976 that alarms will increase to almost 460,000; structural fires to 57,000; non-structural fires to 82,000; emergencies to 63,000 and false alarms to 257,000.

The potential for catastrophe is manifest. A fire fighting force of declining numbers and reduced manning cannot deal with this substantial and continuing increase in the need for fire protection. There is a point when men and equipment are spread
too thin.

The danger is that when a company is located from one area to another (due to the elimination of the company at the latter location or a general reduction in companies), its home district may be left unprotected or underprotected. The response time to a fire is critical. Added delays of only a few minutes could turn a fire otherwise easily controllable into one that is beyond containment. The danger to lives and property is obvious. With the elimination of companies, others must travel longer distances and cover larger areas with the attendant possibility of further delay in reaching a fire early enough to control it. With reduced manning there is one less fireman to attack the fire. Control or its extinguishment may take that much longer. Again, markedly evident is the possibility of fatal delay by the loss of critical minutes and because fewer hands are fighting the fire. Bluntly, these possibilities may well become inevitable realities if the Fire Department suffers further manpower and manning reductions. If that happens the Department will have fallen below the point of no return in its governmental obligations to the public. It would constitute, in my view, not simply a wrong "ordering of priorities", but "governmental neglect."

A word about "five-man manning" is appropriate. This manning level was negotiated because the City, the Department, and the Union were in agreement that the most effective way to fight a fire was to send teams of at least five men with each vehicle. By no stretch of the imagination was it "feather-
bedding" or a "boondoggle." On the contrary each man had a specific job(s) and responsibility at the fire - ventilating, searching for the fire location, stretching hose, operating the engine or ladder equipment, opening the roof, maintaining communication, and backing up others in case they are overcome by smoke or falling debris.

Fire fighting in the City of New York is unique. It cannot be compared to any other city in this country. The structures of our city, concentration of our population, traffic conditions, the incidents of fire, are so different, so much more complex, intense and demanding than anywhere else, that the manning requirement of our vehicles cannot be determined by the manning complements of other cities. I was deeply impressed by the testimony of many fire officers, several of them of senior rank who sincerely and eloquently explained the difficulties and hazards involved in fighting serious fires with less than five men on each vehicle. Again the possibility of unreasonable danger is present, this time to the firemen themselves. Firemen accept the hazards of their job. They know they are expected to risk their lives, and the tragic increase in deaths and injuries in recent months is a sad testimony to that dedication. The current fiscal crisis will probably continue for some time, necessitating the continuation of less than five-man manning in those companies where the manning levels have been reduced. In those cases I know that the firemen will continue to perform their work as before, even if
the "back-up man" which they previously were able to rely upon for communication and help or relief in emergency situations is no longer present. And so long as there are some companies responding as well with five men, some of the slack may still be taken up. But if there are further reductions in men, the possibility of unreasonable danger to firemen, beyond the danger which they willingly assumed when they took on the job, may become a cruel reality.

To repeat, the application and interpretation of Articles XXVII and XXVII-A must be determined with these compelling factors of safety in mind. The City's right to reduce manning levels and to layoff personnel is impliedly restricted by levels of safety to the public and the level of reasonable danger to the firemen.

The present layoffs and manning reductions, which are the subject of this proceeding, leave the Fire Department "wounded" but still effective. But if the Department is to remain "under siege" from those who are concerned only with cost reductions; from those who see a dollar cut as a dollar saved, (as distinguished from cuts in other services which are subsidized in part by State or Federal funds); or from those mindless people who cruelly and criminally ring false alarms that call out a fire company and make it unavailable to respond to a real fire (and which has reached "epidemic" proportions requiring the priority attention of law enforcement officials), this Department, which Mayor Beame has called the most efficient in
City government will not be able to save lives and property as before, or do the job for which it exists. The "siege" must be moderated if not lifted. The Mayor has said that we have done all we can in terms of cutting personnel in the essential services to meet the budget crisis. The Governor has said substantially the same thing. I believe, and quite properly so, that Commissioner O'Hagan has taken the same position following the massive economies which he and his Department have already made. Towards this end, my authority permits the ruling that the relevant contract sections involved in this case must and were intended to be interpreted to stop layoffs and manning reductions at the point where enough has been done and where more may be synonymous with disaster. A halt may be called, when as here, there is already a "clear and present danger" to the Department's vitality and viability.

Based on the foregoing I hold that the City, having exercised its rights to reduce personnel and manning under its general right to effectuate layoffs and under the provisions of Article XXVII of the contract, has executed and completed its rights in that regard as they relate to the City's fiscal crisis. Further layoffs or further reductions in manning would, in my judgement, be violative of explicit and implicit conditions and limitations of the contract.

