AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Bakery & Confectionery Workers International Union, Local #6

and

Acme Markets, Inc.

AWARD
Case #1430 0334 77D

The Undersigned, duly designated as the Arbitrator under the arbitration agreement dated October 10, 1976 and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

Based on the evidence and testimony adduced at the hearing on August 31, 1977 and my study of the record thereafter, I am satisfied that the Company has met its burden of establishing just cause for the discharge of John Enright. Accordingly the discharge is sustained.

I choose not to wrote an Opinion because I conclude that an Opinion would be neither helpful to the grievant nor needed by the Company.

Eric J. Schmertz
Arbitrator

DATED: September 3, 1977
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration:

between

Federation of Telephone Workers
of Pennsylvania

and

The Bell Telephone Company
of Pennsylvania

AWARD OF ARBITRATORS
Case No. 14 30 0360 75

The Undersigned, duly designated as the Arbitrators under the arbitration agreement dated July 28, 1974 and having duly heard the proofs and allegations of the above parties make the following AWARD:

The Company's implementation of its reorganization plan in the manner which gave rise to those Union grievances which are the subject of Issues 4, 5 and 6 of Joint Exhibit #5 violates the Horlacher I and II arbitration decisions, and thereby violates the collective bargaining agreement.

Absent mutual agreement of the parties on some other resolution, the Company at its option, shall either adopt and implement the Union's proposed "Appropriate Relief" set forth on pages 35 through the top of page 41 of the Union's brief, or cease and desist from implementing the reorganization plan in the manner which gave rise to the Union's grievances herein.

November 11, 1977

Eric J. Schmertz
Chairman

William E. Wallace
Concurring

Daniel R. Carroll
Dissenting
This proceeding is another in a series of cases growing out of a reorganization promulgated by the Bell Telephone Company of Pennsylvania, hereinafter referred to as the "Company", on January 6, 1974. In particular, this case is the third one involving issues of the displacement of central office ESS switchmen attached to the Company's new SCC office which was created in the reorganization.

A hearing was held on February 18, 1976. The Undersigned served as Chairman of a Tripartite Board of Arbitration. Messrs. William E. Wallace and Daniel R. Carroll served respectively as the Union and Company designees to said Board. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Both sides filed briefs and the Board met twice in Executive Session.

The Federation of Telephone Workers of Pennsylvania, hereinafter referred to as the "Union", complains that as a consequence of the reorganization certain ESS switchmen now assigned to the

1. ESS refers to the Electronic Switching Systems. (Tr. 8).
2. SCC refers to the Switching Control Center at 900 Race Street in Philadelphia. In previous cases this operation was known as the MAC or Maintenance Assistance Center. (Tr. 9).
Centrex Group and the Growth Group or the SCC have been displacing ESS switchmen who are assigned to central offices both on straight time and overtime in violation of the collective bargaining agreement between the parties dated July 28, 1974.

The Centrex ESS switchmen are sent from the SCC to a central office to connect the customer's newly installed centrex system with the ESS machine at the central office (Tr. 77). Prior to the reorganization, this work was done by ESS switchmen assigned to the appropriate central office. (Tr. 166-168). The ESS switchmen assigned to the Centrex Group receive no new training (Tr. 85-86), and have the same qualifications as the ESS switchmen assigned to the central offices (Tr. 85-86). Since the reorganization it is undisputed that all centrex installation work previously done by the ESS switchmen assigned to central offices is now done by members of the Centrex Group (Tr. 94-95, 165-168). Nor is there any serious dispute that the ESS switchmen assigned to central offices are capable of performing the installation work on centrex systems. (Tr. 86-87, 112).

Similarly, ESS switchmen assigned under the reorganization to the Growth Group are sent from the SCC to various central offices (Tr. 49) to work on equipment manufactured by Western Electric (Tr. 128).

3. The Centrex Group consists of 7-8 ESS switchmen headquartered at the SCC (Tr. 132). Their function is to install centrex systems throughout the entire ESS district (Tr. 48) which includes six former districts (Tr. 39) (Company Exhibit 1).

4. The Growth Group consists of 6-9 ESS switchmen who work with Western Electric employees in the installation of new equipment. (Tr. 49, 135).

5. Central offices are also known as "end" offices or "local" offices.
Prior to the reorganization this work was done by the central office ESS switchmen (Tr. 50, 91). The central office ESS switchmen can and do perform the same work (Tr. 90-92, 94). The Growth Group has not completely displaced the central ESS switchmen (Tr. 94-95, 131-133). They have, however, performed work which the central ESS switchmen could be called on to perform (Tr. 133, 150). In the assignment of personnel from the Growth Group to work in the central offices no attempt is made to equalize overtime with ESS switchmen in those central offices (Tr. 150) and Growth Group people sometimes share work with local personnel (Tr. 131-135) but often do not (Tr. 90-92).

The evidence of record establishes that the use of ESS switchmen assigned to the Centrex and Growth Groups, to the extent they work in the central offices, has caused displacement of ESS switchmen on both straight time and overtime in those offices.

This is the gravaman of the dispute which has separated the parties in the so-called MAC cases.

The question of displacement of ESS switchmen in the central offices was the main focus of both the first and second cases. In the first case the Union complained prospectively about the effect of MAC intervention in central offices.

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6. The first case, No. 14 30 0667 71 was decided on February 26, 1973 (JX-3) in an Opinion and Award issued by arbitration panel Chairman John Perry Horlacher and hereinafter referred to as Horlacher I.

The Second case, decided August 26, 1974 shall be referred to as Horlacher II (JX-2A).
The Union was unable, at that time, to offer proof of the displacement they foresaw. Instead its witnesses speculated on what was likely to occur. The arbitrators rejected the Union's "general" complain of displacement. The ground of the rejection was the lack of proof of displacement on the record (Horlacher I, p.8). It is clear that the arbitrators reserved this matter for a subsequent proceeding if displacement became a reality and not merely theoretical (Horlacher I, p.6). Mr. Horlacher stated:

"The thing to be emphasized is that it is a question of fact as to the existence of any contract interference by the operation of MAC, not a theoretical or conceptual matter...."

"....I am pointing out that the Board of Arbitrators cannot be blamed if it is not convinced in the absence of proof in the form of particular occurrences." (Horlacher I, p.5).

Thus, the Board held that there was no basis in the record for directing the Company to restrict MAC to intervening in central offices only when requested to do so by those central offices (Horlacher I Award, Issue 1). The Board added a cautionary note to the award. It directed:

"The Company, however, is directed to refrain from that type of intervention whereby a Switchman attached to MAC is sent to a central office when the effect would be to displace a central office Switchman who otherwise would perform the work..." (Id.)

This language became the focal point of the second arbitration which followed the reorganization of January, 1974. The Union argued that the reorganization was a per se violation of its contract rights. The Company asserted the contrary and sought
to reverse the language in the award on Issue I which prospectively directed the Company to refrain from displacement.

In Horlacher II, Chairman Horlacher sought to explain the scope and meaning of his finding in the first case on the issue of intervention and displacement. He stated that his holding in the first case was grounded upon an overtime equalization letter between the parties dated August 3, 1971 and annexed to the contract (JX-1, Letter Agreements, p.10). He stated:

"I think the Company misconstrues my position in the first decision.... the overtime equalization letter quite clearly implies that overtime will be worked by the employees in the particular location where the overtime occurs.... if a MAC switchman did the job, the end office switchmen wouldn't get the overtime assignment. This is the nub of the matter."

The Chairman held that if the Board eliminated that provision of the prior award, the Company could assign MAC people to do overtime work in central offices and render the equalization letter meaningless. (Id.)

Unlike the first case, the second decision involved specific situations of MAC interference in central offices. As a result the Board had before it a specific factual context within which to decide the question of displacement.

The Union contended that the Company was sending MAC switchmen into two central offices to do certain card over writes which would have been done by the local switchmen. The Board found this practice in violation of its award in the first case. (Horlacher II, p.6).

The Chairman, in commenting on the Company's position, said:

"This concept could be applied to every instance where a MAC switchman was sent to a local office to perform certain work...."
Such an application of this concept would make a nullity of the Award provision here being interpreted." (Id.)

x x x x

" Who did the (work) on ESS machines before MAC existed? Who would do it today if MAC were non-existent? The answer is that someone in the central office would do the overtime." (Id.)

The Award in the first case was held to bar the practice of sending switchmen in from MAC to do the work previously done by central office switchmen, which work they were qualified to do. (Id.)

Or, in other words, unless the Company could prove that the central office switchmen lacked the skill and training to do the job, they could not be displaced. (Horlacher II p.7).

The central portions of the holding in the second case then is that the reorganization effected January 6, 1974 was not a per se violation of the contract (Horlacher II p.23), but the Company could not engage in displacement practices pursuant to the reorganization which violated contract rights.

Recognizing that problems would likely arise from its approval of the reorganization, but its disapproval of certain assignment practices thereunder, the Board provided in Paragraph II of the Award in the second case, that the parties negotiate ground rules or contract adaptations made necessary by the reorganization. Failing a successful negotiation, the issues were to be arbitrated (JX-2A p.2).

The present case arises from the partial failure of those
negotiations; specifically those disputes which are the subject of issues 4, 5 and 6 of Joint Exhibit 5 in this record.

As I see it the Company, seeks essentially to relitigate the question clearly decided by the two prior Awards, namely displacement. It takes the position that the Award should be limited to situations involving work other than by the Centrex or Growth Groups in the central offices. It contends that its general right to reorganizing would be nullified or at least seriously restricted if the ESS switchmen at SCC cannot perform their functions at the central offices. Whatever the merits of this argument may be, it is in fact, the same argument made in the second case and decided adversely to the Company by that Board.

We need not remind these sophisticated parties that arbitration awards unless vacated or otherwise modified by appropriate court action or mutually disregarded or changed by the parties thereto, are not only final and binding, but stand as authoritative interpretations of the contract provisions involved. Hence it is immaterial whether we agree or disagree with the two Horlacher decisions on the merits or on their interpretation of the contract. Similarly it is not for us to determine or even consider whether Arbitrator Horlacher and his Boards exceeded its authority by remanding to the parties certain issues for further negotiations and by directing subsequent arbitration if those direct negotiations failed. Indeed, instead of testing the validity of those portions of his Award, the
partied did negotiate on the disputes which Horlacher remanded to them, and apparently reached agreement on some. That act of compliance, together with the effect of Article 13 and Exhibit B of the contract, and, as previously stated, the absence of any court action to test the validity of those Awards, renders them binding on the parties and not subject to de novo review, reversal or modification by this instant Board. As such they stand as interpretative of the contract regarding the reorganization with which they dealt and which again is the subject matter of the instant case.

The three disputes before this Board which are numbered 4, 5 and 6 in join Exhibit #5 in the record. They are captioned:

4. District oriented Centrex group  
5. End office assignment of Western Electric group  
6. Overtime for Western Electric group.

As I see it the issue before this Board, is whether the Company's implementation of its reorganization giving rise to grievances which are the subject matter of the foregoing issues 4, 5 and 6, violated the Horlacher decisions and per force the collective bargaining agreement as interpreted by those decisions.

Based on my reading and interpretation of the Horlacher decisions, I conclude that the Company's actions in this regard were examined substantively if not in every particular and considered by Horlacher and found to be violative of the contractual rights of end office switchmen. In short, to quote Horlacher II the instant proceeding appears to be another "bite of the apple" by the Company in its attempt to reverse Horlacher I and II.
I find that the Company's implementation of its reorganization plan, with regard to what the Union is grieving over in issues 4, 5 and 6 of Joint Exhibit #5, displaces ESS Switchmen in the central offices and adversely changes their seniority status and contract rights based on seniority within the meaning and proscription of the Horlacher decisions. Consequently those implementations constitute contract violations.

Eric J. Schmertz
Chairman

DATED: November 11, 1977
This proceeding is a "last and best offer" arbitration over contract issues in dispute between the above named parties, pursuant to the applicable statute of the Commonwealth of Massachusetts.

In accordance with prescribed procedures, the undersigned Panel of Arbitration, consisting of Eric J. Schmertz, Chairman and Messrs. E. David Wanger and Paul V. Mulkern, Jr., the Union and City designees respectively, was duly appointed.

Hearings were duly scheduled and conducted in the City of Chelsea on August 16, September 23, October 17, October 24, November 9 and November 18, 1977, at which time representatives of the above named Union and City appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record of the hearings was taken.

With the express agreement and participation of authorized representatives of the parties, the Chairman of the Arbitration Panel undertook a mediation effort on November 19 and 20, 1977 in an attempt to effectuate a voluntary resolution of the issues in dispute. This effort failed to produce a settlement.

Thereafter, on the morning of November 21, 1977, the parties submitted
to the Panel, and delivered to each other, written statements of their respective "last and best offers" on each of the issues in dispute.

Subsequently, both sides submitted to the Panel and exchanged between themselves, written briefs.

The Arbitration Panel met in executive session in Boston, Massachusetts on December 28 and 29, 1977. At the request of the Chairman, conveyed to the parties by their respective designees on the Panel, both sides submitted revised "last and best offers" on December 29, 1977 as substitutes for the offers previously submitted on November 21. It was expressly stipulated that the submission of revised "last and best offers" on December 29 created no legal obstacles to the validity of this proceeding; that neither party would challenge the legality or validity of this proceeding or the Award rendered on the ground that revised "last and best offers" were submitted; and that said revised "last and best offers" constituted the "last and best offers" of the parties within the meaning of the applicable statute.

Following the submission of the revised "last and best offers", the hearings were declared concluded.

Throughout the proceedings the parties disagreed over which statute applied to this case. The Union contends that the applicable statute is the Public Employee Bargaining Law, Chapter 1078 of the Acts of 1973, Effective July 1, 1974. (Joint Exhibit #1 in the record.) The City asserts that the applicable statute is An Act Further Regulating Collective Bargaining Impasses Involving Firefighters and Police Officers, 1977. (Joint Exhibit #2 in the record.)

It is the ruling of a majority of the Panel that the statute applicable to this case is the Public Employee Bargaining Law, Chapter 1078 of the Acts of 1973, Effective July 1, 1974.
Perforce, with that ruling, a majority of the Panel finds that the Rules and Regulations of the Board of Conciliation and Arbitration of the Commonwealth of Massachusetts, effective July 1, 1974 are also applicable to this case. Accordingly, pursuant to Rule 2.10 Paragraph (C) of said Rules and Regulations, and in accordance with his discretionary authority set forth therein, the Chairman of the Panel chooses not to write an Opinion supporting the Award.

The disagreement of the parties over the applicable statute notwithstanding, a majority of the Panel concludes that its "last and best offer" selection and Award is supported by analysis and application of either statute (Chapter 1078, Section 4, Acts of 1973 or Chapter 347, Acts of 1977).

Based on full consideration of the entire record before us, including the factors set forth in Section 4 of the Public Employee Bargaining Law, Chapter 1078 of the Acts of 1973, Effective July 1, 1974, and substantively the same factors set forth in Section 4 of the 1977 Act Further Regulating Collective Bargaining Impasses Involving Firefighters and Police Officers, the undersigned Panel of Arbitration makes the following AWARD:

The Panel selects the written statement of "last of best offer" of the Union as the final and binding Award on the issues in dispute between the Union and the City and submitted to this Panel.

The Union's written statement of its "last and best offer" (consisting of seven pages) is attached hereto and made a part hereof as Exhibit A and shall constitute the Award of the Panel.

DATED DECEMBER 29, 1977

ERIC J. SCHMERTZ
CHAIRMAN

DATED DECEMBER 29, 1977

E. DAVID WANGER
Concurring

DATED DECEMBER 29, 1977

PAUL V. MULKERN, JR.
Dissenting
In The Matter of The Arbitration between
Local 420, International Brotherhood of Electrical Workers and
Connecticut Light and Power Company:

The stipulated issue is:

Was the discharge of John Ryan, Jr. for just cause? If not what shall be the remedy?

A hearing was held in Meriden, Connecticut on January 24, 1977 at which time Mr. Ryan, hereinafter referred to as the "grievant", and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Union and Company filed post-hearing briefs.

The essential facts are not in dispute. The grievant's job was to inspect the work performed by a private contractor for the Company. He accepted money in the amount of $350 to $450 from the private contractor whose work he was inspecting.

Manifestly this is a serious offense. It potentially compromises the grievant's inspectional and supervisory authority and effectiveness. It is clearly improper and does not require the promulgation of a Company rule prohibiting it. It is a dischargeable offense unless there are special and mitigating
factors which would warrant a reduction of the penalty to a lengthy suspension.