If the City's fiscal crisis justified the layoffs and manning reductions, and deactivated the manning schedules, it logically follows that if the fiscal crisis abates, as evidenced by the recall of firemen from layoff, and those firemen are
assigned regular firemen duties, the manning schedules should be reactivated. The proviso to this is that the funds or law which support the recall do not contain restrictions which would prohibit the assignment of firemen to restore manning minimums. This requirement is logically and obviously reciprocal to the conditions and circumstances under which the City is relieved of the manning requirements. For the City to fail to meet this reciprocal obligation under the conditions set forth, would as I earlier indicated, constitute a "subterfuge" within the meaning of Section 10 of Article XXVII.

Eric J. Schmertz
Impartial Chairman
In The Matter of The Arbitration between

Uniformed Fire Officers Association and

City of New York (Fire Department)

OPINION AND AWARD

Case #A-541-76

The stipulated issues are:

1. Did the City violate Article XIX, Section 1 and Article VI, Section 1 of the collective bargaining agreement in its refusal to permit delegates to attend duly authorized meetings of the UFOA, and if so what shall be the remedy?

2. Did the City violate Article XIX, Section 1 and Article VI, Section 1 of the collective bargaining agreement in its refusal to permit Executive Board members to attend duly authorized meetings of the UFOA, and if so what shall be the remedy?

The foregoing stipulated issues notwithstanding, this arbitration is more in the nature of a request for a prospective declaratory judgement.

A hearing was held on March 15, 1976 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 parties filed post-hearing statements or briefs.

Based on the record it is clear that by practice, Department policy and as contemplated by Article VI, Section 1 of the contract, the Fire Department has granted release time with pay to Union Delegates actively at work at the time, to attend duly
authorized meetings of the Union whether those meetings were general membership meetings, special membership meetings or Delegate meetings, provided the delegate was replaced pursuant to said Article VI, Section 1.

I interpret the letter dated October 15, 1975 from John P. Finneran then Assistant Director of the Office of Labor Relations to Commissioner Stephen Murphy, First Deputy Fire Commissioner as authoritative confirmation of the City's agreement with the Union to accord the Union's Executive Board members the same right to attend authorized Union meetings as was granted the Union Delegates.

Accordingly I find that it has been and continues to be Departmental policy to grant the right to release time with pay to both Delegates and Executive Board members actively at work at the time, to attend duly authorized Union meetings.

What is not clear and what remains in dispute is to how many such meetings each year that right or policy applies. The contract is silent on that question. The Department's position with regard to "policy" on that point lacks uniformity; and there is no precise or unvaried past practice. For example, in calendar year 1973 Delegates were released to attend sixteen Union meetings; in 1974 Delegates were released to attend fourteen meetings; and in 1975 Delegates were released to attend sixteen meetings, but were denied release time with pay to attend a scheduled seventeenth (and possibly and eighteenth) meeting. In letters or memoranda respectively dated October 29, November 7th and
December 30, 1975, Joseph A. Flynn, Fire Department Chief of Staff stated sequentially that "the Department agreed to excuse for a total of twelve meetings a year"..."Delegates may be excused for a maximum of fourteen meetings each calendar year"..."effective January 1, 1976 excusals for Delegates...will be limited to a maximum of six per year" (emphasis added).

In short, the practice on one hand and the Department's position on the other are not only mutually inconsistent but both are so varied as to negate any finding of either a binding practice or an effective policy.

Under that circumstance it is questionable whether there is contractual authority or authority based on practice and policy for this Arbitrator to legislate specifically how many meetings Delegates and, by the equal right granted them under the Finneran letter, the Executive Board members may attend with paid release time. It seems to be that under those circumstances if the question is presently a mandatory subject of collective bargaining the parties should engage in collective bargaining on that question. If not, a rule of reason should apply subject to arbitral review. As a guideline on the matter of reasonableness and based on the facts in this record, I deem it obviously unreasonable for there to be no limitation on the number of meetings which Delegates and Executive Board members may attend under the foregoing conditions. Similarly I deem too few and hence unreasonable, the Department's last position limiting paid attendance to only six meetings, particularly in view of what the
Department authorized in the years 1973, 1974 and 1975 plus the fact that under the Union's constitution of which the Department had actual or constructive notice, ten regular meetings are held each year. As a practical matter and for the future, the reasonable number of meetings which Delegates and Executive Board members may attend in pay status may fluctuate depending upon the prospective circumstances which legitimately warrant or require meetings at any particular time. For example, more meetings in addition to regular membership meetings might be reasonable during a year in which a new collective bargaining agreement was negotiated, or, as the Union alleges, in 1975, to authorize expenditure of Union pension funds to purchase Municipal Assistance Corporation bonds.