Based on the record before me I conclude that such mitigating factors exist. The grievant does not deny the misconduct. He admits it was wrong and he is contrite. He explains that he was under severe emotional and financial strain and accepted the money to meet those particular needs. It is undisputed that he in no way compromised the job or standards required of the private contractor. All the requisite specifications were met, and the contractor was given no consideration or other preferential treatment in exchange for the money. In that respect therefore, the Company was not damaged by the grievant's wrong doing. Additionally, in matters of discharge for an offense which may very well preclude future employability elsewhere, the employee's work record and longevity are relevant considerations. Here, the grievant served the Company satisfactorily for twenty-four years. That period of service entitles him to some consideration. He is at an age where employment elsewhere would be difficult under ordinary circumstances, and highly improbable if he is discharged for this offense.

Let me analogize to misconduct proceedings of grievance committees of Bar Associations. If a lawyer were to commit an offense of comparable seriousness, the matter of whether he
would be disbarred or suspended from the practice of law usually turns on his prior record as an attorney. If the offense occurs early in his career disbarment usually follows. But if he has served satisfactorily for an extended number of years, and if as here, the offense has not done actual harm, chances are that he would be suspended from the practice of law for an extended period of time, but allowed to resume his practice thereafter.

I choose to apply that analogy to this case. The grievant has devoted almost his entire working life to the Company, and until this incident has done his work satisfactorily. On that basis I accept his statement that only extreme pressures caused him to accept the money. Because the job was not compromised, and because the Company in this particular case was not damaged, I think that a lengthy suspension more nearly approximates a "just cause" penalty than dismissal.

Accordingly it shall be my Award that the grievant's discharge be reduced to a suspension for the full period of time since his original suspension plus an additional three months.

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

The discharge of John Ryan, Jr. is reduced to a disciplinary suspension. Three months following the date of this Award he shall be reinstated without back pay.

Eric J. Schmertz
Arbitrator
DATED: April 28, 1977
STATE OF New York )ss.:
COUNTY OF New York )

On this 28th day of April, 1977 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Was there just cause for the suspension of Thomas Carmichael? If not what shall be the remedy?

A hearing was held at the Union offices in Mt. Vernon, New York on July 7, 1977 at which time Mr. Carmichael, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Company charges the grievant with a violation of Section 13 E of the collective bargaining agreement. That Section accords the Company the right to discharge an employee for:

"Direct refusal to obey orders given by the proper party unless such orders jeopardize life or health."

The Company argues that with the power to dismiss it may, per force, impose the lesser penalty of suspension.

The Company's case is faulty because there is no evidence that the grievant refused to obey a direct order. Based on the evidence and testimony it is clear that, in objecting to his foreman performing what he considered to be bargaining unit work,
the grievant was disrespectful and argumentative. Also, by stating that if the foreman continued to perform the work, he, the grievant, "would not have to work", the grievant substituted a threat of impermissible self-help for the prescribed use of the grievance provisions of the contract. But the grievant was not disciplined for being disrespectful or argumentative or for failing to complain about what he thought was a contract breach in the proper manner. Rather, the charge against him is a "direct refusal to obey orders...." The facts do not support the charge. He was given no orders which he refused to obey. He did not cease performing his duties. He continued working at his regular assigned duties while he argued with the foreman over the work which the foreman was performing. Contrary to the Company's statements, he was not "ordered to return to his job" nor did he refuse to work in defiance of any such order.

The Company argues that it should not be required to wait until the grievant carried out his threat "not to work", but rather should be permitted to treat his "threat" as equivalent to a refusal to work. I cannot agree. Whether the grievant would have stopped work if his foreman continued performing the disputed activity is speculative. Discipline cannot rest on speculation especially where it is expressly based on an allegation of a "direct refusal to obey orders." In short, to sustain
the suspension based on the offense charged, the elements of that offense must have taken place. The bare possibility or even probability that the grievant would have refused to continue at work is not synonymous with an order given and an order disobeyed.

Accordingly, as the allegation against the grievant is not supported by the facts, the discipline explicitly based on that allegation must be reversed.

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 suspension of Thomas Carmichael for the reasons asserted by the Company was not for just cause. It is reversed, and Mr. Carmichael shall be made whole for the time lost.

The Arbitrator's fee and expenses for the scheduled hearing date of April 18, 1977 when Mr. Carmichael failed to appear, shall be borne by the Union. The balance of the Arbitrator's fee and expenses shall be shared equally by the parties.

DATED: July 29, 1977
STATE OF: New York )ss.: COUNTY OF: New York )

On this twenty ninth day of July, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Arbitrator
In The Matter of The Arbitration between
Local 702 Motion Picture Laboratory
Technicians, I.A.T.S.E.
and
Du Art Film Laboratories, Inc.

The stipulated issue is:

Is the Employer in violation of the Agreement by operating the Photomec 16mm color reversal process with a crew of less than three? If so what shall be the remedy?

A "quickie" arbitration hearing was held on August 15, 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.

On July 14, 1966, when the NOTE at the end of the reference to Negative Developing Department in Schedule A of the contract read as it presently reads, the then Industry Arbitrator Joseph E. McMahon held (Case 702-66 Al) that development of color reversal film stock, then done on the Pako machine, was not "color negative developing" within the meaning of the NOTE.

In pertinent part he stated:

"The type of work performed by the Pako machine is the crux of this dispute. The machine processes color reversal film stock.

" ....... the Pako machine does not fall squarely within either the Positive or Negative Developing Department."
"The note in Schedule A relating to color negative developing, fixes the crew complement. That provision is not binding here, in view of my previous determination that the Pako machine does not come within the Negative Developing Department." (Underscoring supplied.)

He ruled therefore that a crew of three operators on the Pako machine was not required by the contract, and that the Employer could operate that machine and run the color reversal development process with a crew of two.

Whether Mr. McMahon was correct is immaterial. His Award is binding unless the parties by mutual agreement reject or change it, or unless by contract negotiations or other agreement its effect is amended, changed or nullified.

None of this was done. Following the McMahon Award, no change, expansion or modification in the NOTE was made, nor was there any other contract provision or agreement entered into covering color reversal development.

So, the McMahon decision remains as the "definitive word" on color reversal development performed on the Pako machine.

The issue before me involves color reversal development on the Photomec machine. Though the Photomec is different from the Pako, the process or "type of work" (which Mr. McMahon said was the "crux" of the earlier case) is still color reversal development. I fail to see how, in the face of the McMahon ruling on the nature of the process of color reversal develop-
ing, and in the absence of any subsequent contract provision or any other agreement to deal with that process, I can now hold that color reversal development on the Photomec machine is color negative developing within the meaning of the NOTE. As I see it, the question still remains a matter for bargaining between the parties and not for arbitration.

Nor can I presently consider the question of the manning of the Photomec machine on operational grounds. As yet that machine has not run enough to determine its complexities, difficulties, and its demands on its operators. It ran for a short period in 1970, which obviously cannot be used as a contemporary experience, and then again for only a few days this month. The number and frequency of breaks, if any; the physical, mental and other operating demands on the operators assigned cannot yet be determined, and must await the passage of a reasonable running time.

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

The NOTE referred to in the contract at the end of the reference to the Negative Developing Department in Schedule A does not apply to color reversal developing performed by the Photomec machine. That process is not "Color Negative Developing" within the meaning of the NOTE. Therefore the Employer is not in violation of the Agreement by operating the Photomec 16mm color reversal process with a crew of less than three. It may operate the machine with a crew of two.
The Arbitrator's fee shall be borne by the Union.

Eric J. Schmertz
Arbitrator

DATED: August 17, 1977
STATE OF New York )ss:
COUNTY OF New York )

On the seventeenth day of August, 1977, 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 702 Motion Picture Laboratory Technicians, I.A.T.S,E.
and
Du Art Film Laboratories, Inc.

The stipulated issue is:

Whether the Employer has breached the contract by excluding a new employee hired to perform plant clerical functions in the Maintenance Department from the bargaining unit. And if so, what shall the remedy be?

A hearing was held on August 1, 1977 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.

For about ten years the clerical duties which are the subject of this case were performed by a bargaining unit employee classified as a Maintenance Mechanic B. Those duties constituted his principal straight time hours assignment.

I consider this extended and undisputed history of how and by whom the work was performed, to be constructive if not explicit acknowledgement and acceptance by both sides that those duties were within the contractual jurisdiction of the bargaining unit, and hence covered by Article 1 of the contract. Particularly so, as here, in the absence of any
specific job description which does not include those duties within that classification.

That other types of clerical duties elsewhere in the laboratory have and are being performed by non-bargaining unit employees is immaterial. None of those situations had any history—let alone such an extensive history—of being performed by a bargaining unit employee as a principal part of his bargaining unit classification.

That the incumbent bargaining unit employee who performed that work has now retired does not mean that the work is lost to the unit, nor does it mean that the Company may now unilaterally remove it from the unit and assign it to a non-bargaining unit new hire. Having ripened into a bargaining unit assignment for reasons previously stated, it must remain so placed unless the parties mutually agree otherwise.

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

The Employer has breached the contract by excluding a new employee hired to perform plant clerical functions in the Maintenance Department from the bargaining unit. The Company is directed either to include that employee within the bargaining unit at a rate of pay to be negotiated by the parties, or to return the clerical duties to the Maintenance Mechanic B classification, or establish a new bargain-
ing unit job covering those duties and negotiate with the Union the wage rate for that job, which, in my judgement, should be less than what is paid a Maintenance Mechanic B.

The Arbitrator's fee shall be borne by the Employer.

Eric J. Schmertz
Arbitrator

DATED: August 17, 1977
STATE OF New York )ss.: 
COUNTY OF New York )ss.: 

On this seventeenth day of August, 1977, 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 702, Motion Picture Laboratory Technicians, IATSE
and
DuArt Film Laboratories, Inc.

OPINION AND AWARD

At the first hearing on October 13, 1976 the parties stipulated the issue as:

Whether the Employer violated Section 16(e) of the collective bargaining agreement by failing to pay proper wages to John Gazaway, and if so what shall be the remedy?

Thereafter, on May 24, 1977 I rendered an Opinion and Award in the case between Local 702, Motion Picture Laboratory Technicians, IATSE and Radiant - Technicolor Laboratory. That Opinion and Award dealt with the calculation of pay for working foremen and subforemen under Section 16(e) of the industry-wide contract.

At the request of the Employer, the instant case was reopened and a second hearing held on August 1, 1977 at which, based on the evidence and argument of the parties the issue was narrowed to whether the rates of pay for employees operating the New Eastman Color Negative II Processor (ECN II) under the separate agreement between Local 702 and DuArt dated September 17, 1975 are "base rates" within the meaning of my Opinion and Award in Radiant - Technicolor. (Presumably the parties felt that with a determination on that they would be able to calculate the pay of working
foreman John Gazaway under Section 16(e) of the contract and under the formula established by my Award in Radiant - Technicolor. However, that remains unclear because as the Employer (DuArt) points out in its brief, the parties have yet to fully litigate, and I have not decided whether "merit increases" are part of "base rates" within the meaning of Section 16(e), and also unlitigated is the question, apparently involved in the instant case, of whether the pay of a working foreman may be compared with an employee within his Department but who works a different shift.)

In Radiant - Technicolor I stated inter alia:

"The parties must have meant that there be a difference between regular pay and base rate, because they used two different terms;"

and

"....I must conclude that "base rates" are more often, and probably most often, the rates found in Schedule A of the contract."

Though I gave some examples of circumstances under which a "base rate" would be higher than the rates set forth in Schedule A, I stated that a base rate "does not include incentive earnings, premium pay, shift differentials or fringe benefits."

In the instant case I do not find that the rates of pay for the Color Wet Developer Type 3 and the Dry End Man Color Type 3 on the ECN II machine, as set forth in the agreement between the parties of September 17, 1975, fit within the categories of exceptions to which I referred in Radiant - Technicolor. Rather I conclude that the instant disputed rates constitute Schedule A "base rates" plus a bonus of $.45 and $.30 an hour respectively
when the machine is operated by a crew complement of two.

The separate agreement of September 17, 1975 uses the phrase "special rate." As in Radiant - Technicolor, I must conclude that the parties meant those rates to be different from the "base rates" because they used a different identifying phrase. Had they intended the rate for the two operators, made up of the Schedule A rate for a negative developing machine plus $.45 and $.30 per hour respectively, to constitute the "base rate", they could and should have said so. But they did not. Instead they referred to it as a "special rate", which in my judgement, meant a base rate to which something else is added, in this case a bonus or an incentive of $.45 and $.30 per hour respectively, as a quid pro quo for a willingness to run the machine with only two operators.

The memorandum itself is also supportive of a conclusion that the rates of pay are in excess of a contractual "base rate." It expressly provides for the circumstance under which the "special rate" is cancelled. So long as the machine is operated with a complement of two men the special rate is applicable, but when the machine is run on a continuous basis, the crew complement is then increased to either three or five in accordance with the manning provisions of the Negative Developing Department as set forth in the contract, and the "special rate" is cancelled. To my mind that means that under circumstances where the crew complement coincides with the contractual manning requirement for negative
developing, the operators receive the Schedule A base rate. When the crew is reduced to two, those operators are paid more than the base rate i.e. a bonus or an incentive for the extra work or attention required by the reduction in complement. Because they are demonstrably different, I am unable to conclude that the higher "special rate" for two operators, and the lesser Schedule A rate for a complement of three or five operators are both synonymous with "base rate."

Because it is not certain that with this determination Gazaway's pay can be calculated under Section 16(e), it is my ruling that the Arbiterator's fee for this proceeding thus far be shared equally by the parties.

AWARD

The "special rates" set forth in the separate agreement between Local 702 and DuArt dated September 17, 1975 are not "base rates" within the meaning of Section 16(e) of the contract or my Award in the Radiant-Technicolor case dated May 24, 1977.

The Arbiterator's fee shall be shared equally by the parties.

DATED: December 1, 1977
STATE OF New York )ss.
COUNTY OF New York )

On this first day of December, 1977, 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

I.U.E., Local 218

and

General Electric Company

CASE NUMBER: 1130-1659-76 CR. ND 48956 (Jesse Hawkins)

AWARD OF ARBITRATOR

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated 1973 - 1976 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The discharge of Jesse E. Hawkins was for just cause.

Arbitrator's signature (dated)

STATE OF New York
COUNTY OF New York

ss:

On this 27th day of June, 1977

before me personally came and appeared

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In The Matter of The Arbitration between
International Union of Electrical, Radio and Machine Workers, Local 119: AFL-CIO and
General Electric Company
Philadelphia, Pennsylvania

The stipulated issue is:

Did the Company violate Article VIII, Section 3 (b) of the 1973-1976 GE-IUE National Agreement when it did not grant service credits to 47 named employees in Group 50 in the Relay and Component Operation for the period July 31, 1975 to September 8, 1975? If so, what shall the remedy be?

A hearing was held at the Philadelphia offices of the American Arbitration Association on May 18, 1977 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. Both sides filed post-hearing briefs.

On July 30, 1975, at approximately 3:30 PM after receiving their pay checks for the annual plant vacation shutdown, the employees referred to in the stipulated issue went on strike. The plant vacation shutdown began on August 4 and lasted until August 17, 1975. Those employees returned to work on September 8, 1975.

The question posed by the parties in this case is a narrow
one. It is whether during the period from August 4, 1975 to August 17, 1975 the forty-seven employees referred to in the stipulated issue were on vacation or on strike.

There is no dispute that between 3:30 PM on July 30, 1975 and the beginning of the vacation shutdown on August 4, 1975 the involved employees were on strike; and it is equally undisputed that from the end of the plant vacation shutdown on August 17, 1975 to September 8, 1975 the employees were also on strike.

The Union contends however that during the period of the plant vacation shutdown the employees were on vacation and were not on strike. The Company asserts that the strike was continuous from July 30th until September 8th. It is agreed that if the employees were on vacation they would be entitled to service credits pursuant to Article VIII, Section 3(b) of the contract, but if they were on strike they would not be entitled to service credits under that provision of the contract.

I interpret the Union's argument to be that a strike took place from July 30th to August 4th; that the strike then ended by virtue of the annual plant shutdown; that the strike began again on August 17 when the plant shutdown ended and continued to September 8, 1975. I cannot accept this analysis of the events. Strikes end in many ways by definitive notice of its termination by the Union and/or employees involved; by a bilaterally negotiated settlement with the employer; and by circumstances indicating an abandonment of the strike by the Union and/or the employees. But
I am not persuaded that there is a "constructive end" to the strike by the mere intervention of a scheduled annual plant shutdown. This is especially so in my view when, undisputedly, the strike commenced before the plant shutdown and employees were still or again on strike when the shutdown ended.

I see no reason why the status of the affected employees should not be deemed consistent with the facts. The facts are, as I see them, that during the disputed period the employees were on strike and also on vacation. That is what actually occurred, and I see no reason why those particular and unique circumstances should be considered mutually inconsistent. The strike was no more ended by the bare intervention of the plant vacation shutdown, then was the vacation period attendant to that shutdown ended by the strike. The two conditions factually existed side by side and simultaneously, and I see no reason to construe either pre-eminent to the other.