Accordingly it is my determination and Award that if the issue is presently a mandatory subject of collective bargaining, it is remanded to the parties for bargaining. If not, and if the parties cannot mutually agree upon what constitutes a reasonable number of meetings for which Delegates and Executive Board members would be released with pay, the Department retains the right to determine the number of meetings, subject to the Union's right to grieve and have reviewed in arbitration a claim that any such quantity is not reasonable under the particular circumstances which then obtain. Such circumstances would include, among other relevant factors, both the needs of the Union for those meetings, and the operational requirements of the Department.

Eric J. Schmertz
Impartial Chairman
DATED: May 26, 1976
STATE OF New York )ss.:
COUNTY OF New York )

On this twenty sixth 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.
The stipulated issue is:

Are Department Orders 119 Section 2.9 and 121 Section 2.6 regarding detailing, and the implementation thereof since July, 1975, insofar as detailing on an inter-battalion basis is concerned, violative of the collective bargaining agreement? If so what shall be the remedy?

A hearing was held on June 2, 1976. Representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Union's complaint is that the Department has been detailing firefighters from one battalion to another on a regular basis since July, 1975 in violation of Article XXVII Section 2 of the collective bargaining agreement, the pertinent part of which reads:

The Department may detail within a battalion to fill a vacancy if another Company within that battalion is running with an extra man ......

There is no dispute over the fact that the Department has been detailing firefighters on an inter-battalion basis, as
well as within battalions, since the promulgation of the two
Departmental Orders referred to in the stipulated issue.

The Department has done so in order to meet the manning
requirements of the contract without paying overtime for the
retention or recall of firefighters who work other regular tours.
The Department has done so because of a reduction in the number
of firefighters available to meet the manning requirements of
the contract, following recent layoffs due to fiscal restrictions.

Detailing by the Department on any broader basis than
within a battalion is violative of the collective bargaining
agreement. Article XXVII Section 2 is a negotiated restriction
on the Department's right to detail firefighters. It allows
detailing from one Company to another within the same battalion.
But, contrary to the City's argument, by expressly authorizing
detailing within a battalion, perforce it forecloses and pro-
hibits detailing from one battalion to another. Article XXVII
Section 1 which reads:

The Department may equalize man-
power among the Companies,
does not deal with detailing and consequently was not meant to
permit detailing on a broader basis than within a battalion.
Section 1 was bilaterally agreed to for a "one shot" realignment
or equalization of manpower by the Department at the time that
the contract was negotiated. It was not intended nor can it
preempt the explicit provisions of Section 2 dealing with
detailing. The right to equalize manpower among the companies,
at the outset of the effective period of this collective bargain-
ing agreement, means just that, and has nothing to do with the
detailing of firefighters to meet the ongoing contractual manning
requirements. In short, Section 1 deals with "one shot" man-
power equalization; and Section 2 deals with the subject of the
instant case,

I fully understand, and indeed can appreciate why the
Department chose to detail on an inter-battalion basis even if
that constituted a contract breach. The Department's budget is
critically restricted by the City's grave fiscal crisis. It
does not have the funds to pay the overtime which would be
necessary to meet the contract manning requirements, if detail-
ing, as the contract requires, was confined to the battalion.

The reduction in firefighting personnel, resulting from
the layoff of firemen for economic reasons, has further compound-
ed the problem. Fewer firefighters are now available within
each battalion to be detailed from one company to another in the
event of manning shortages.

However, unless the parties to the contract agree other-
wise, or unless they negotiate new provisions or waivers of
existing provisions, the Chairman is required to enforce the
agreement as bilaterally negotiated. Therefore I have no choice
but to direct the Department to comply with Article XXVII Section
2, and forthwith cease and desist from detailing firefighters
from one battalion to another.

Such a traditional remedy for that type of contract breach is
well established as proper and appropriate, in both the private
I am concerned that if the City and the Department are ordered to pay a money remedy of this magnitude, it would result in further reductions in firefighting facilities, thereby further reducing the Department's capability to protect the lives and property of the public. With the firefighting capability of the Department now at a precarious point, new cuts to meet an order to pay monetary damages might further endanger the safety and well-being of the public, which must rely on the continued effectiveness of the Fire Department. Additionally the imposition of a monetary penalty of this magnitude, albeit fully justified under traditional circumstances and well settled contract law, might well jeopardize the Department's present plan to recall more than two hundred firefighters from layoff. Frankly I choose to see the Department's available funds used not just to maintain its presently too-thin firefighting facilities but to increase and improve those facilities and the delivery of firefighting service to the public by recalling firefighters from layoff.

To deny the firefighters and the Union monetary relief for this year-long breach of the contract by the Department means, in a real sense, that for a year the Department has obtained increased productivity from the firefighter by extensive detailing beyond what is allowed under the contract, to the tune of two million dollars. Put another way, to deny
the Union and the affected firefighters monetary relief, means that the Union and the employees have made an extensive, albeit involuntary, productivity contribution to the Department, the City and to the public.

It seems to me that in current contract negotiations, and in view of my decision not to award a monetary remedy, the firefighters, and the Union on their behalf, who have accepted a number of specific and workable productivity improvements over the last few years, and who are second to none as productive employees of this City, should be given productivity credit for the additional savings realized from the extra-contractual detailing between battalions in which the Department has been engaged from July, 1975 to date.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD, neither part of which may be separated from the other:

Department Orders 119 Section 2.9 and 121 Section 2.6 regarding detailing, and the implementation thereof since July, 1975, insofar as detailing on an inter-battalion basis is concerned are violative of the collective bargaining agreement. The contract permits detailing only among companies within the same battalion. Unless otherwise agreed to by the City and the Union, the Department is directed to forthwith cease and desist from detailing from one battalion to another.

As a productivity contribution by the firefighters and the Union to the City,
the Department and the public, and in the furtherance of maintaining and improving firefighting services to the public in the interest of the public safety and welfare, the City shall not be liable for monetary damages arising from the Department's breach of the contract for the period July, 1975 to the date of this Award.

Eric J. Schmertz
Impartial Chairman

DATED: June
STATE OF New York    
CITY OF New York     )ss.:

On this 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.
In The Matter of The Arbitration:

between

Communication Workers of America:

and

New York Telephone Company

The stipulated issue is:

Under the Collective Bargaining Agreement whether splicers are entitled to time and one-half for all hours worked before 4 PM on the Saturdays in the weeks they worked four night tours, and one Saturday tour, between June 15, 1974 and November 22, 1974.

Hearings were held on April 12 and September 21, 1976 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The pertinent contract sections are:

Section 17.01(a): A work schedule showing the days, scheduled tours and regular tour assigned shall, in accordance with Section 17.02, be established for each employee for each payroll week and become fixed at 12:00 o'clock noon, Thursday, or four (4) hours before the end of his fourth scheduled tour, whichever is earlier, of the payroll week immediately preceding.

Section 17.02(3): An individual employee's request to change his scheduled days or tours shall be granted provided it will not require premium payments to him or to some other employee, and provided further, that the employee making the request and the other employee involved, if any, are qualified, in the Company's judgement, to do the work on the scheduled days or tours involved.
including the split shift, falls more properly under the provisions of Section 17.02(3) than within Section 19.08 of the collective agreement.

The original work schedule of the affected employees required periodic rotation between weeks of day shifts and weeks of night shifts. Some employees, for whom the rotation was burdensome arranged "swaps", thereby confining their work week either to days or nights. These "swaps" were approved by the Company. Thereafter, all the affected employees asked the Company for a work schedule which would eliminate the rotation, and under which they would work either the day shift or the night shift. The Company agreed to this request, but a day shift on Saturday was necessary, primarily to cover emergencies, and because of the apparent insistence of the remaining day tour employees who would have had to work every fourth rather than fifth Saturday, the Company conditioned the approval of the request on the requirement that the employees assigned permanently to the night shift work one Saturday day shift every five weeks. (As the stipulated issue indicates, when they worked a Saturday tour each fifth week, they worked only four night tours during the same week.) The employees agreed to that condition.

Under the foregoing facts I am persuaded that the revised work schedule, about which the Union complains in this case, was effectuated only because the employees requested to work either days or nights. It is clear that the Company was satisfied with the rotation schedule it had originally promulgated. It agreed to the subsequent change not only to accommodate the employees
but also because of the mandated provisions of Section 17.02(3) of the contract. I find the condition which the Company attached to granting the request, namely that the night shift employees work a Saturday day shift every fifth week, to be merely incidental to the request for a change in the work schedule initiated by the employees and came about because the employees to be assigned to the day shift objected to being the only ones to cover the Saturday tours. Understandably they wanted the employees who worked nights to share in the Saturday schedule. But, had the affected employees not requested a new work schedule which eliminated periodic rotation between days and nights, the ultimate work schedule challenged herein with the Saturday coverage would not have been promulgated. On balance therefore, what happened was substantially in compliance with Section 17.02(3) rather than in violation of Section 19.08. The mere fact that the Company required Saturday coverage every fifth week as part of an otherwise major change in the schedule requested by the employees, does not qualify this situation as a "change (in a) scheduled tour after it had been fixed in accordance with the provisions of Section 17.01(a),........ requested by the Company", within the meaning of Section 19.08.