The question then is whether the employees are entitled to service credits for a period of time during which they were both on strike and on vacation. For several reasons I answer that question in the negative.

The Company concedes that service credits are given for periods of vacation. The Union concedes that service credits are not given for periods of strikes. And that has been the practice. There is no practice, nor agreement, nor anything in the contract to base the grant of service credits for a period of time during
which both circumstances take place.

The only variation to the foregoing is the Company's concession that it does grant service benefits for strikes of no more than two weeks duration. But that concession is supportive of the Company's position in this case. It appears, persuasively, that the practice of granting service credits for strike periods no greater than two weeks has been a Company policy and practice which the Union has accepted and which inter alia was in the implementation of an internal Company Employee Benefits Bulletin interpreting the collective bargaining agreement, promulgated in the 1950's and reissued in 1969. That Company interpretation covered various circumstances of overlapping periods of strikes and vacations, and set forth when, under the contract, service credits would or would not be granted.

At no time over the ensuing years, including the various contract negotiations, did the Union dispute, repudiate or seek to change those interpretations and there is little doubt that the Union knew of, if not officially notified of, the full content of those interpretations.

Standing alone, an internal and unilateral Company Bulletin is not conclusively binding on the Union. However, it is apparent to me that over the years the Union accepted those parts of that Bulletin which were beneficial to it, namely for example, service credits for strikes of no more than two weeks, service credits for an employee who was on vacation at the time that a strike
commenced, and service credits for employees whose vacation commencement coincided with the beginning of a strike. Now, however, that the instant circumstances have arisen for the first time, namely the commencement of a strike prior to the beginning of the vacation, the Union claims that it is in no way bound by that portion of the Company's Bulletin which precisely covers the instant set of circumstances. Specifically, the Bulletin states in pertinent part:

When a strike commences prior to the start of a scheduled vacation, an employee who is "on strike" as defined in the first paragraph on page one, is considered to be "on strike" for the full period of such strike -- notwithstanding the fact that he may have drawn his vacation allowance preceding the strike -- and accordingly will receive no service credits if the strike exceeds two weeks.

And there is no contract provision on this circumstance.

The inconsistency of the Union's position is obvious. It cannot treat the Company's Bulletin and the policies implemented therefrom, as a "chinese menu." It cannot pick out of it the things that it likes and reject the things it dislikes, especially when as here, the things it likes and the benefits it has enjoyed are rooted in that Bulletin and are not to be found in the collective bargaining agreement.

I agree with the Company that to grant the Union's grievance would be to give the Union a contract benefit which it
repeatedly failed to obtain in contract negotiations. During several negotiations the Union sought to obtain service credits for periods of strikes. That demand was never agreed to by the Company and the Union never obtained that benefit. If, in the instant case the disputed period was deemed to be solely a period of vacation, the employees who commenced a strike on July 30, 1975, and did nothing demonstrably thereafter to end the strike until September 8, 1975, would receive service credits for a strike spanning that entire period. In my view that would accord the Union and employees the very benefit which the Union failed to obtain in negotiations. That the employees are and have been receiving service credits for strike periods of no more than two weeks is the outside limit of what the Company has done, and is required to do. To interpret the contract reference to "absences of longer than two weeks" to include strikes of two weeks or less is not to be found in the contract, but comes from portion of the Bulletin which reads:

a. An employee who is "on strike" as defined on page 1, shall receive the following service treatment:

1. Service credits will be granted to all such employees and will be included in their record of continuous service for any period of absence during a strike where the strike does not exceed two weeks.

The burden is on the Union to prove that by the terms of the contract, or the implementation or practice thereunder,
service credits are to be given for a period of time longer than two weeks during which employees are both on strike and on vacation. The Union has not and cannot do so. Accordingly the Union has failed to meet its burden of proof in this case, leaving the matter not for arbitration, but for negotiations.

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 Article VIII, Section 3 (b) of the 1973-1976 GE-IUE National Agreement when it did not grant service credits to 47 named employees in group 50 in the Relay and Component Operation for the period July 31, 1975 to September 8, 1975.

DATED: September 8, 1977

Eric J. Schmertz
Arbitrator
In The Matter of the Arbitration:
between:
International Union of Electrical;
Radio and Machine Workers, Local 707, AFL-CIO
and:
General Electric Company

OPINION AND AWARD
Expedited Case #53 30 0275 77

The stipulated issue is:

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

Mr. Corpe, hereinafter referred to as the "grievant", was
discharged for falsifying his expense account. He sought payment
for lodging in the amount of $18.28, an expense he did not incur.

There is no question that the Company has the right to
discharge an employee who falsifies an expense account. However
it is also well settled that an employer must exercise that right
uniformly and consistently with regard to all employees who commit
that offense and are otherwise similarly situated.

The grievant's case is compared with that of Howard Parry,
who nine years earlier was suspended for one week and given a
letter of reprimand for receiving meal allowances for breakfast
and lunch when in actuality he had those meals at home rather than
on the road.

I agree with the Company that there are differences between
the Parry case and that of the grievant. But I do not agree that
the differences are so sharp and material as to justify a one week
suspension for the former and the ultimate penalty of discharge for
the latter.

The Company asserts that Parry was a long service employee
and that the grievant was of "relatively short service." As I see
it, Parry with twenty years of service was a long service employee, but the grievant with eleven years of service had relatively long service tenure. The Company argues that the grievant wilfully falsified his expense account, seeking money which he did not expend; but that Parry only received meal money because it was "prepared" on the expense account. The fact is that Parry either received, or permitted the meal expense to stand, when he knew or should have known that he was not entitled to it. As I see it, as between the grievant and Parry the question of wilfullness is only a matter of degree. The Company points out that Parry had a "good disciplinary record", but that the grievant's disciplinary record was "poor." Obviously the grievant's disciplinary record has not been "good", but on the other hand I would not characterize it as "poor." His "active" record for purposes of consideration herein, includes two written warning notices, one for "failure to follow instructions" and the other for attendance infractions; and some oral admonitions for "failure to wear his uniform," but he has received no disciplinary suspensions.

The comparison of these two cases, the only ones introduced into the record which involve expense account improprieties, leads me to conclude that if Parry received a one week suspension and a written reprimand, the grievant, whose offense was only to some degree more serious, whose record was only less satisfactory than Parry's and did not include a prior disciplinary suspension, should have been disciplined more severely than Parry but not discharged.

Under these particular circumstances I think it appropriate, adequate and consistent with the way the Company handled the prior
Parry case for the grievant to suffer a disciplinary suspension for the period of time since his discharge.

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 discharge of Manuel Corpe is reduced to a disciplinary suspension. He shall be reinstated without back pay and the period of time between his discharge and reinstatement shall be deemed the period of his disciplinary suspension.

Eric J. Schmertz
Arbitrator

DATED: October 7, 1977
COUNTY OF New York   )ss.: 
STATE OF New York 

On this seventh day of October, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Was there just cause for the discipline imposed on forty identified employees for their conduct on April 29, 1977 which the Company alleges was in violation of Article XIV, Section I of the contract? If not, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on June 28, 1978 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. A stenographic record was taken, and the Company filed a post-hearing brief.

The Company disciplined each of the forty grievants with a warning letter for their alleged violations of the "no strike" provisions of the contract.

I conclude that the forty identified grievants engaged in a work stoppage for about one hour on April 29, 1977 within the meaning and proscriptions of Article XIV Section I of the contract. It is apparent that they did so to protest the Company's action of
turning off the heat in the plant and the reduced temperature that resulted.

Assuming the accuracy of the Union's position on how cold the plant became, I do not find that it created such an unsafe or otherwise exceptional condition as to constitute a "safety exception" to the rule that disputes are not to be dealt with by a work stoppage but rather are to be grieved and arbitrated. The plant may have been more cold than warm, but it was not imminently dangerous to the employees, a condition which must be present to properly invoke the "safety exception" to the aforementioned rule. Moreover, I do not believe that the then temperature level required wearing outer clothes, which, if so required, might interfere with the safe operation of the machines. Hence it is immaterial whether some employees wore them that day. Thus if the Union protested the Company's policy of turning off the comfort heat in April, or if the work conditions were uncomfortable because of the reduced temperature, those matters should have been grieved and if not resolved, arbitrated, under the available grievance and arbitration provisions of the contract.

Additionally, if, as the record seems to indicate, the Company acted disingenuously by attributing the lack of heat to a mechanical problem, and only later disclosing that it was due to its policy to shut off heat annually in April (a policy which had been followed and known to the Union and the employees in prior
years), that too is exclusively for the grievance and arbitration provisions of the contract. As I see it, the arbitration forum is fully capable of redressing that matter and those circumstances either by arbitral directives for the future and/or by admonitions to the Company, if the arbitrator finds that the Company either misled the Union and the employees about the real reason for the lack of heat, or that the Company's policy was unreasonable or a contract breach. If the present grievance and arbitration provisions of the contract are not jurisdictionally adequate or not expeditious enough to handle such immediate matters, that problem must be left for collective bargaining, and not for self help.

The instant facts, though indicating some lack of frankness by the Company representatives with the employees and the Union, for which I am critical of the Company, did not however rise to the level of provocation which would excuse the work stoppage.

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

There was just cause for the discipline imposed on forty identified employees for their conduct on April 29, 1977.

DATED: October 9, 1977

[Signature]

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

International Union of Electrical, Radio and Machine Workers, Local 301: AFL-CIO

and

General Electric Corporation

OPINION AND AWARD
Case #15 30 0217 77

The stipulated issue is:

Did the Company violate Article XXVIII, Section 1 of the 1976-1979 GE-IUE National Agreement and the Local Understanding on Job Posting and Upgrading on November 22, 1976 when Frederick Berg was upgraded to Group Leader-Foundry Service rather than Merlin Luther Dexter? If so, what shall the remedy be?

A hearing was held in Schenectady, New York on July 11, 1977 at which time Mr. Dexter, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record of the proceedings was taken, and the parties filed post-hearing briefs.

Article XXVII Section 1 reads:

1. Standard for filling open jobs and upgrading

The Company will, to the extent practical, give first consideration for job openings and upgrading to present employees, when employees with the necessary qualifications are available. In upgrading employees to higher rated jobs, the Company will take into consideration as an important factor, the relative length of continuous service of the employees who it finds are qualified for such upgrading.
The foregoing contract language, particularly the phrase:

"...who it finds are qualified for such upgrading." (emphasis added)

vests the Company with the unilateral and discretionary authority to determine which employees are qualified to be given consideration for a promotion. Of course the Company may not abuse that discretion or exercise it in an arbitrary or capricious manner.

In the instant case the Company determined that the grievant was not qualified for promotion to the job Group Leader-Foundry Service despite his conceded qualifications in his incumbent position, Foundry Service, and despite his significantly greater seniority than that of Frederick Berg, who was given the promotion.

It cannot be seriously disputed that a Group Leader job requires not only leadership abilities but also the capability of working cooperatively and smoothly with both supervision and whatever group of employees are assigned to the Group Leader. Consequently, leadership attributes and a work history of dealing with supervision and in directing groups of employees are relevant in judging qualifications for upgrading to the Group Leader classification.

Considering the substantial evidence adduced by the Company regarding the grievant's resistance to supervisory instruction; his abrasive and argumentative attitude toward other employees; his reluctance to follow certain safety requirements; and some disciplinary problems, I cannot conclude that the Company either abused its discretion or acted arbitrary or capricious in
determining that he was not qualified for the Group Leader-Foundry Service job. It is undisputed that Berg had none of these disabilities.

The Union's principal point in support of the grievant, namely his service as an acting foreman in the Department, when examined, is not supportive of the grievant's claim for a promotion. His service as Acting Foreman, in my judgement, was for too short a period of time to be determinative, and significantly, during that tenure he expressed in unmistakable terms his dislike for the job and sought to be relieved of it. That circumstance reasonably demonstrates an unsuitability for a job requiring not only leadership capabilities but a proper leadership attitude.

Assuming arguendo that the grievant met the requisite qualifications for upgrading to the Group Leader position, the foregoing contract provision would still not mandate his promotion. The relevant contract clause does not require the Company to promote the senior employee if he is qualified. Instead it requires that the Company "take into consideration as an important factor" the relative seniority of those qualified.

In the instant case, despite the Union's assertion to the contrary, I am satisfied that the Company did consider the grievant prior to making its determination that he was unqualified. The consideration was informal, and he was not interviewed. But I do not find a contractual obligation to undertake formal interviews or other structured procedures in order to meet the
"consideration" requirement of Article XXVII Section 1. And, on the assumption that the grievant's record in dealings with supervision and other employees, as previously referred to, did not render him unqualified, I still cannot conclude that the Company's selection of Berg was an abuse of the Company's discretion, arbitrary or capricious, or violative of Article XXVIII Section 1. Though the grievant's greater seniority is "an important factor", the Company's conclusion that his negative work attitudes and expressed dislike of the only leadership function he ever performed outweighed his greater seniority, was not inconsistent with the evaluative rights of the Company under Article XXVIII Section 1 of the contract.

In view of the agreement of the parties that the "Job Interest Card" is not involved in determining the issue in this case, I find nothing in the Local Understanding on Job Posting and Upgrading which would change the foregoing conclusion.

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 Article XXVIII Section 2 of the 1976-1979 GE-IUE National Agreement and the Local Understanding on Job Posting and Upgrading on November 22, 1976 when Frederick Berg was upgraded to Group Leader-Foundry Service rather than Merlin Luther Dexter.

Eric J. Schmertz
Arbitrator
DATED: October 13, 1977
STATE OF New York ) ss.:
COUNTY OF New York )

On this thirteenth day of October, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[Signature]

VALERIE R. HANSEN
Notary Public State of New York
No. 30-557063
Qualified in Nassau County
Term Expires March 30, 19...
The Undersigned, duly designated as the Arbitrators under the arbitration agreement between the above named parties and dated June 25, 1975, and having duly heard the proofs and allegations of said parties, make the following AWARD:

1. Based on the record the fourteen District Agents involved participated in a violation of Article IV of the collective bargaining agreement on September 2, 1975. The one day disciplinary suspension and the warning letters given to each of them are upheld.

2. In the interest of due process under evidentiary rules for establishing the occurrence of a "concerted action" the individual grievants or the Union on their behalf shall be accorded the opportunity to expunge the foregoing disciplinary penalties by proving to the Company that not only did they not make in-person collections of premiums on their debits during the period from the prior Thursday, but that in fact there were no mailed in premiums in their mail boxes or otherwise available for deposit on September 2, 1975. Appeals under this portion of the AWARD shall be subject to the grievance and arbitration provisions of the collective bargaining agreement.
Sam B. Wander
Concurring in No. 1
above.
Dissenting from No. 2
above.

Frank H. Zaruba
Dissenting From No. 1
above.
Concurring in No. 2
above.

DATED: May 10, 1977
STATE OF New York )ss.
COUNTY OF New York)

On this tenth day of May, 1977, before me personally
came and appeared Eric J. Schmertz to me known and known to me
to be the individual described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same.

DATED: May 1977
STATE OF
COUNTY OF

On this of May, 1977, before me personally came
and appeared Sam B. Wander to me known and known to me to be
the individual described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same.

DATED: May 1977
STATE OF
COUNTY OF

On this of May, 1977, before me personally came
and appeared Frank H. Zaruba 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 VI of the collective bargaining agreement effective June 25, 1975 between John Hancock Mutual Life Insurance Company, hereinafter referred to as the "Company", and Insurance Workers International Union, AFL-CIO, hereinafter referred to as the "Union", the Undersigned was designated as the Chairman of a tripartite Board of Arbitration to hear and decide, together with the Union and Company designees to said Board the following stipulated issue:

Whether the 14 district agents involved participated in a violation of Article IV of the collective bargaining agreement on September 2, 1975, and if so, whether the disciplinary action taken by the Company as outlined in the letters of September 29, 1975, was warranted? And if not, what shall be the appropriate remedy?

Hearings were held at the offices of the American Arbitration Association in New York City on September 16 and 17, 1976 at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and examine and cross-examine witnesses. Messrs. Sam B. Wander and Frank H. Zaruba served respectively as the Company and Union designees to the Board of Arbitration. Follow-
The fourteen district agents involved, hereinafter referred to as the "grievants", are charged with engaging in a "concerted action" within the meaning and in violation of Article IV, by refusing or willfully failing to make deposits of premium collections or "mail payments" on Tuesday September 2, 1975, a scheduled "report" day.

The Company contends that the grievant's action constituted a "slowdown" as defined by the following portion of Article IV:

"The term 'slowdown' as used in this Article shall mean, but not by way of limitation, concerted action by a group of Agents for the purpose of coercing the Company into granting their demands by the willful cessation or reduction of normal business activity."

There is no dispute that under Paragraph C of Article IV the Company "may discipline ..... any District Agents participating in or encouraging ..... slowdown during the term of this contract ....." In the instant case the Company imposed a one day disciplinary suspension on each of the grievants, and gave each a written warning.

It is also uncontested that the Company procedure and policy requires Agents to deposit premiums collected or received during the prior week, on the first office report day each week, (usually Tuesday), and to particularize and update those collections (as to source and policy credit) on the next office report day (usually Thursday).
The Company scheduled Tuesday September 2nd as the first "report" day following the Labor Day weekend. It is undisputed that each of the fourteen grievants made no deposits that day.

The Company's case is simply that it is beyond reasonable explanation, except as a concerted action, for a group of Agents to have made no premium collections or received no mail payment premiums for deposit on that day; that for all fourteen not to make deposits was their collective angry response to the Company's change in the report day from the Wednesday following Labor Day weekend to the earlier Tuesday of September 2nd, and that their group action was a "willful cessation or reduction of normal business activity" as proscribed by Article IV of the contract.

The Union vigorously denies any concerted action or slowdown by the grievants. It argues, together with the testimony of some of the grievants, that none of the grievants collected premiums during the period from the prior Thursday to Tuesday, September 2, 1975; that it was not their practice to open their mail and deposit mail payments on a Tuesday "report" day (but held the mail payments received or available on that day for the following Thursday); that the absence of collections during this period is explained by the Labor Day weekend; that at least two of the grievants could not be held responsible for failure to deposit collections because one was on vacation during the preceding week and the other took the time off from work because
of family commitments (Messrs. Valenti and DePalma respectively); and that in any event the Company has produced no evidence of collusion, explicit cooperation between or among the grievants, instructions from one or more to the others, or any other indicia of understandings to collectively withhold deposits which are the requisites of any legal conclusion that a "concerted action" was undertaken. And finally, that the test of a concerted action within the meaning of Article IV has not been met, because the Company has not shown that the grievants acted "for the purpose of coercing the Company into granting their demands ......."

The parties need not be reminded that this is a civil, disciplinary case where the standard of proof is less than is required in criminal and possibly other statutory proceedings. As in other similar civil matters, such as unfair trade allegations, price fixing, or civil conspiracies, the charge of "concerted action" may be proved and satisfied by other than direct evidence of collusion, coordinated group participation or a collectively planned and executed action. Rather a "concerted action" like price-fixing, monopolistic practices and conspiracy may be proved by substantial evidence of unusual surrounding circumstances which defy other reasonable or logical explanations, which go beyond the bounds of reasonable coincidence, and which sharply exceed the parameters of ordinary probability. Based on the record before me the instant case meets this latter circumstantial test, at least for disciplinary purposes.
I do not accept either the testimony or the assertion that it has not been the practice of the grievants to deposit on Tuesdays, mail payments that are in their mail boxes on those days. The Company's testimony that the debits of the grievants were of the types on which eighty percent of the premiums were paid by mail, stands unrefuted on the record. Coupled with the statements of those certain grievants that their normal deposits or recordings of premiums collected, on the regular Tuesday office report days range from $100 to $600 or more, leads to the inescapable conclusion that the bulk of the deposits come from payments mailed in. It follows that on Tuesdays, the payments deposited and recorded on that day, came, in the regular course, from mail paid premiums which are in the mail boxes of the agents when they report in each Tuesday. Consequently for fourteen of twenty District Office Agents not to examine, open and/or make use of what was in their mail boxes on September 2, 1975 was not only contrary to both their individual and collective past practice, but to deem it simply as an act of each agent individually is beyond the bounds of coincidence or reasonable probability. Rather the only logical and acceptable explanation is that in some form or other the fourteen grievants, out of the twenty Agents in that office, agreed collectively and in concert to vary their regular practice and not make use of the premiums in the mail whether or not they made any in-person collections during the preceding week.
In support of the foregoing conclusion I am satisfied that because of the quantity of deposits on prior Tuesdays as a matter of practice, and because of the undisputed fact that eighty percent of the premiums on the debits involved were paid by mail the Company had reasonable grounds to believe and conclude that the grievants had payments in their mail boxes on September 2 which they could have used to make the deposits requested by the District Office Manager. On that basis the Company has made out a clear prima facia case of the availability of mail paid premiums. For reasons later stated, I hold that under that circumstance any grievant to whom that situation did not apply had the duty to explicitly demonstrate his different status. The mere additional assertion by the Agents that they did not know whether such premiums were available, or did not know if they had mail in their mail boxes, are inadequate arguments in rebuttal. And that includes Messrs. Valenti and DePalma, who, even if excused from in person collections during the preceding week when they were respectively on vacation or on personal business failed to satisfactorily explain their failure to use mailed in deposits when both of them were in the office on Tuesday, September 2, and knew at the latest on that day that it was a scheduled day for "reporting-in" and making deposits.

On the matter of probability, it is uncontested that an individual agent only rarely has no deposits to make on a
Tuesday for the period from the preceding Thursday. It is also unchallenged that never before has such a large group (i.e. fourteen) had no deposits to make. The latter circumstance is not only unprecedented but defies probability, and consequently, constitutes probative evidence of a willful and concerted plan by the individuals involved.

The suggestion that fourteen agents had nothing to deposit on September 2, 1975 because of the intervening Labor Day weekend is not persuasive. The Company offered substantial evidence to show that in other similar situations where there was an intervening holiday on the day before a reporting day, the agents made significant and representative deposits consistent with their regular averages. Consequently for the Tuesday following Labor Day to be so radically different is, as part of the total picture, further probative evidence of a collective plan or concerted action to withhold deposits.

To my mind, any inconclusiveness with regard to the foregoing analysis is ended when viewed against the backdrop of what the Company characterizes as prior "job actions" by most of the same agents involved in this case. The Company has offered testimony and evidence of at least two prior collective actions by twelve or thirteen of these grievants. In January 1975 they conducted or participated in a union meeting during regular office hours and later in the same month failed to come to work on time, calling in large numbers with the same excuse
- car trouble. The Company officially characterized both incidents as violations of Article IV of the contract, and though the Union protested that characterization, the grievance it filed in response to disciplinary action taken with regard to one of them was not carried to arbitration. Hence the Company's characterization, unchallenged by the Union to the point of adjudication, must stand as part of the prior record of this district office and of virtually all of the grievants involved in the instant incident. In short, based upon earlier events, I must conclude that the circumstantial factors surrounding the September 2, 1975 incident add up to substantial evidence of another in a series of concerted actions or "self help" by these employees in protest over some decision or action by the Company.

Finally, I disagree with the Union's contention that the Company cannot prove a concerted action because it has not shown a "purpose of coercing the Company into granting (a) demand." The record adequately establishes that the grievants had a motive or purpose for their refusal or failure to make deposits. Clearly, they were objecting to the change in the reporting day following Labor Day from Wednesday to the earlier Tuesday. Indeed, when the District Manager learned that deposits were not being made, and inquired of the Union office representative as to the reason or whether "there was a problem", Mr. Juliana candidly indicated that there had been too many
changes in the office; that Wednesdays and Thursdays had been the reporting days and that the change to a Tuesday report day was "too many changes." Though Juliana also stated that the agents didn't have any money to deposit because it was Tuesday after Labor Day, I am persuaded that his statement reflected and represented the collective anger of the grievants over the change from a Wednesday report day to the earlier Tuesday. Therefore it is both logical and reasonable to conclude that what the grievants intended was to force the Company into rescheduling report days following holidays and to generally protest, and change what the grievants viewed as "too many changes" in that district office, following the arrival of District Manager Guralnick. I consider this enough to meet not only the general test of purpose or motive in connection with establishing a "concerted action" from surrounding circumstances, but also to meet the test of the meaning of the term "slow down" in the second paragraph of Article IV of the contract.

A word on the burden of proof. I have held that based on well settled evidentiary rules, a series of circumstances may, cumulatively constitute probative evidence of concerted action by a group of employees similarly situated, without the need of proving the willful involvement of each member of the group. For disciplinary purposes direct evidence of the explicit participation, collusion and active cooperation of each member
of the group or other direct "smoking gun" evidence is not essential to prove the elements of concerted action as a civil offense. On balance, a different rule would unduly impede redress of concerted abuses of contract requirements because of the difficulty in proving that those involved acted as a group or in concert. Of course there is always the danger that some innocent individual may be caught up in what is deemed to have been a group action. In that event the investigative and adjudicatory process must afford any such individual full due process opportunity to establish non-involvement. But the burden is on such an individual to come forward with probative evidence which would distinguish him from the group with which he appears to be identified. Here, the grievants did not do so, or their defenses were inadequate to meet that burden. Accordingly I uphold the Company's case herein, but because the Union and the grievants may not have anticipated that burden, I shall reserve the right of any of the grievants to present to the Company evidence of their non-involvement in the events of September 2; particularly that they not only made no in-person collections of premiums from the prior Thursday but that in fact there were no mail payment premiums in their mail boxes or otherwise available for deposit on the reporting day of September 2, 1975. Any such appeals by any of the individual grievants or the Union on their behalf will be subject to the grievance and arbitration provisions of the collective bargaining agreement.

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Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Insurance Workers International Union, AFL-CIO and

John Hancock Mutual Life Insurance Company

AWARD OF ARBITRATORS

Case #13 30 0269 76

The Undersigned, duly designated as the Arbitrators under the arbitration agreement dated June 25, 1975 and having duly heard the proofs and allegations of the above named parties make the following AWARD:

The termination of Agent Douglas Bussing was for just and sufficient cause under the terms of the collective bargaining contract and was with due regard for his reasonable rights.

---

Eric J. Schmertz
Chairman

Neil Smith
Concurring

Arthur H. Higginson
Dissenting

DATED: August 8, 1977
STATE OF New York )ss.: COUNTY OF New York )

On this eighth day of August, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Insurance Workers International Union, AFL-CIO

and

John Hancock Mutual Life Insurance Company


OPINION OF CHAIRMAN

Case #12 30 0269 76

In accordance with Article VI of the collective bargaining agreement effective June 25, 1975 between John Hancock Mutual Life Insurance Company, hereinafter referred to as the "Company", and Insurance Workers International Union, hereinafter referred to as the "Union", the Undersigned was designated as the Chairman of a tri-partite board of arbitration to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

Whether the termination of Agent Douglas Bussing was for just and sufficient cause under the terms of the collective bargaining contract with with due regard for his reasonable rights? If not, what should be the remedy?

Hearings were held in Bridgeport, Connecticut on March 15th and 16th, 1977 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. Messrs. Neil Smith and Arthur H. Higginson served respectively as the Company and Union arbitrators on the Board of Arbitration. The Arbitrators' Oath was waived. The Board of Arbitration met in executive session on August 8, 1977.
Let me come right to the point, as I see it. I do not find in this case that the Company imposed specific productivity standards on Mr. Bussing or that he was discharged for failing to meet any such explicit standards.

Hence, what is not part of this case is whether the Company can establish specific production standards or minimums, or whether any such policy if applied to Bussing or otherwise would be a proscribed effort by the Company to obtain what the Union asserts the Company failed to obtain when it withdrew Demand #9 in the 1975 contract negotiations.

Rather, in this case I find and conclude that Bussing was terminated for failure to sell insurance in reasonable amounts. That obligation I find to be a fundamental and inherent obligation attendant to his employment, whether or not the contract contained the language "will sell the products of the Company... ..." as found in Article XVI Section 2. I am persuaded that that language was negotiated into the contract as a codification of the implicit and inherent obligation of an agent to sell insurance policies in reasonable amounts.

To my mind, an agent's sales activities must be sufficiently quantative in terms of selling the Company's product in order to make his continued employment economically tolerable if not worthwhile. Without particularizing herein there can be no serious dispute Bussing's sales record for an extended and relevant period of time was manifestly unsatisfactory and below
any level of reasonableness. His exceedingly poor sales record continued unimproved after several warnings and after he was given specific opportunities by the Company to improve. The record amply demonstrates that for a lengthy and continuing period his sales income was considerably less than what the Company was obligated to pay him in guaranteed wages and benefits. By comparison with others similarly classified his sales record was by far the worst, achieving such a small percentage of the average of others as to be incontestably unreasonable in quantity.

In that regard, without any consideration of specific sales standards, he failed to meet an essential condition of his job; a condition I have held to be an implicit and integral part of the employment relationship, and per force therefore, an obligation of an agent under the contract.

I conclude that it was on that ground, namely that he failed to sell insurance in reasonable quantities, that the Company imposed the discharge penalty. That circumstance meets the "just cause" test within the meaning of the collective bargaining agreement.

The Union asserts that the Company failed to give "due regard" to Bussing's reasonable rights by not transferring him from the Office Debit he occupied when he was terminated to a Regular Debit where he had worked earlier. I cannot agree with the Union's assertion. I find nothing in the contract which obligated the Company to make that transfer. It could have done
so but was not required to do so. The earlier arbitration case involving Mileski upheld the Company's right to assign agents from an Office Debit to a Regular Debit when the former debit was eliminated. But that Award does not require the Company to accord any such transfer or reassignment to an Office Debit agent when his productivity is unsatisfactory. Moreover, the record is unclear as to whether the Office Debit or the Regular Debit affords greater sales and earning opportunities. For that reason and also in view of his previously expressed objections to any such transfer I cannot conclude that Bussing would have done better if the transfer had been made, even assuming that a Regular Debit was available (which the Company disputes).

In sum I find that the Company discharged the grievant for failure to make sales in reasonable amounts and that the obligation of an agent to do so, as codified in Article XVI Section 2 of the contract, is an implicit and inherent requirement which existed even before that contract section was negotiated. Bussing was not discharged for failure to meet any specific productivity level nor because he failed to comply with a plan or policy which attempted to impose or implement the establishment of specific productivity standards. As the Company was not obligated to affectuate his transfer to a different debit, and because it appears most unlikely that any such transfer would have helped Bussing's sales record, the Company did not fail to give
due regard to Bussing’s reasonable rights. Accordingly the
grievance is denied and the discharge is sustained.

August 9, 1977
In accordance with Article XX Step 5 of the collective bargaining agreement dated March 6, 1973 between the Glass Bottle Blowers Association, Local 145, hereinafter referred to as the "Union", and Johns-Manville Products Corporation, hereinafter referred to as the "Company", the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Is the grievant Richard Hoffman entitled to holiday pay for Memorial Day and July 4, 1975 under the terms of the collective bargaining agreement?

A hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on March 11, 1977, at which time representatives of the Union and Company and Mr. Hoffman, hereinafter referred to as the "grievant", appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Subsequent to the hearing the parties waived the contractual time limit for rendition of the Award.
The grievant was on a medical or disability leave of absence from May 12 to August 11, 1975. The two holidays for which he claims holiday pay fell within that period. The pertinent contract section is Article XV Sections 1 and 2. Section 1 includes Memorial Day and July 4th as paid holidays. Section 2 reads:

> On each of the above holidays, all employees shall be paid for eight (8) hours at their straight-time job rate whether or not they performed any work, provided that the employee works his scheduled day first preceding and next following the holiday and on the holiday if scheduled by the Company. These requirements do not apply where the employee has been excused by his supervisor.

The Union contends that the grievant meets the requirements of Section 2. It claims that he worked "his scheduled day first preceding and next following the holiday...." It argues that the last day he worked before beginning his medical or disability leave constituted "his scheduled day first preceding....the holiday", and that the day he returned to work from that leave of absence was his "scheduled day next....following the holiday...." Alternatively the Union asserts that the grievant's medical or disability leave of absence meets the test of an "excuse" from the Section 2 requirements within the meaning of the last sentence of that Section. Moreover the Union claims that other employees have been granted holiday pay while they were on leaves of absence, and that arbitration cases generally support the Union's interpretation of the foregoing contract.
The Union's case is not persuasive. The parties no doubt are familiar with the statement that "the facts may be within the letter of the law but not within its intent." I am convinced that Section 2 of Article XVII was not intended to apply to employees on medical or disability leaves of absence. Rather it presupposes that an employee is actively employed at the time that a paid holiday occurs. The requirement that the employee be scheduled work days before and following the holiday is obviously designed to discourage stretching the holiday into additional time off. To deem the last day that the grievant worked and the first day of his return to employment following his disability leave, as meeting the requirements of "working his scheduled day preceding and following the holiday" is a tortured and unorthodox interpretation. And to interpret a leave of absence as equivalent to having been "excused by his supervisor" is similarly insupportable and unreasonable.

Moreover, a medical or disability leave of absence is without pay. An employee on such a leave of absence is not actively employed. To grant him holiday pay during that period of time is inconsistent with the non-pay status of the leave and contrary to the previously enunciated principle that Section 2 is applicable to employees actively employed at the time the holiday occurs.

So far as "past practice" is concerned the Union was able
to show only one instance in which an employee on a similar leave of absence received holiday pay for a holiday which fell within the period of his leave. Contrarywise the Company demonstrated that in all other cases, and there have been a significant number, holiday pay was not given to employees while on medical or disability leaves. Therefore, if there has been a past practice, it has been overwhelmingly contrary to the Union's position herein.