It was the view of a Union official that Section 17.02(3) prohibited the Company from granting an employee's request for a change of scheduled work day or tour after Thursday noon for the ensuing week unless the Company granted premium pay to that
employee called for under any other Section of the contract. I read the clause differently. Although an employee's schedule may be posted for many months in advance of the time it becomes fixed for the ensuing week, an affirmative obligation on the Company to honor an employee's request for a change is plainly stated in Section 17.02(3), irrespective of the time that the schedule becomes fixed. Once the schedule is fixed, the Company is restricted from initiating a change itself unless the affected employee consents to the change and the Company pays premium payments required by Section 19.08(3). But where the scheduled change is requested by an employee, the Company must honor that request "provided it will not require premium payments to him or some other employee." Therefore, where the change is requested or initiated by the employee the Company is not obligated to premium pay, but rather must grant that request where premium payments to that employee or to some other employee are not required. To allow the Company to accede to requests made after the schedule has become fixed only upon payment of the same premium pay that would be required if the Company initiated the request, would serve to defeat the request because it would plainly result in Company denials of all such requests made after the schedules became fixed. Such result would frustrate the legitimate requests of the employees, would be detrimental to their interest, while of no particular significance to the Company. As I see it, it would be a
diminution in the rights sought and obtained by the Union in gaining that clause.

This conclusion is further confirmed by Company Exhibit No. 2, a joint CWA-New York Telephone Company stipulation in a case before Arbitrator Emmanuel Stein in which several examples were cited of changes of schedule made at the request of the employee after the time at which the schedule became fixed. The Company paid five days pay at straight time for the work week involved, in the same manner as though the employee scheduled days had not been changed.

Finally, the Union seriously questioned the propriety of split shifts on a pre-planned, long term basis. The instant work schedule may have been the first such arrangement. I do not reach that question in this case. Having found that the Company was required to grant the request of the employees under Section 17.02(3) of the contract, I consider it at least inequitable if not contractually unsound, for the employees to gain an economic benefit from part of an arrangement which came about solely because they sought to eliminate rotating between the day shift and the night shift, and which they expressly agreed to in order to gain that objective.

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:
Under the Collective Bargaining Agreement the splicers are not entitled to time and one-half for all hours worked before 4 PM on the Saturdays in the weeks they worked four night tours and one Saturday day tour, between June 15, 1974 and November 22, 1974. The Union's grievance is denied.

Eric J. Schmertz
Arbitrator

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

On this 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 The Matter of The Arbitration
between

The Flight Attendants As Represented
by The Air Line Pilots Association, International

and

Overseas National Airways, Inc.

AWARD OF SYSTEM BOARD OF
ADJUSTMENT
Case No. NY-10-74S

The Undersigned, duly designated as Chairman and members
of System Board of Adjustment, and having duly heard the proofs
and allegations of the above named parties makes the following
AWARD:

The Union's grievance that Flight Attendants
be paid at the overtime rate for work perform-
ed or credited under Section 6(E) of the con-
tract in the circumstances set forth in this
proceeding, is denied.

Eric J. Schmertz
Chairman

Brita Garrett
Concurring

Winston Defieux
Concurring

Clare Gretz
Dissenting

Thila Gerber
Dissenting
DATED: August 8, 1976
STATE OF New York )ss.:
COUNTY OF New York )

On this eighth day of August, 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 Section 27 of the collective bargaining agreement between the above named Union and Company dated April 1, 1972 to August 31, 1974, the Undersigned was selected as the neutral referee of a System Board of Adjustment to hear and decide with the Union and Company designees to said Board, a dispute under Section 6 of the collective bargaining agreement.

Ms. Clare Gretz and Thila Gerber served as the Union designees on the Board and Ms. Brita Garrett and Mr. Winston Defieux served as the Company designees to said Board.

A hearing was held at the Company offices on February 5, 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 Arbitrators' Oath was expressly waived. The parties subsequently filed post-hearing briefs. An Executive Session of the Board was waived. The parties authorized the Undersigned as Chairman to render the Award, to be concurred in or dissented from by the other members of the Board.