Finally, the Union cites several arbitration decisions in other contractual relationships which purport to support the Union's contentions herein. Not only are those cases not binding because they evolved from different contractual relationships, but my research discloses a significant number of arbitration cases, probably a majority, which hold the other way.

For all the foregoing reasons the grievance is denied.

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

Richard Hoffman is not entitled to holiday pay for Memorial Day and July 4th, 1975.

DATED: April 28, 1977

[Signature]
Erich J. Schmeretz
Arbitrator
The stipulated issue is:

Is the Company in violation of the contract by assigning non bargaining unit employees to perform the work of servicing and gassing milk delivery vehicles? If so what shall be the remedy?

A hearing was held on August 18, 1977 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 parties filed post-hearing briefs.

With the closing of the "milk city" location and the transfer of the milk delivery vehicles in question to other locations, the Company assigned non bargaining unit employees at the latter locations to perform the work of servicing and gassing those milk delivery vehicles which was previously performed by bargaining unit employees at the "milk city" location.

I find that this violated Section 2 paragraph 3 of the contract.

A "move of (a) depot or other facilities to any other location within the Metropolitan area" may be voluntary or involuntary
and still fall within the meaning of Section 2 paragraph 3 of
the contract. It may also be the establishment of a new facility
or, as here, a new use of an existing facility. Hence that
"milk city" was closed not by the Company, but by the owner of
that facility, requiring the Company to find other locations at
which it would service and gas the trucks it leased to various
milk companies, is no less a "move of a facility" within the
meaning of Section 2 paragraph 3 than if the Company implemented
the move on its own initiative. Section 2 paragraph 3 places no
limitations, conditions or exceptions on how or why a facility
is "moved." Accordingly I conclude that the Company's need to
find new locations to place and service the milk delivery (and
other) trucks leased to various milk companies, and its transfer
of trucks to various other locations from "milk city" to meet that
need, constituted a "move" of a "facility" to other locations
within the Metropolitan area within the meaning of Section 2 para-
graph 3 of the contract.

Therefore, under the balance of the language of that contract
clause, the collective bargaining agreement between the Company
and the Union "remain(ed) applicable and shall cover the employees
at the new location." On that basis, employees of the local 584
IBT bargaining unit had the right to be assigned, and if necessary
to follow the work they had been doing at "milk city" - namely
the servicing and gassing of the milk delivery trucks which had
been transferred from "milk city" to other locations.
I do not read the NLRB jurisdictional decisions to negate the foregoing conclusion. Those decisions decided a jurisdictional work issue between Locals 584 and 447 (both IBT) at the milk city depot. In pertinent part the decisions awarded the servicing and maintenance of non-milk trucks to Local 447 and the servicing and maintenance of milk delivery trucks to Local 584. Relying on that part of the Board's Opinion that states:

"However, at the time that Local 447 assented to the Employer's assumption of the agreement that Local 584 and Holland were parties to, it was, at least as disclosed by the record, understood that the work would encompass only the maintenance and servicing of the milk trucks at the Holland garage" (i.e. "milk city")

the Company contends that the Union's jurisdiction was and is limited to milk city, and that that jurisdiction is lost if any of the vehicles the Union serviced there are transferred elsewhere, particularly when any such transfer is for bona fide business or other legitimate reasons and especially if, as here, the Company made a good faith but unsuccessful effort to place the trucks at locations where local 584 employees could continue to service and maintain them. I do not read the Board decision that way. As I see it the Board decided which work at milk city was to be done respectively by Locals 584 and 447 under their contracts with the Company, and pursuant to the jurisdictional dispute settlement procedures of the National Labor Relations Act. The foregoing quoted portion of the Board's decision was, in my
opinion, designed to make clear that Local 584 did not have the right to claim new work or jurisdiction in connection with the servicing and maintenance of milk delivery trucks outside of the milk city location. But it does not, and in my judgement was not intended to answer the question of whether bargaining unit employees of Local 584 could follow or otherwise retain work jurisdiction over old or existing work which had been assigned to and regularly performed by them at the milk city location prior to its transfer elsewhere. That latter factual situation was not before The Board. Consequently the stated question arising therefrom, not dealt with or determined by the Board, may be answered only by resort to the applicable provisions of the collective bargaining agreement. As previously stated, the applicable contract provision is Section 2 paragraph 3, and I have interpreted it and applied it as supportive of the Union's grievance herein.

I am satisfied that the Company made a good faith effort to place the trucks in question at locations where Local 584 employees could continue to perform the disputed work. Indeed, a number of trucks not involved in this dispute were so located and Local 584 bargaining unit employees "followed that work" to the new locations. However the Arbitrator does not have the power to relieve the Company of a contractual obligation merely because of the Company's good faith efforts, or because, more specifically, the Company sought to comply with what appears to
be an understanding or "custom and practice" between the two local unions that Local 584 and Local 447 members "do not work side by side." That "understanding" is not part of the contractual obligation nor is adherence to it required by law, and therefore cannot be the basis for an arbitrator's decision, though I am cognizant of and respect the practical considerations on which it is based.

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

The work of servicing and gassing the 13 milk delivery trucks in question which was performed by Local 584 bargaining unit members when located at "milk city", but which has been done by Local 447 members at other locations following the closing of milk city and the transfer of those trucks to other locations, shall be reassigned to and continue to be performed by the Local 584 bargaining unit.

The location of that reassignment is discretionary with the Company, except that it shall be within the geographical area covered by the contract.

That this may mean that Local 584 and Local 447 members must work at the same location is neither barred by the contract nor by law. It is a matter which, if this Award is so implemented, must be worked out by the parties involved.

I find that one Local 584 bargaining unit employee whose identity is known to the parties, did suffer a period of layoff as a result of the events involved in this matter. He shall be made whole for the period of his layoff.

Eric J. Schmertz
Arbitrator
On this the twenty-fourth day of December, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Is the dispute arbitrable?
If so, was Eva King denied weekly disability income benefits by the Company's insurance carrier in violation of the collective bargaining agreement? If so what shall be the remedy?

Hearings were held in Wallingford, Connecticut on July 17 and August 22, 1977 at which time Ms. King, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Company filed a post-hearing brief.

The dispute is arbitrable. It is well settled that where the grievance alleges a breach of a specific contract provision, and where the subject matter of the grievance is the same as or reasonably related to the subject matter of the clause specified, the grievance is arbitrable. Whether the contract clause cited supports the Union's case involves the merits of the dispute, not its arbitrability.
Here the dispute concerns a claim for "Weekly Disability Income" benefits. The Union alleges a breach of Article XXVIII of the contract. That Article deals with "Group Insurance", including, specifically "Weekly Disability Income." Accordingly as the grievance involves a claim substantively related to the contract section which the Union alleges has been breached, the requirement of arbitrability has been met.

On the merits however, the grievant's quarrel is not with the Company, but rather with the Company's insurance carrier. On that basis, and under the specific conditions and limitations set forth in the last paragraph of Article XXVIII, the Company is not contractually liable if its insurance carrier, as here, declares a claimant ineligible for weekly disability income benefits.

The last paragraph of Article XXVIII reads:

In all other respects, the provisions of the above plans remain unchanged and eligibility for the increased benefits are subject to the standard practices and provisions required by the insurance carrier.

I interpret the phrase "increased benefits" set forth in the foregoing to mean the enumerated benefits of Article XVIII, including, as relevant to this case, the explicit provision for Weekly Disability Income. In my view, it would be illogical and wrong to interpret the phrase "increased benefits" to mean only the difference between the present level of benefits and the lower levels of those benefits under the prior contract. Rather, the
phrase "increased benefits" is obviously synonymous with the present benefits of Article XXVIII. Indeed it is the present contract benefit as "increased" from the prior contract that the grievant seeks in this proceeding, and what she applied for in her claim to the Company's insurance carrier.

The foregoing contract provision explicitly conditions the granting or denial of benefits on the "standard practices and provisions required by the insurance carrier." In the instant circumstance the insurance carrier, not the company, invoked certain conditions of its insurance contract to declare the grievant ineligible for weekly disability income. The foregoing contract language, negotiated bilaterally by the parties expressly subjects the granting of any of the group insurance benefits to the provisions "required by the insurance carrier." The denial of weekly disability income was pursuant to and not violative of that particular contract limitation.

I cannot accept the Union's assertion that the provisions or conditions which the insurance carrier may impose are limited to those which were part of the insurance policy at the time the collective bargaining agreement was negotiated. The foregoing clause does not restrict itself to that period of time. In my judgement the possibility of limiting conditions and provisions to those which existed when the contract was entered into, or to foreclose any later changes in conditions of eligibility, were well within the contemplation of the parties when the contract
was negotiated. Had any such time limitation been intended, the parties could and should have said so by contract language in the foregoing clause. That they did not means that they accepted the possibility that the insurance carrier might make certain changes in eligibility requirements and conditions during the contract term, to which the parties would be bound.

This is not to say that the carrier would be allowed to make major or radical changes which would actually or constructively nullify any or all of the benefits. That would be an abuse of the limitations set forth in the last paragraph of Article XXVIII. But reasonable changes are clearly allowed and are contemplated by contract language which is both contemporary and prospective. Therefore I cannot hold that the provision invoked by the insurance carrier to deny the grievant weekly disability income, even if legislated subsequent to the signing of the collective bargaining agreement, was an abuse of the foregoing contract language for which the Company must assume liability.

It should be clear that the Arbitrator makes no determination whatsoever as to whether the insurance carrier properly or improperly denied the grievant's claim for weekly disability income. Rather, his decision is limited to the holding that the carrier's denial of that claim was not a violation by the Company of the collective bargaining agreement. The grievant's rights, if any, to pursue her claim directly against the insurance carrier in whatever forum has jurisdiction, are expressly reserved.
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 dispute is arbitrable. The denial of weekly disability benefits to Eva King by the Company's insurance carrier was not a violation of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: September 1977
STATE OF New York )
COUNTY OF New York )

On this day of September, 1977, 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
United Steelworkers of America,
Local 12330, AFL-CIO
and
Allied Chemical Corporation,
Buffalo Dye Plant, Specialty
Chemicals Division

In accordance with Article IX of the collective bargaining agreement dated June 13, 1976 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

What shall be the disposition of the Union grievance #77.1.3 dated December 10, 1976?

The hearing was held on August 9, 1977 in Buffalo, New York 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 Company filed a post-hearing brief.

Following extensive reductions in the work force, the Company closed down the plant area in which the plant compactor was located. As a consequence the Company subcontracted the pick up and compacting of its trash, debris, etc. to the Niagara Sanitation Company. The bargaining unit truckdriver who previously performed this work was transferred to other assignments without loss of pay.

The Union's grievance #77.1.3 reads:

Buffalo Specialty Dye is violating the sub-contract with transportation by contracting
work with an outside company to do transportation work while there are men on layoff that could be called back to do this work. There were twenty-three Demster Boxes brought in around the plant by Niagara Sanitation. This work is done by the Transportation Department and since there are three men on layoff from the Transportation Department the Buffalo Specialty Dye Co. is going against the subcontract by contracting outside work. These men on layoff should be called back to work. This practice is unfair and unjust and should be stopped by the Buffalo Specialty Dye Co.

The Company contends that with the close-down of the entire area in which the compactor is located, the necessary utilities to support the compactor were no longer operative or available; the compactor was in poor condition; the Company's trucks were not equipped with compactor equipment; and it was necessary therefore to subcontract the pick up, removal and compacting of trash, and debris to an outside contractor whose trucks had compactor equipment.

The Union contends that the Company's action violated Article XII Section (6) of the contract entitled New Practices, and also violated subcontracting agreements dated June 13, 1976.

Article XII Section (6) reads:

New Practices

(6) Any new practice pertaining to rates of pay, hours of employment, and other conditions of employment shall be brought to the attention of the Bargaining Committee and when agreed upon, shall be promptly reduced to writing in a form satisfactory to both the Company and the Union.

The two subcontracting agreements dated June 13, 1976 read respectively:
SUBCONTRACT - MAINTENANCE

The Company will not contract out any work that has been performed by its employees, or that could be performed by available qualified employees, provided such work can be performed in an economic efficient, and timely manner and for which adequate tools and equipment are then available within the plant.

Further, the Company will notify and advise, and upon request, will discuss details of the subcontracting with the local Union before contracting out any work.

No maintenance employee in the affected trades will lose any time from his basic work week (40 hours) as a direct result of subcontracting.

MEMORANDUM OF AGREEMENT

In a discussion with the Union concerning prior "Notice and Advice" pertaining to the sub-contracting agreement, the Company agrees to:

1. Provide a 3-day advance notice for sub-contracts not considered an emergency or detrimental to total plant operation.

2. If it is essential to sub-contract with less than 3 days notice, the Company will contact a member of the Union Committee or their designated representative in the most expedient manner.

3. Further, the Company will not rely totally on interoffice mail as a means of notification.

4. All sub-contracts will be processed thru the Employee Relations Department prior to release to the approved contractor.

The Union asserts that the use of a subcontractor and the elimination of the duties of the bargaining unit truck driver with regard to removing compacted debris, trash, etc., is a "new practice" pertaining to a condition of employment within the meaning of Article XII Section (6); that it was not brought to the attention of the Union, not agreed upon, and not reduced to writing.
satisfactory to both sides.

With regard to the subcontracting agreements it is the Union's claim that the Company failed to give any notice to the Union in advance of its agreement with Niagara Sanitation and that the work contracted out had been performed by bargaining unit employees and could be continued on that basis within the provisions of the first paragraph of the first above quoted subcontracting agreement.

I am not persuaded that Article XII Section (6) is applicable to the instant set of facts. In my judgement that contract clause relates to changes in express provisions of the contract or to any practice concerning a mandatory subject of collective bargaining on which the parties must jointly negotiate. It is a contractual recitation of the basic legal requirement that wages, hours and other conditions of employment that are mandatory subjects of bargaining may not be unilaterally promulgated, introduced or changed by the employer; but rather must be meaningfully negotiated by the union and employer. In the instant case we are not dealing with a new practice, change in or the introduction of conditions of employment not covered by the contract or on which the parties have not engaged in meaningful collective bargaining. The instant case deals with the matter of subcontracting on which the parties did bargain because they entered into two subcontracting agreements dated June 13, 1976, the same date as the collective bargaining agreement, and which
update original subcontracting agreements of June 13, 1973 and January 23, 1974. As I see it this is not a case of a "new practice" but rather is a case involving the application and interpretation of "two side agreements" which have the same force and effect as a provision of the collective bargaining agreement.

Therefore the question narrows to whether the Company's action violated the two subcontracting agreements. I cannot conclude that it did.

The burden is on the Union to prove its grievance. The Company asserts that the subcontracting agreements are not applicable to the Transportation Department, and hence have no bearing on the instant subcontracting. The Union's case fails simply because it has not clarified the intent and applicability of those subcontracting agreements, which, based on a bare reading, are and remain ambiguous.

The basic subcontracting agreement recited first above has as its subject SUBCONTRACT-MAINTENANCE. That heading, together with the text of that agreement leaves unclear whether it applies to subcontracting generally or only to subcontracting in the Maintenance Department. In my opinion it can be read either way with equal logic. Its heading, which includes the word "Maintenance", together with its last paragraph, which specifically refers to maintenance employee(s) could mean that the entire agreement applies only to the subcontracting of maintenance work or work performed by the "affected trades." On the
other hand the first two paragraphs talk about subcontracting generally, thereby allowing for the interpretation that the first two paragraphs apply to the subcontracting of any work performed by the bargaining unit, with the third paragraph applicable only to the affected trades. The second subcontracting memorandum of agreement is obviously inextricably related to the first, and deals only with the manner in which the Company will give advance notice to the Union, apparently in amplification of the second paragraph of the first agreement. So the second agreement in no way clarifies the ambiguity of the first. More importantly, the record before me does not clear up the ambiguity.

If the agreement applies, I would have no difficulty in holding that the Company failed to give the Union the requisite three day advance notice, whether or not the bargaining unit could continue to do such work in "an economic efficient and timely manner for which adequate tools and equipments are then available within the plant." On the other hand if the agreement is not applicable to the Transportation Department, the Company would have no obligation to provide the Union with advance notice and it would be immaterial if the bargaining unit employees could perform the work efficiently. Also, if the agreements do not apply to the Transportation Department, it means that though the parties bargained on the question of subcontracting, and could have negotiated a clear and explicit provision restricting or conditioning all subcontracting in all of the Company's
departments, the parties did not do so. And hence in that circumstance, though it was well within their contemplation, no other contract restriction was placed on the Company's right to subcontract.