This case involves the application and interpretation of Section 6(E) of the collective bargaining agreement. That Section reads:
(E) If a Flight Attendant is required to perform ground service or ground cabin service in excess of forty-five (45) minutes after the passengers have been boarded before block-out or forty-five minutes after block-in, the employee shall be compensated at applicable flight pay credit for the entire elapsed period that such services are performed.

The Union contends that after a Flight Attendant has achieved or been credited with sixty-five (65) hours of flight pay credit per month under Section 6(A) of the contract, work performed in addition thereto that month under paragraph (E) is to be compensated for at the over-time rate. The Company asserts that work performed under paragraph (E), if beyond the sixty-five (65) hours credited under Section 6(A) is to be paid for at straight time.

The dispute narrows to the meaning and intent of the phrase:

"...shall be compensated at the applicable flight pay credit...." (emphasis added),
as set forth in paragraph (E).

Implicit if not explicit in the presentation of this case was the recognition by the parties that the foregoing disputed phrase is contractually ambiguous. In addition to other parts of the contract, both sides relied heavily and principally on "past practice" to give the phrase meaning.

I agree that the bare contract language "applicable flight pay credit," is ambiguous. It could mean base or straight time pay as well as pay at the over-time rate.

Based on the entire record before me I conclude that the
phrase is still ambiguous; neither side having satisfactorily cleared up the ambiguity. The reference to other contract sections falls short of conclusiveness. The sparse testimony on what transpired at negotiations when Section 6(E) was agreed to either in the current agreement or the predecessor contract, was not sufficiently enlightening to be probative. The "past practice" relied on by both sides is not determinative because it has been neither uniform nor consistent. The Union showed certain specific instances in which authoritative company representatives instructed that Section 6(E) payments be made at the overtime rate. Yet the Company showed a vast number of examples, indeed a pattern, over the last several years where Section 6(E) payments were made at straight time, and not protested or grieved.

The burden in this type of contract interpretation is on the grieving party, in this case the Union, to prove the contractual basis or justification for its grievance. The critical evidence in this case is incomplete, offsetting, conflicting and hence indeterminative. Therefore the Union has not met that burden. Consequently, so far as the instant case is concerned, Section 6(E) is not definitively interpreted one way or the other, but rather left as before because the Union's case falls short of the burden of proof required. Accordingly the Union's grievance is denied.
In The Matter of The Arbitration:
between
Glass Bottle Blowers Association: OPINION AND AWARD
Local 243, AFL-CIO : Grievance #243-76-46-21
and
Owens Illinois, Inc.

In accordance with Articles 12 and 26 of the collective bargaining agreement effective July 16, 1974 between Glass Bottle Blowers Association Local 243, AFL-CIO, hereinafter referred to as "the Union," and Owens Illinois, Inc., hereinafter referred to as "the Company", the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Are Factors 2, 5, 6, 8, 9 and 10 of the job Lubrication Worker-Maintenance properly evaluated? If not what should be the points for those factors?

A hearing was held in Wilkes Barre, Pennsylvania on August 5, 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 waived.

The Union challenges the points presently accorded Factor 2, Employment Training and Experience; Factor 5, Responsibility for Materials; Factor 6, Responsibility for Tools and Equipment; Factor 8, Responsibility for Safety of Others; Factor 9, Mental Effort; and Factor 10, Physical Effort of the above mentioned job under the Company's job evaluation plan.
Based on the entire record before me I conclude that the Union has made out a case for an increase in the point evaluation of Factor 8 (Responsibility for Safety of Others) and Factor 10 (Physical Effort), but has not done so with regard to the other challenged factors.

Factor 8: Responsibility for Safety of Others: The job is presently coded at B with a numerical evaluation of .5. The characteristics of the job evaluated at this level are:

- Ordinary care required to prevent injury to others.
- Coordinates gang or crew work where individual acts may injure others.
- Operates equipment where others are occasionally exposed.

The Union seeks code C with a numerical classification of 1.0. The characteristics of the job at that level are:

- Considerable care required to prevent injury to others.
- Operates power driven mobile equipment where others are exposed, but probability of accident is low.
- Handles inflammable liquids, gases or molten glass where safeguards minimize the probability of fire, explosion or serious accidents.

Part of the job of Lubrication Worker-Maintenance is to lubricate the "crusher" which is a large ball used to crush glass in a twelve foot deep pit. The lubrication is performed by a team of two Lubrication Workers. One shuts off the operation of the crusher while the other performs the greasing and required lubrication. When completed he turns the "crusher" on again. Part of their responsibility to prevent injury to others is to be sure that no other employee is in the pit or in the vicinity of the ball when the Lubrication Worker first turns the machine.
off for lubrication and then activates it again after the lubrication is complete. The evidence is that mechanics routinely go into the pit to make repairs as does the man who loads the crusher to inspect the pit before the crusher is put to work and that many employees work in the area. I am persuaded that the Lubrication Worker's responsibility in this regard is realistically concerned with the safety of other employees, when lubrication of the crusher is carried out each day. Considering the possibility of a serious or fatal injury because of the size and nature of the crusher operation, I am satisfied that as to that responsibility the Lubrication Worker must exercise "considerable care....to prevent injury to others" rather than "ordinary care." Also his task in turning the crusher off for lubrication and then on again after lubrication is completed is more closely the "operation of power driven mobile equipment where others are exposed but the probability of accident is low," than an "individual act (that) may injure others." Though the lubrication of the crusher requires only about fifteen minutes of time, the fact that it must be done every day under the conditions described, better satisfies in my view, the Code C level than Code B for purposes of point credit. Accordingly Factor 8 shall be increased from Code B to Code C and accorded a numerical classification of 1.0 rather than .5.

Factor 10: Physical Effort: The job is presently coded B for "light physical exertion" and a numerical classification of .5 ("continuous"). The job requirements under that code
level and numerical classification reads:

Light physical exertion. Uses light hand tools and handles light material manually. Operates controls and valves involving moderate physical effort. Operates truck or tractor. Sweeps, cleans up, shovels light material, etc.

The Union seeks Code C ("moderate physical exertion") and a point score of 1.8 ("intermittent"). The job requirements at that level read:


The evidence indicates that employees performing the job use, climb and work from ladders, and also occasionally use a light sledge. As to frequency it is undisputed that work is performed in this classification from a fixed ladder throughout the plant each day, that employees go up and down those ladders regularly and that moveable ladders and hyjackers are used occasionally. On balance I am persuaded that that constitutes "climbing and working from a ladder" within the meaning of Code C. Based on the testimony I think it reasonable to conclude that the use of a ladder and hyjacker, together with routine climbing of ladders and working off some ladders takes from five per cent to thirty-five per cent of the Lubrication Workers time. Therefore I am constrained to conclude, based on the Determination of Frequency Percentage set forth in the job evaluation plan, that employees in this classification
experience "moderate physical exertion" on an "intermittent basis." Accordingly the Code of Factor 10 shall be raised from B to C and the point score from .5 to 1.8.

With regard to all the other factors challenged by the Union, the evidence adduced either failed to support the Union's factual allegations that additional point credit or a higher code symbol should be accorded those factors, or did not meet the conditions or qualifications set forth in the applicable job evaluation plan. I see no useful purpose in reciting the Union's contentions or the Company's defense with respect to those factors.

Accordingly the claims of the Union with regard to Factors 2, 5, 6 and 9 are 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:

Factors 8 and 10 of the job Lubrication Worker-Maintenance are not properly evaluated. As to Factor 8 the Code shall be increased to C with a numerical classification of 1.0. With regard to Factor 10 the Code shall be increased to C with a numerical classification of 1.8. The Union's claim with regard to Factors 2, 5, 6 and 9 are denied.

Eric J. Schmertz
Arbitrator
DATED: September 7, 1976
STATE OF New York )
COUNTY OF New York )

On this 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 accordance with the applicable arbitration provisions of the collective bargaining agreement between the above named Union and University, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

1. What is the Arbitrator's authority in disputes involving Article X Paragraph b (page 15) of the collective bargaining agreement?

2. Did the University violate the contract by failing to comply with the procedural provisions of Article X line 5 (page 13) and lines 1 through 9 (page 14) of the collective bargaining agreement?

A hearing was held at the offices of the University on May 19, 1976 at which time Professor Kate S. Ahmadi, hereinafter referred to as the "grievant", Joseph R. Mack, Esq. personal attorney for the grievant, and representatives of the 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 parties filed post-hearing briefs. A brief by counsel for the above named Union was also
filed with the Arbitrator as "an interested party for the assistance of the deliberations of the Arbitrator in the above matter."

For reasons to be indicated I will deal with the second issue first.