The Union has failed to meet its burden of showing the applicability of the subcontracting agreement to the Transportation Department. No examples were introduced into evidence of the application of the subcontracting agreement to the work performed by departments other than the Maintenance Department. No evidence was adduced as to what the parties intended or what they said to each other when the subcontracting agreements were negotiated. In short the record is inadequate to conclude that the subcontracting agreements went beyond the Maintenance Department and covered work performed by bargaining unit employees elsewhere. This is not to say that the agreements apply only to the Maintenance Department. Rather it is to say that the agreements are ambiguously written and the ambiguity has not been clarified in this record; leaving those agreements undefined and unclear as to scope and intent and therefore subject to either interpretation. On that basis the Union has failed to sustain its grievance, though the rights of the parties are reserved in subsequent cases to adduce the requisite clarifying evidence.

Accordingly, having found Article XII Section (6) inapplicable and because, based on the record before me I am unable to determine whether the subcontracting agreements are limited to the
Maintenance Department or apply to the subcontracting work of the bargaining unit generally, including the work of the Transportation Department, I cannot find support in the record to uphold the Union's grievance. Therefore the grievance is denied.

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

The Union's grievance #77.1.3 dated December 10, 1976 is denied.

Eric J. Schmertz
Arbitrator

DATED: October 3, 1977
STATE OF New York )ss.
COUNTY OF New York )ss.

On this third day of October, 1977, 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 XV of the collective bargaining agreement dated 1974-1976 between the Committee of Interns and Residents hereinafter referred to as the "Union", and The League of Voluntary Hospitals on behalf of the above named hospitals, hereinafter referred to as "The League" or "The Hospitals", the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the above named Hospitals violate Article 111 Paragraph 6(a) of the collective bargaining agreement by refusing to pay COLA there provided, to house staff who came on the payroll effective on and after July 1, 1976? If so what shall the remedy be?

A hearing was held at the offices of the American Arbitration Association in New York City on March 14, 1977 at which time representatives of the Union and League appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.
Though I agree with the Union's interpretation of the relevant contract clause, I consider conclusive the conceded fact that during contract negotiations between the Union and the League, the chief negotiator for the League agreed that the League and the hospitals it represented would do the same as did the City of New York in the contract between the Union and the Health and Hospital Corporation with regard to the application of COLA to house staff who came on the payroll on and after July 1, 1976.

In his direct testimony in this arbitration, William Abelow, Esq. the Director and chief negotiator for the League stated:

There is no question that early in January the League made an offer to include in the contract COLA language in line with what was being done with the City (Tr. page 153).

On cross examination Mr. Abelow was asked by counsel for the League:

Q. The understanding was that there would be the same treatment under COLA with the League as there was with the City. Was that the understanding between the parties?

Mr. Abelow replied:

A. At the time we signed the contract. Yes. (Tr. page 61).

It is undisputed that on June 18, 1975, by letter from Mr. Robert Pick, the City's Assistant Director of Labor Relations, the City informed the Union that COLA would be paid to house staff who came on the payroll effective on and after July 1, 1976. Six days later the contract between the Union and the League was executed.
The position of the League is that it did not know of the City's decision to grant COLA to house staff who came on the payroll on or after July 1, 1976, nor did it learn of Mr. Pick's letter until the instant arbitration. I consider this only an explanation of why the League and the Hospitals did not grant COLA payments to the grievants in this case, but not a defense to the promise to do so.

Having committed itself to the same substantive arrangement agreed to between the Union and the Health and Hospital Corporation (the latter represented by the City of New York), that commitment obtains regardless of whether and when the League or the Hospitals learned of the agreement between the City and the Union under the CIR-Health and Hospital Corporation contract.

Indeed, the question of whether and when the League or the Hospitals learned or should have known of how the City would implement the COLA provisions under the agreement between the Union and the Health and Hospital Corporation is relevant only to the Union's request that this Arbitrator award COLA with interest to house staff who came on the payroll effective on or after July 1, 1976 and that the costs of this arbitration be assessed wholly against the League or the Hospitals.

I consider the relevant dates significant. If as of June 24, 1975, when the instant contract was executed, the League or the Hospitals did not know that the City six days earlier had agreed...
with the Union to apply COLA in the manner sought by the Union in this proceeding, I am satisfied that they should have learned of the City's decision within the more than one year which elapsed between the date that the contract was signed and July 1, 1976, when, for the first time, the question of the application of COLA to house staff employed on and after that latter date, arose. The League representative acknowledged that at the time the contract was signed on June 24, 1975, he knew that the City would determine how COLA would be applied under the CIR-Health and Hospitals Corporation contract and that Mr. Pick was to write a letter to the Union setting forth the City's decision. The League's knowledge that such a letter was to be written, served as notice not only that a City decision was made or would be made shortly but created an obvious duty on the part of the League or the Hospitals to find out between June 24, 1975 and July 1, 1976 what understanding had been reached between the City and the Union, so that the commitment made to the Union during contract negotiations could be implemented.

As I have concluded that the League and the Hospitals should have known at least by July 1, 1976 that the City had agreed with the Union to grant COLA to house staff employed on or after July 1, 1976, I must also conclude that there should have been no need for the Union to bring on this arbitration to enforce that commitment. Under that circumstance I deem the Union's
request for interest on the monies due appropriate and proper. However, for various reasons I deny the Union's request for the assessment of the costs of this arbitration against the League and the Hospitals.

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

The captioned Hospitals violated Section III Paragraph 6(a) of the collective bargaining agreement by refusing to pay COLA therein provided, to house staff who came on the payroll effective on and after July 1, 1976. The Hospitals are directed to make said COLA payments together with interest at the statutory rate retroactive to July 1, 1976.

Eric J. Schmertz
Arbitrator

DATED: June 27, 1977
STATE OF New York )
COUNTY OF New York 

On this twenty seventh day of June, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Livingston Manor Faculty Association

and

Livingston Manor Central School District, Board of Education

AWARD

Case #1339 0079 77

The above matter was settled by and between the above named parties by direct negotiations, and accepted by the grievant, Penelope Wagner.

At the request of the parties I make the settlement stipulation my AWARD, as follows:

1. Penelope Wagner shall be reinstated by the Board as a probationary teacher to a position in her former tenure area for three (3) consecutive semesters beginning in the fall semester in September, 1977 and ending at the conclusion of the fall semester in January, 1979.

2. During the foregoing period Mrs. Wagner shall be observed and evaluated in accordant with Article 8 of the 75-77 Collective Bargaining Agreement.

3. The Board shall notify Mrs. Wagner of their decision to grant or deny tenure no later than December 1, 1978. In the event that she is not so notified she will continue in employment with tenure.

4. Penelope Wagner shall be entitled to participate in the New York State Health Insurance Program beginning on the 1st day of June, 1977 or as soon as legally possible at the Board’s cost.
5. In September, 1977, Penelope Wagner shall be placed on Step 4 of the salary schedule then in effect.

6. Effective the first full pay period of the second semester Penelope Wagner shall be placed on Step 5 of the salary schedule then in effect and shall remain for the balance of her probationary period.

7. This settlement shall not be interpreted to prejudice the positions of either party with respect to and in any subsequent matter nor shall it serve as precedent to the interpretation or construction of any agreement between the parties.

8. Eric J. Schmertz shall retain jurisdiction with respect to the compliance and implementation of this Award.

Eric J. Schmertz  
Arbitrator

DATED: August 8, 1977  
STATE OF New York  )ss.:  
COUNTY OF New York )

On this eighth day of August, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In The Matter of The Arbitration between

New York Stereotypers' Union No. 1
New York Printing Pressmen's Union No. 2

and

The Long Island Press, Inc.

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

1. There is no obligation under Section 11 of the Pressman's contract and Minute Item Section 21(a) of the Stereotypers' contract for the Company to make payment to the affected employees in lieu of notice of the permanent suspension of operations on March 25, 1977.

2. Under Section 25 of the Pressman's contract and Section 10 of the Stereotypers' contract contributions to the respective pension and welfare funds are not required to be made on the entire amounts of severance pay and notice pay.

A. Jury duty and compassionate leave benefits as set forth in Section 11 of the Stereotypers' contract are not effective from the close of operations March 25, 1977 through December 31, 1977.

B. Walter Dermody, Jr., Thomas W. Jones and Henry E. Frohnhoefner qualify for severance pay under Section 33 of the contract.
I Robert Kronert and Charles Mundhenk are not entitled to severance pay under the contract.

II The claims of Thomas Jablonsky and Edward Gursky for severance pay are barred by the time limits of Section 41(a) of the contract.

Eric J. Schmertz
Chairman

Irving Newhouse
Concurring in I, 2, A, I and II.
Dissenting from B

Jack Kennedy
Dissenting from I, 2, A. Concurring in B

William Kennedy
Dissenting from I, 2, I and II

On this sixteenth day of January, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

On this day of January, 1977, before me personally came and appeared Irving Newhouse to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
DATED: January 1977
STATE OF New York ) ss.:
COUNTY OF New York )

On this day of January, 1977, before me personally came and appeared Jack Kennedy to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: January 1977
STATE OF New York ) ss.:
COUNTY OF New York )

On this day of January, 1977, before me personally came and appeared William Kennedy to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In The Matter of The Arbitration
between
New York Stereotypers' Union No. 1
New York Printing Pressmen's Union No. 2

and
The Long Island Press, Inc.

In accordance with the applicable arbitration provisions of the respective collective bargaining agreements between the Long Island Press, Inc., (hereinafter referred to as the "Publisher" or the "Company"), and the New York Printing Pressmen's Union Number Two and the New York Stereotypers' Union Number One (hereinafter referred to separately as the "Pressmen's Union" and the "Stereotypers' Union" and collectively as the "Unions"), the Undersigned was selected as Chairman of a Board of Arbitration to hear and decide, together with the Unions' and Publisher's designees to said Board, certain issues in dispute between said parties arising out of the closing of the Publisher's operations on March 25, 1977. Mr. Irving Newhouse served as the Publisher's designee on the Board of Arbitration for all issues involved. Messrs. William Kennedy and Jack Kennedy served respectively as the Pressmen's Union and Stereotypers' Union designees to said Board for those issues between their Union and the Publisher. A hearing was held on August 10, 1977 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. A stenographic record of the hearing was taken. The Unions and the Publisher filed post-hearing briefs. A meeting of the Board of Arbitration was expressly waived as was the Oath of the Arbitrators.

Six issues have been submitted for determination; two of which are common to both Unions and the Publisher; two of which are between the Stereotypers' Union and the Publisher; and two of which are between the Pressmen's Union and the Publisher.

The two common stipulated issues are:

1. Whether there is an obligation under Section 11 of the Pressmen's contract and Minute Item Section 21(a) of the Stereotypers' contract for the Company to make payment to the affected employees in lieu of notice of the permanent suspension of operations on March 25, 1977?

2. Whether contributions to the respective pension and welfare funds under Section 25 of the Pressmen's contract and Section 10 of the Stereotypers' contract should be made on the entire amounts of severance and notice pay?

The issues between the Stereotypers' Union and the Publisher are stipulated as:

A. Whether jury duty and compassionate leave benefits as set forth in Section 11 of the Stereotypers' contract should be effective from the date of the closing of operations on March 25, 1977, through December 31, 1977?

B. Whether certain enumerated individuals qualified for severance pay under Section 33 of the contract?
The stipulated issues between the Pressmen's Union and the Publisher are:

I. Whether Robert Kronert and Charles Mundhenk are entitled to severance pay under the contract?

II. Whether Thomas Jablonsky and Edward Gursky are entitled to severance pay under the contract?

In the course of the hearing the Unions asserted that at issue also was the Publisher's failure to pay severance pay undisputedly due most of the employee's covered by both contracts. The Unions sought an order directing forthwith payment of said severance pay with interest. The Publisher acknowledged his obligation to pay the severance benefits, but took the position that this was not an issue properly before this Board of Arbitration and that the Board did not have jurisdiction to rule on that question. At the conclusion of the hearing, following discussions between the parties and the Chairman, the Publisher agreed to make immediate payment to those employees undisputedly entitled to severance pay, and the Union withdrew its demand for interest. Accordingly that issue has been resolved.

Common Issue 1

I conclude that the two relevant contract sections, namely Section 11 of the Pressmen's contract and Minute Item 21(a) of the Stereotypers' contract apply to layoffs, reduced operations causing layoffs, and operational changes causing
layoffs under circumstances where the Publisher otherwise continues in business and continues publishing his newspaper. In my judgement neither Section was intended to be applicable to the instant circumstances - the complete shutdown and cessation of the Publisher's business. Rather, in the event of the total closing down of the Publisher's operations and the permanent termination of the publication of his newspaper, notice pay is preempted by the severance pay provisions of both contracts. I am satisfied that this conclusion is supported not only by a logical reading and interpretation of the two contract sections involved but also by other arbitration decisions which I consider to be relevant and in point. Accordingly the Unions' grievance for pay in lieu of notice when the Publisher totally ceased business on March 25, 1977, is denied. I make no determination on whether the Publisher met his statutory obligations under the National Labor Relations Act, as Amended. Any such question is not within the jurisdiction of this Arbitrator but rather is a matter for other forums. In that respect the rights of all parties concerned are expressly reserved.

Common Issue 2

Based on the foregoing determination, the Unions' request for the payment contributions to the respective pension and welfare funds on notice pay is mooted, and hence denied.

I am not persuaded that severance pay is synonymous with pay for "a shift worked" or "a shift paid for" within the meaning
of Section 25(c) of the Pressmen's contract, or "pay per shift worked" within the meaning of Section 25(b) of the Pressmen's contract. Similarly I am not persuaded that severance pay constitutes pay for a "shift worked or paid for" within the meaning of Section 10(d) of the Stereotypers' contract. Clearly, no specific shifts were in fact worked for which the severance pay was paid. On the contrary, the severance pay was a lump sum and it became due and payable upon severance from employment, not for specific time worked. In my view the Union's reliance on the language "or paid for" as a substitute for alternative to "shift worked" is misplaced. That phrase must be read together with the balance of Sections 25(b) of the Pressmen's contract and Section 101d) of the Stereotypers' contract which provide in significant part that "such payments will be made on the basis of weekly employment....(emphasis added). Absent more explicit language and a special definition of severance pay, I do not interpret severance pay as the equivalent of pay for ongoing "weekly employment." Again, it is a benefit, accumulated as a consequence of years of past service, payable on the termination of the employment, not as a consequence of or related to current or prospective weekly employment.

I do not read Section 33 of the Stereotypers' contract to bring severance pay within the meaning of "shift....paid for." As I see it the reference to "eight weeks pay (forty (40) shifts)" does not mean that severance pay is to be treated as pay for forty
shifts worked. Rather, in my judgement, the parenthetical reference to "forty (40) shifts" is used only as a measurement of the amount of severance pay, not for what the severance represents or for what it is in payment.

Accordingly the Unions' request that contributions to the respective welfare and pension funds be made for severance pay is denied.

Stereotypers' Issue A

I do not find that Sections 11(a), and (b)(i) survived the cessation of operations on March 25, 1977. The Union asserts that those employees who worked the more than 109 shifts referred to in Section 11(c) acquired a vested interest, extending to the original contract termination date of December 31, 1977, for bereavement leave and jury service, and that the Publisher should be required to set up an escrow fund to take care of such claims for the full contract term.

As I see it the completion of more than 109 shifts is not the only requirement for entitlement to bereavement leave and jury duty pay. I read Sections 11(a) and (b) to be founded on the precondition that a regular situation holder who seeks bereavement leave or jury duty pay must be actively employed by the Publisher at the time the claim arises. Section 11(a) applies to a regular situation holder "covered by this agreement." With the cessation of operations and with the termination of the Publisher's employees as a consequence (and possibly their
employment elsewhere), I consider it highly questionable, both under the language of the contract and as a matter of general contract law, that any such employee remained "covered by this agreement" subsequent to the cessation of the Publisher's operations. More pointed is the fact that Section 11(a) accords a benefit of "three days off with pay." Obviously this presupposes employment at the time that a bereavement leave is requested, otherwise from what would an employee get "three days off"? With the cessation of the newspaper on and after March 25, 1977 there is no way that a regular situation holder could be given "days off with pay", for there are no days at which he would be at work.