I do not find that the University violated the contract by failing to comply with the procedural provisions of Article X, line 5 on page 13 and lines 1 through 9 on page 14 of the collective bargaining agreement. As a matter of contract law, Article X of the contract, and indeed the entire collective bargaining agreement was not in effect at the time that the grievant was notified of her non-reappointment. She was given oral notification that she would not be reappointed on February 27, 1975. The contract was not ratified and hence not legally binding until March 18, 1975. While it is apparent that Article X was agreed to in substance prior to February 27, 1975, and could have been followed by the University had it wished to do so, it was not binding on the University or the Union for that matter, until the full agreement was ratified on March 18th. The Arbitrator's authority is not to rule on what the parties could have done, or indeed what might have been the better labor relations approach, but rather what the parties are obligated to do under the terms of their agreement. While it is also true that the agreement once ratified on March 18th, 1975 was made retroactive to September 1, 1974, it is well settled that certain
physical conditions of a retroactive agreement simply cannot be made retroactive. Here the requirements set forth on line 5 of page 13 and lines 1 through 9 on page 14 are "physical matters" which could not be made retroactive or re-created on a retroactive basis.

The procedure followed by the University in denying the grievant reappointment was not materially inconsistent with the general procedures and practices which obtained at that time prior to the enactment and applicability of the collective bargaining agreement, which is the first negotiated between the parties.

Accordingly the grievant's claim with regard to the second issue is denied.

Based on the foregoing I find it unnecessary and therefore choose not to render a "declaratory judgement" decision on issue 1. I leave that question for resolution to a later date when and if there is a justiciable and arbitrable issue arising from Article X, of the contract.

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 grievance of Professor Kate S. Ahmadi is denied.

Eric J. Schmertz
Arbitrator
DATED: November 22, 1976
STATE OF New York ) ss.:
COUNTY OF NEW YORK )

On this twenty second day of November, 1975, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In The Matter of The Arbitration:

between

Local 484, IUE, AFL-CIO

and

Otis Elevator Company

OPINION AND AWARD
Case No. A76-1323

The stipulated issue is:

Has the Company violated Section 3 of Article VIII, a series of side agreements and other provisions of the contract with respect to four Specifier jobs in Yonkers? If so what shall be the remedy?

A hearing was held at the Company plant on September 1, 1976 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Union's claim in this proceeding is that a verbal side agreement was reached between the Union and the Company regarding the transfer of Specifier work and the transfer of certain employees to perform that work from the Company's plant in Harrison to its installation in Yonkers. The Union explains that the agreement included certain concessions by the Union at the Yonkers location regarding the waiver of contract seniority provisions in order to accommodate the introduction of the Harrison work and the Harrison employees into Yonkers, the upgrading of certain Yonkers employees to handle additional Specifier work and the filling of certain secondary vacancies at Yonkers created by the
the latter upgradings.

The Union asserts that the Company reneged on the agreement and seeks its enforcement and implementation by an order from this Arbitrator.

The Company denies that any "side agreement" was reached, and that therefore there has been no contract breach and nothing to enforce.

I find it unnecessary to decide whether a side agreement was reached in September or October of 1975. Assuming arguendo that the parties reached an enforceable understanding then, as alleged by the Union, the record clearly discloses, and indeed the local Union president admits, that because the Company was "footdragging" and not implementing the agreement as expected, he told the Company on March 4 that the "Union was backing out of the agreement." I conclude therefore that on March 4th, the Union revoked the agreement, if indeed one had been previously consummated.

The question therefore is whether the parties reestablished the agreement, or alternatively reached an agreement, subsequent to March 4th. It appears that before March 4th, the Union took certain steps which could be construed as contractual concessions or prospectively acceptable arrangements in anticipation of the completion or implementation of an understanding with the Company regarding the transfer of the Harrison work and employees and the integration of that work and those employees into the Yonkers
plant. Yet the record falls short of showing that after March 4th the parties actually concluded a new agreement or reestablished the alleged prior understanding. It is the Union's contention that the agreement was reestablished in discussions during the grievance procedure. But the evidence discloses that as late as April 6th, at a grievance meeting that day, the parties had still not agreed, among other things, on how certain secondary jobs were to be filled. And the record before me contains no additional evidence upon which I could conclude that after April 6th, and prior to the filing of the grievance, further agreements or understandings were entered into between the parties, which, as a totality, would constitute either a new full agreement or the reestablishment of what the Union contends was agreed to prior to March 4, 1976. In short, that the Union may have taken certain difficult steps in a good faith expectation that an agreement would be implemented is not, standing alone, sufficient evidence to reestablish or prove the making of an agreement after the Union's revocation of March 4th.

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 violated Section 3 of Article VIII, a series of side agreements and other provisions of the contract with respect to four Specifier jobs in Yonkers. The Union's grievance is denied.

Erie J. Schmertz
Arbitrator
On this twenty-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.