Similarly Section 11(b) defines jury service as a day on which the regular situation holder is required to report as a juror "when he normally would have been scheduled work..." On and after March 25, 1977 there are no days on which any of the employees would be "scheduled to work." In short I am persuaded that the bereavement and jury duty benefits are founded upon an implicit if not explicit condition that employment be ongoing at the time that an employee seeks either or both benefits; and inasmuch as there was no ongoing employment after March 25, 1977, the right to those benefits on and after that date, even for those who had worked the prescribed 109 shifts, did not survive that date. Accordingly the Union grievance in this regard is denied.
Stereotypers' Issue B

There are three grievants involved in this issue, Walter Dermody, Jr., Thomas W. Jones and Henry E. Frohnhofer. Technically they were classified as "substitutes" at the time that the Publisher ceased operations, having lost their "regular situation" status about three years earlier due to reductions in the Publisher's work force. I conclude that this issue calls for an equitable rather than technical resolution. Though the grievants were not "regular situation holders", they had long years of service with the Publisher, worked regularly on a five day a week basis and accumulated each year a quantity of regular straight time shifts equal to the amount worked by classified regular situation holders. After their reclassifications from regular situation holders to substitutes, they continued their employment with the Publisher uninterruptedly, and as before, performed the same or virtually the same duties on a continuing basis until the newspaper closed. It has been stated that a thing may not be within the technical letter of the law but yet be within its spirit and intent. Here, as to spirit and intent, I believe that the three grievants performed duties on a regular and continuing basis which, de facto, were identical to or virtually the same as a regular situation holder. Considering that fact, together with their longevity with the Publisher and the abrupt cessation of the publication of the newspaper without prior notice to the Union or the employees, I shall deem that
under these particular and unique circumstances the grievants are eligible for severance pay under Section 33 of the contract.

Pressmen's Issue I

I cannot conclude that the grievants, Messrs. Kronert and Mundhenk were "deprived of their work" by the shutdown of the newspaper. Both grievants were not actively employed at the time of the shutdown because they were either ill or disabled and had been out of work for those reasons for some time. There is no evidence to show that either or both were physically capable of returning to work at the time of the shutdown or significantly, were or would be physically capable of returning to work at any time during the life of the contract had the shutdown not taken place. Indeed, based on their disabilities and conditions, and the extent of time that they had been away from active employment, I think it probable that they would not have been capable of returning to work at any time during the life of the contract, and I think it clear that they were not capable of doing so when the newspaper ceased operations on March 25, 1977. Under those circumstances it is accurate to state that they were not at work and could not work not because of the shutdown, but rather because of their illnesses and disabilities. I distinguish the decision of Arbitrator Jesse Simons quoted in the Union's brief, from the facts in this case. Mr. Simons stated inter alia in a case between the Publisher and a different union that the permanent shutdown of The Press precluded those who were ill or disabled from returning to work
when they became well, and because they could not therefore exercise their priority claims they had been deprived of future employment by the shutdown and were entitled to severance pay. Here however, grievant Kronert was not simply ill or disabled within the Simons decision, but had been deemed totally disabled from open heart surgery, was receiving total disability benefits from Social Security and had not worked in the industry for several years. I think it fair to conclude that he would not have become physically capable of returning to work any time during the life of the contract even if The Press had not shut down. As to Mundhenk it appears that he had not sought work for over a year prior to the date of the cessation of operations nor had he sought employment in the industry as of the date of the arbitration hearing. Under that circumstance, even within the Simons decision, I believe he and/or the Union on his behalf had the burden of showing, not merely alleging, that he would have been capable of returning to work sometime during the life of the contract. That burden was not met. Accordingly this grievance is denied.

Pressmen's Issue II

Irrespective of the merits of this issue, the remedy which the Union seeks, namely restoration of the grievants to the mutually agreed to priority list and the payment to them of severance pay, is beyond the jurisdiction of the Board of Arbitration. The Union's case is based on an allegation that
the Publisher breached the contract in failing to recall the
grievants to work in accordance with their recall rights under
the contract. The Union asserts that had this breach not
occurred the grievants would have been on the mutually agreed
to priority list at the time of the shutdown and hence eligible
for severance pay. However the issue of the alleged contract
breach was not raised when the grievants allegedly should have
been recalled to work but rather only after the cessation of
operations. Section 41(a) of the contract, as the Publisher
points out, bars the Board of Arbitration from issuing a decision
the effect of which is "retroactive to a date earlier than the
date on which the issue is raised...." This clear and explicit
limitation, negotiated by the parties as part of their contract
cannot be ignored by the Arbitrators, for to do so would, by
the very language of Section 41(a) prejudice the final and
binding nature of the Arbitrator's decision. To grant the
relief which the Union seeks would be to restore the grievants
to the mutually agreed upon priority list on a date substantially
earlier than the date on which the issue of their recall was
raised. On that basis, an analysis of this issue on the merits
is mooted and the grievance must therefore be denied.

Eric J. Schmertz
Chairman
In The Matter of The Arbitration of the claims of Leila Mustachi, Christine Grove, Julie Small and Carol Weitz and
Macmillan Publishing Co., Inc. and Macmillan Book Clubs

OPINION AND AWARD

Appearances:

For the Claimants -
   Attorney General of the State of New York
   by: Arnold D. Fleischer, Esq.

For the Respondent Company -
   Linden & Deutsch
   by: David Blasband, Esq.
   Kaye, Scholer, Fierman, Hayes & Handler
   by: Frederick H. Bullen, Esq.

These matters came to arbitration in accordance with an Agreement of Conciliation dated March 27, 1976 between the Attorney General of the State of New York, hereinafter referred to as "the Attorney General" and Macmillan, Inc., Macmillan Publishing Co., Inc. and Macmillan Book Clubs, Inc., hereinafter referred to as the "Company." The Agreement was approved and ordered by the State Division of Human Rights in an Order After Stipulation dated March 30, 1976.

The pertinent part of said Order reads:

Any employee who was employed as of September 5, 1974, the date of the Attorney General's complaint before the State Division of Human Rights and who believes he or she is entitled to retroactive pay because of prior discrimination based upon sex, race or national origin in terms and conditions of employment, shall present within 30 days from the date hereof a claim, in writing, to the Attorney General setting forth in detail the exact nature of the complaint in a manner to be specified by the Attorney General. The Attorney General shall transmit to respondents within 20
days thereafter the name of each such employee who submits a claim which meets his criteria for arbitrability. Such employee (hereinafter referred to as a "claimant"), shall be entitled to have his or her claim determined under the following procedure and conditions.

In determining whether an employee's claim should be transmitted to respondents, it is understood that the Attorney General will require specific and detailed information concerning the nature of the alleged discriminatory practices and, that he will transmit to respondents an employee's complaint only if, in his opinion, it is a bona fide complaint and raises a reasonable question as to whether a discriminatory practice existed in respect to that employee which warrants a hearing to determine such question. The decision of the Attorney General to transmit such a claim to respondents should in no way be considered a judgement or evidence as to the ultimate validity of such claim.

The Attorney General and respondents shall select and jointly agree upon, within 30 days from the effective date of this Agreement, an individual who shall serve as arbitrator to determine any such retroactive claims. The services of such arbitrator shall be paid for by the respondents. The hearing before the arbitrator shall begin approximately 60 days after the transmission to respondents by the Attorney General of all claims as set forth above. The arbitration shall be conducted under the Voluntary Labor Arbitration Rules of the American Arbitration Association. Each claimant shall have the right to utilize this arbitration procedure and, if he or she so desires, to be represented by counsel in such procedure upon signing a statement agreeing that this procedure will be the sole procedure through which all such claims will be processed and waiving any further action before the State Division of Human Rights, the EEOC, the Federal District Court, or any other forum concerning such claims and releasing respondents from any and all claims and liability in respect to any discriminatory practices except for any amount that may be awarded pursuant to the arbitration provided for herein. The claimant, along with respondents, will also agree in writing
to accept the written report and award of
the arbitrator with respect to the issues
set forth below as final and binding upon
them. Each claim shall be heard and deter-
mined on an individual basis. The burden
of proof shall be on the claimant.

The sole issues for the arbitrator to hear
and determine with respect to each claimant
are:

(i) Whether during the period from September
5, 1974 to October 1, 1975 (or if such claim-
ant is one of the 44 persons named in the cap-
tion of the Attorney General's complaint of
September 5, 1974, whether during the period
from September 5, 1973 to October 1, 1975),
respondents discriminated as to such claimant
on the basis of sex, race or national origin
by paying a salary to the claimant at a rate
less than the rate respondents paid to an
employee or employees of the opposite sex or
of a different race or national origin, for
equal work in a position, the performance of
which required equal skill, effort and respon-
sibility, and which was performed under similar
working conditions, except where the differential
in salaries was made on the basis of seniority,
merit, quantity or quality of production, or any
other job related factor other than sex, race or
national origin;

(ii) In the event of a finding of discrimination
under the criteria set forth in paragraph (i)
above, the amount of retroactive pay to be awarded
with respect to the above time period. Such award
shall be based upon and shall not exceed the amount
of salary differential which was due to such salary
discrimination for the period during which such
actual discriminatory differential existed and
in no event for a period in excess of one year.
No penalties, costs or attorneys' fees shall be
awarded, and the arbitrator's findings and con-
clusions shall be limited to the aforesaid time
period.

Should the arbitrator find that a discrimina-
tory salary differential was in existence during
the applicable periods set forth above for which
a corrective adjustment has not been made as of
the date of the hearing and which continues
to exist as to that claimant, respondents
agree, in addition to making whatever corrective
adjustment is awarded by the arbitrator pursuant
to paragraphs (i) and (ii) above, to make such
corrective adjustments effective prospectively
as of the date of the award.

The above named individuals, hereinafter referred to by
name or as the claimant(s), filed their claims for arbitration
in accordance with the foregoing Order and were represented in
this proceeding by the Attorney General.

Hearings were held on September 27th, September 29th,
October 18th and October 20th, 1976. Each claimant was present
when her case was presented. Representatives of the Attorney
General and the Company appeared at each of the hearings in
active representative capacities. All concerned were afforded
full opportunity to offer evidence and argument and to examine
and cross-examine witnesses. The Arbitrator's Oath was expres-
sely waived. The Company filed a post-hearing brief. The Attorney
General waived submission of a reply-brief.

Submitted to the Undersigned as the Arbitrator duly
selected in accordance with the foregoing Order, were the follow-
ing stipulated issues:

1. Whether during the period from September
   5, 1973 to April 8, 1974 the Company discrim-
   inated as to Leila Mustachi on the basis of
   sex by paying a salary to Leila Mustachi at a
   rate less than the rate the Company paid to an
   employee or employees of the opposite sex for
   equal work in a position, the performance of
   which required equal skill, effort and respon-
   sibility, and which was performed under similar
   working conditions, except where the differen-
   tial in salary was made on the basis of seniority,
merit, quantity or quality of production, or any other job related factor other than sex.

2. Whether during the period from October 1973 to August, 1974 the Company discriminated as to Christine Grove on the basis of sex by paying a salary to Christine Grove at a rate less than the rate the Company paid to an employee or employees of the opposite sex for equal work in a position, the performance of which required equal skill, effort and responsibility, and which was performed under similar working conditions, except where the differential in salary was made on the basis of seniority, merit, quantity or quality of production, or any other job related factor other than sex.

3. Whether during the period from January 1974 to October 1974 the Company discriminated as to Julie Small on the basis of sex by paying a salary to Julie Small at a rate less than the rate the Company paid to an employee or employees of the opposite sex for equal work in a position, the performance of which required equal skill, effort and responsibility, and which was performed under similar working conditions, except where the differential in salary was made on the basis of seniority, merit, quantity or quality of production, or any other job related factor other than sex.

4. Whether during the period from February 1974 to July 1974 and April 1974 to August 1974 the Company discriminated as to Carol Weitz on the basis of sex by paying a salary to Carol Weitz at a rate less than the rate the Company paid to an employee or employees of the opposite sex for equal work in a position, the performance of which required equal skill, effort and responsibility, and which was performed under similar working conditions, except where the differential in salary was made on the basis of seniority, merit, quantity or quality of production, or any other job related factor other than sex.
There is no evidence of and indeed no claim that the Company engaged in overt or undisguised sex discrimination with regard to the salaries of the claimants. Rather, each claimant compares herself with a male employee whom it is alleged performed the same or similar work, or work of no greater responsibility or importance, but who was paid more. One claimant additionally claims that she took on the higher rated duties of a superior who had resigned and who was male, without additional compensation. From these comparisons the arbitrator is asked to infer and conclude that because the claimants are women they were paid less and/or not accorded extra compensation for additional services.

I have no doubt that each claimant feels intensely that she was paid less solely because of her sex and that this constitutes sex discrimination within the meaning of the law.

Sex discrimination is a serious charge. As such, in an adversary, adjudicatory forum, whether in arbitration, before an administrative agency or in the courts, the burden of proof is on the complainant, and the allegation of sex discrimination must be proved by the standard applicable to civil matters, namely by a fair preponderance of the credible evidence, if not by substantial evidence.

It is well settled, by decisions of Human Rights Commissions, the EEOC, and the courts, that differences in pay between men and women may be lawfully justified by significant
differences between them in such things as experience, seniority, job performance, responsibility, importance of their duties and the scope, complexity, quality and quantity of their respective work assignments. More in point, the wording of the issue in the instant proceedings, as set forth in the foregoing Order, recognizes the legitimacy of differentials in salaries "made on the basis of seniority, merit, quantity or quality of production, or any other job related factor other than sex."

With the burden of proof as stated, the claimants herein must show that their lower salaries were not due to any of the foregoing accepted conditions. Put another way, I would be compelled to draw and reach the inferences and conclusions requested by the claimants only if the total record failed to show a preponderance of legitimate, reasonable and acceptable differences between the claimants and the male employees to whom they compare themselves, which would explain and justify the salary differentials.

In the instant cases I am satisfied that one or more of those recognized circumstances constituted the basis for paying the male employee to whom each claimant compares herself more than the claimant. Consequently, based on those generally accepted conditions which allow distinctions in pay, and more specifically on the accepted exceptions set forth in
the stipulated issues, the claims of sex discrimination by each of the claimants herein must be denied as failing to meet the requisite standard of proof.

At this point however, I choose to state certain conclusions which I have reached based on the record before me, though as indicated I do not find they involve sex discrimination. The first is that the salaries paid the claimants for the duties and responsibilities of their respective jobs were, in my judgement, low, but this was true of male employees similarly situated. Also, with regard to one of the claimants, the Company, in my judgement, unfairly added to her duties without increasing her pay when her superior resigned, and the Company unfairly failed to raise her pay when it subsequently hired a male employee at a higher salary in a position lateral to that of that claimant. Why these situations did not constitute sex discrimination shall be discussed more fully below. However, I do take as "judicial notice" the payments the Company made outside of and subsequent to the instant arbitration hearing to claimants Grove and Weitz which I believe were designed in part at least to redress those situations. Those payments were expressly made by the Company and accepted by those claimants without bearing on or prejudice to the respective positions of the Company and those claimants in this arbitration.
Leila Mustachi

During the relevant period the claimant was a Book-Club Director. She was hired in October 1972 at a salary of $13,500. Her salary was increased to $14,580 on November 1, 1973; to $16,138 in July 1974 and $17,320 in July 1975.

She compares herself with Lawrence Apple who was hired in January 1972 as a Book-Club Director at a salary of $15,000. In January 1973 he was promoted to Associate Editorial Director at a salary of $17,200. His salary was increased to $18,630 on January 1, 1974. In April 1974 he was promoted to Director of New Product Development and was increased in salary to $21,000.

I find significant differences between the claimant and Apple which justify the salary differential during the entire relevant period. Those differences are based on the factors of experience at time of hire, seniority, importance of job assignments, and scope of duties and responsibilities.

Apple was hired some nine months before the claimant. He came to the Company with specific prior experience in directing a book club for one of the Company's competitors. The claimant had no prior experience in that work. On the basis of prior experience in directing a book club, I find that the Company was justified in paying Apple $1,500 a year more than the claimant at the point that both were hired, and that the initial salary difference was for that reason.
Thereafter, it should be noted, that Apple, who enjoyed nine months greater job tenure than the claimant came up in the normal routine for salary evaluation and salary increases ahead of the claimant, and so on seniority alone would continue to enjoy a wage differential as compared with the claimant, assuming both received the same periodic increases at specified times of review.

More significant to my mind is that Apple was twice promoted, first to the job of Associate Editorial Director and then to Director of New Products Development while the claimant remained as a Book-Club Director. Those promotions, with the higher titles, create a presumption that Apple assumed additional duties and responsibilities beyond that of a Book-Club Director.

The claimant asserts that those promotions were "paper promotions" without additional duties and therefore are of no consequence to the comparison she makes.

The weight of the probative evidence does not support the claimant's assertion, and the presumption not only remains unrebutted but is reinforced. I accept the direct testimony and the subsequent affidavit of the Company's President as better evidence than the bare affidavit of Francine Campbell, and conclude that Apple did assume and perform additional and important duties as a member of the New Products Committee while he was an Associate Editorial Director and later when he was made Director of New Products.
Additionally, I find that Apple, while an Associate Editorial Director assumed greater training and supervisory responsibilities over later appointed Book-Club Directors than did the claimant.

Consequently I find substantial differences between the two in scope of job assignments, and conclude that the salary differential, in part, was legitimately based on the extra duties and responsibilities assumed by Apple and attendant to his higher titled jobs.

Finally, and probably most determinative, I conclude that between the Book Clubs directed by the claimant and those for which Apple was responsible, there were significant differences in importance, prestige, financial return and potential, all supportive of higher pay for Apple.

The Company submitted into evidence financial and sales data designed to show that the Behavioral Science Book Club which Apple directed throughout was the "largest, most important and most prestigious of the various Macmillan book clubs," and more profitable than the clubs directed by the claimant. These assertions are disputed by the claimant who submitted her own financial and sales data designed to support her position. The arbitrator is in no position to make a determination on that question independent of the record before him, and unless the evidence on those issues is compellingly favorable to the claimant, the arbitrator is disinclined to substitute his judgement.
for the Company's business judgement in those areas.

The evidence on these points is not compelling or even preponderantly supportive of the claimant's position. Rather, though the parties are in sharp disagreement over the economics and financial return of the Behavioral Science Book Club as compared to the Early Learning Book Club; the Library of Contemporary Education and the Teacher Book Club directed by the claimant, the Company's data represents the criteria and methodology regularly and normally used by the Company in evaluating the production, sales, investment and financial return of its book clubs. I find no justification in the record for this arbitrator to substitute a different financial analysis or a different evaluation of the activity of the book clubs involved for the methods regularly utilized by the Company in judging how the sales, investments, and profitability of its book clubs are and should be calculated. Especially so, when as here, there is no evidence that the Company used a different methodology or changed its regular criteria for this case.

The Company offered testimony that it has been its consistent policy to pay a higher salary to a book club director in charge of a club that is more important, more prestigious and financially more consequential. Any such salary differential, when compared with what is paid a book club director who is in charge of a club or clubs of less status is legitimate and properly based, particularly, where as here, the evidence on that policy
stands unrefuted.

It is also noted that Apple was not confined just to the Behavioral Science Book Club. He took over supervision of two additional clubs as well. Therefore, the fact that the claimant had responsibility for three clubs is not, standing alone, any basis to warrant a salary equal to what was paid Apple.

For the foregoing reasons, namely greater experience at the point of hire; longer job tenure throughout the relevant period; performance of and responsibility for additional duties attendant to higher titles; and responsibility for a more important and prestigious book club, I find the salary differential and its spread during the period in question to have been justified and lawful.

Christine Grove

The claimant was hired in October 1973 as an Associate Editor at a salary of $12,000 a year. She was assigned to the "Price Project" and continued on that assignment during the full relevant period. In April 1974 she was promoted to Project Editor and was increased in salary to $13,200. She received a further salary increase to $15,850 in August 1974.

She compares herself to Pierce Nylund who was hired as a Project Editor in September 1963 at $15,000 a year and who was increased in salary to $15,850 in September 1974. Nylund
was assigned to the "Faissler Project."

The claimant asserts that at all times she did the same type of work as Nylund irrespective of his initial higher title and should have received comparable pay throughout the relevant period.

Though I find substantial similarities in the work performed by the claimant and Nylund I nonetheless cannot ascribe the salary differential to sex discrimination.

At the point of hire Nylund had had a previous period of service of five years with the Company from 1966 to 1971 in its Social Studies Department. That previous tenure with the Company is a legitimate ground to reemploy him at similar work at a salary higher than that paid to the claimant who had not had previous service with the Company (though she did have some experience in this type of work from prior employment elsewhere.) Additionally, I am persuaded that Nylund was hired at the higher salary not necessarily because he was appointed initially as a Project Editor, but because the Company believe he had the potential for and would be assigned additional responsibilities in other capacities soon after he was reemployed. The combination of prior tenure with the Company in work similar to the latter period of employment and the expectation that he could and would take over additional duties and responsibilities is sufficiently set forth in the record to rebut any contention that the pay differential at the point of hire was based on the
difference in their sexes. Neither of these conditions applied to the claimant when she was hired.

That Nylund did not take on the additional assignments and responsibilities does not nullify the legitimacy of paying him more at the point of hire in expectation that he would do so. Indeed, the fact that the claimant received three salary increases totalling $3,850 and achieved parity with Nylund in less than a year, while Nylund was increased by only $850 in the same period is evidence that Nylund did not fulfill the potential on which his salary upon hire was in part based, and is evidence of the claimant's demonstrated ability and merit. In other words the Company gave the claimant salary increases that closed the gap between her and Nylund because she merited those increases and because Nylund did not fulfill the expectations upon which his initial salary was based.

The question then is whether the delay in bringing the claimant up to Nylund's salary level was because she was a woman? I answer in the negative. The authoritative testimony and evidence in the record reveal that the Faissler Project on which Nylund worked was larger, involved a substantially greater investment and was significantly more profitable than the Price Project on which the claimant worked. Again, that it was Company policy to pay higher salaries for work on more important projects is not refuted. I cannot say that that policy is not a bona fide circumstance to justify salary differentials.
Accordingly, for the reasons of prior experience and tenure with the Company, and because of the greater importance to the Company of his work assignment, I must conclude that the Company had legitimate grounds to pay more to Nylund than to the claimant during the period in question.

Julie Small

The claimant, hired as a Project Editor in the School Department in January 1974 at $14,000 a year also compares herself with Pierce Nylund.

The reasons for my ruling in the Grove case are applicable here. Unlike the claimant, Nylund had five years of previous service with the Company as an Associate Editor between 1966 and 1971 which standing alone would justify a $1,000 differential at the point of hire, despite the fact that the claimant had previous relevant experience with other employers.

However, any doubt on that point must be resolved against the claim by the fact that unlike the claimant Nylund was also hired with the expectation that he would take on additional work, and more significantly his assignment to the Faissler Project was unquestionably of much greater importance and consequence to the Company than the supplemental reading program supervised by the claimant in a totally different department.
Carol Weitz

The facts in this case demonstrate in my judgement substantial inequities to the claimant for which she should have received higher pay. But I do not find that the Company's failure to accord her that higher pay was because she was a woman.

Her first claim for the period February 1974 to July 1974 is for the pay which her superior received, based on her assertion that when he left and was not replaced she assumed and regularly performed the duties of his job.

The claimant was hired on October 22, 1973 as Promotion Manager for the Library Series Division at $12,500 a year. She was raised to $13,020 on June 3, 1974. Her superior, as Marketing Manager was Theodore Sennett whose salary was $23,540. Sennett resigned on February 22, 1974 and his job remained unfilled for five months.

I am persuaded that during those five months the claimant took on and diligently performed, both during regular hours and on overtime, many of the duties previously handled by Sennett. She received no additional pay for doing so. Bluntly put, I believe the Company took advantage not only of the claimant but other incumbent employees in the department by "parceling out" Sennett's work among them in varying quantities, without paying any of them additional compensation. I am persuaded that the claimant was most affected by this arrangement because of the substantial number of additional duties she assumed. In
that respect the inequity and the unfairness of adding duties to her already full job load without additional compensation was felt more by the claimant than others. Clearly she was entitled to extra pay because she took on extra work previously performed by a higher rated employee, but I do not find that she was denied that extra compensation because she was a woman. The Company took advantage of her willingness to take on the work and apparently gave her some positive indications that she would receive a salary adjustment, but it also, albeit to a lesser extent, took advantage of other employees including male employees.

Some of Sennett's duties were assumed by Alan Smith a Company Vice-President and a male. Some other work previously performed by Sennett was taken over by others, including male employees in the department, again without extra compensation. Without delineating the precise duties assumed, I conclude that Smith took on Sennett's policy making functions and the claimant took on most of Sennett's administrative duties and the implementation of policy. Others assumed less important routine functions.

On that factual determination, while I do not hesitate to observe that the Company handled the claimant unjustly and inequitably and failed to tangibly reward her for her loyalty, diligence and acknowledged good work, the evidence is just not there to support a charge that all this took place only or primarily because the claimant is a woman. In labor relations
terms, the Company's error was in failing to pay her extra compensation for her performance of a large number of higher rated duties irrespective of, but not because of her sex.

The claimant's second claim is for the period April 1974 to August 1974. She asserts that while she was a Promotion Manager earning the pay referred to above, the Company hired Barry Feig as a Senior Copywriter at a higher salary of $14,000 a year. In making a comparison with Feig the claimant asserts that his position was below hers in the Company hierarchy; that she regularly edited his copy and gave him advice and instructions which he carried out in performing his work.

I am not persuaded by the Company's contention that the claimant and Feig are not comparable because of different functions, nor do I accept the Company's assertion that because Feig technically reported to a Company vice-president he occupied a higher position than the claimant in the Company's hierarchy. The fact is that had there been a Marketing Manager replacing Sennett, both Feig and the claimant would have reported to that Marketing Manager (as indeed both did after Sennett's job was filled). Also the copy writing work performed by Feig and the promotional duties of the claimant were jointly related to the work of the same department and in that respect can be compared in terms of respective responsibilities, importance, acquired skill and performance.
On the other hand I do not find the claimant's assertion that she had some sort of instructional authority over Feig's work to be determinative. I conclude that they occupied positions that were lateral. What is relevant is simply the answer to the question - why Feig was hired at $14,000 a year when the claimant whose position was lateral was earning somewhat less? I am satisfied that that happened because that's what Feig demanded and that's what it took to hire a qualified and senior copywriter in the job market at that time. I conclude that the Company did not raise the claimant's salary correspondingly simply and solely because it thought it unnecessary to do so, not because she was a woman but because she was an incumbent employee without any bargaining leverage. And because technically the Company could rely upon its policy of reviewing salaries only on a set schedule. I consider what the Company did to be unfair, unequitable, inimical to employee morale and poor personnel practices. But I cannot find that it was done because the claimant was a woman or that it was an act of sex discrimination.

The Undersigned duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:
During the periods of time set forth in the stipulated issues, the Company did not discriminate on the basis of sex with regard to the salaries it paid to Leila Mustachi, Christine Grove, Julie Small and Carol Weitz. The claims of those individuals are denied.

Eric J. Schmertz
Arbitrator

DATED: August 27, 1977
STATE OF New York ) ss.:
COUNTY OF Bronx )

On this twenty-seventh day of August, 1977, 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
Perth Amboy Smelter & Refinery
Workers Union, Local No. 365
and
American Smelting and Refining
Company (Perth Amboy Plant)

The stipulated issue is:

Under the contract what is the proper vacation bonus for the eleven grievants?

A hearing was held at the Company plant on October 25, 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 parties filed post-hearing briefs.

This case involves the question of whether employees who retire are entitled to a vacation bonus under Article VII Section 6 of the contract and a retirement pension at the same time. The eleven grievants retired during the period for which Section 6 of Article VII accords a vacation bonus of $50 a week for vacations commenced during that time. It is the Union's contention that they should be deemed on vacation, and paid a vacation bonus for vacations due them at the time they retired and at the same time they receive pension payments. The Union argues that other employees, similarly situated, received vacation bonuses in accordance with the Article VII Section 6 schedule when they retired and that the grievants should be treated no differently.
It is the Company's contention that the grievants were in retirement status during the calendar period that a $50 a week vacation bonus is paid to those commencing vacations; that the status of retirement is simply inconsistent with "commencing a vacation", and that the grievants cannot be entitled to a vacation bonus at the same time that they are retired and receiving a retirement pension. Instead, in addition to their accumulated or unused vacations under other Sections of Article VII the Company paid them a $20 a week bonus for their remaining vacation entitlement, pursuant to that portion of Article VII Section 6 which reads:

The $20 bonus shall be paid for vacation weeks paid in lieu of time off.

Based on the record it is apparent to me that the circumstances of this case were not contemplated by the parties at the time that Article VII Section 6 was written. It is undisputed that when this contract provision was negotiated the parties did not discuss whether employees commencing retirement would also receive a vacation bonus if their retirement began during the bonus months set forth in Article VII Section 6. I am persuaded that the vacation bonus section of the contract was not intended or designed, one way or the other, to apply to employees who retire. Indeed, I agree with the Union that the provision for a $20 bonus to be paid "in lieu of time off" was intended to apply not to the facts in this case, but to
situations where employees actually worked through their vacation. But if retirees are not covered by that bonus, and if as I have held Section 6 was not written to cover the instant situation at all, the grievants would not even be entitled to the $20 a week bonus which the Company granted them. (In this proceeding the Company does not seek to nor will I deprive the grievants of that bonus.) Under those circumstances it is difficult to see how the Company's refusal to pay a vacation bonus of $50 a week to the grievants was violative of that Section of the contract.

Moreover, the absence of a contract violation is supported by the language of Section 6 and, contrary to the Union's assertion, I do not find an applicable past practice. A pertinent part of Section 6 reads:

The amount of vacation bonus applicable to a particular vacation week....shall be determined by the calendar month in which such week commences that is, the first day thereof the employee would have been scheduled to work. (Emphasis added).

Based on the foregoing language, it is clear to me that the vacation bonus was intended to be paid to employees for vacation time which would coincide with days that they would be at work had they not been on vacation. Manifestly this is not the case with the grievants. They left the active employ of the Company not on a day that they would otherwise have been scheduled to work, but rather terminated their employment entirely and
commenced retirement status drawing a retirement pension.

Finally, the Union's reliance on past practice is inapposite. Other retirees whom the Union asserts were situated similarly to the grievants, were not so situated. The group of employees who "returned for a single day", did not draw their pension until after they returned for that single day. They first exhausted their vacation entitlement, and did not draw vacation bonus and a retirement pension simultaneously. Some other employees were handled in the same manner, except that they did not return to the Company's employ for the single day between exhausting their vacation and commencing retirement. But again, unlike what is claimed for the grievants, they did not draw both vacation bonus and a retirement pension simultaneously. I do not consider these to be merely distinctions without a difference. Unlike the grievants, the other employees cited chose to defer receipt of their pensions for a period of time while exhausting their vacation benefits. The grievants however received their pension benefits immediately upon leaving active employment, thereby enjoying that benefit earlier than the others cited. And in addition the grievants received the $20 vacation bonus "in lieu of time off." Had the grievants sought to be treated like the others cited, and had they been denied any such request, I think they may have been able to make out a case of unequal treatment. But the record does not indicate that they sought to be treated similarly when they were
eligible to retire. And, considering that they chose instead to retire and draw retirement pensions immediately, I do not think that I have the authority to retroactively place them back at a point similar to the others, nor do I think that it is now legally or fiscally possible to do so.

In short, I cannot find in the contract or in practice a consistency between "being on vacation" and "being in retirement status." Absent an explicit contract provision reconciling the two, I must conclude that they are mutually inconsistent, therefore I cannot award a vacation bonus to the grievants at and for the same time that they are retired.

This holding is not to be confused with the undisputed contractual right of an employee to receive pay for his accumulated regular vacation entitlement when he retires. This case does not deal with accumulated or accrued vacation rights. Rather it deals with a vacation bonus as "an add-to and not part of, ....regular vacation pay." As is traditional, the grievants received their regular vacation pay and/or regular vacation entitlement under the other Sections of Article VII. But it is not traditional, nor can I find proper support to grant a vacation bonus over and above regular vacation pay merely because the grievants retired during a calendar period when a vacation bonus is contractually paid to those who go on vacation at that time.
The Undersigned duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The Union's claim that the grievants are entitled to a $50 a week vacation bonus under Article VII Section 6 of the contract is denied.

DATED: January 13, 1977
STATE OF New York )
COUNTY OF New York )

On this thirteenth day of January, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Was there just cause for the thirty day suspension of Alan Goldstein? If not what shall be the remedy?

A hearing was held in Hempstead, New York on May 17, 1977 at which time Mr. Goldstein, hereinafter referred to as the "grievant", and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Arbitrator's Oath was waived.

The Company charges that the grievant was intoxicated while at work.

The Company's testimony regarding the grievant's physical condition, conduct, demeanor and other symptoms and characteristics upon which it concluded that he was intoxicated, is not denied by the grievant. Rather, in denying that he had been drinking to the point of intoxication, the grievant asserts and explains that his condition must have been due to the combination of two mgs. valium which he took at between 6 and 7 am, and two glasses of beer he consumed later that day at lunch between 2 and 3 pm.
Absent medical or other authoritative testimony or evidence, I am not persuaded that the grievant's explanation is either medically sound or even a causal probability. Therefore I must reject his explanation. Accordingly, considering the presence of symptoms, demeanor, etc. which traditionally are deemed probative evidence of intoxication, I must conclude that the Company had reasonable grounds to believe that the grievant was intoxicated.

Inasmuch as the Company rules, unchallenged by the Union in this proceeding, provide for the penalty of discharge for "reporting for work under the influence of an intoxicant.....", the lesser penalty of thirty days suspension imposed on the grievant was per force proper.

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

There was just cause for the thirty day suspension of Alan Goldstein.

Eric J. Schmertz
Arbitrator

DATED: June 27, 1977
STATE OF New York )ss.:
COUNTY OF New York )

On this twenty seventh day of June, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Board violate the contract, established policy and its statutory duty to negotiate by unilaterally adopting an employee dress code policy? If so, what shall be the remedy?

A hearing was held at the offices of the Board on January 10, 1977 at which time representatives of the Union and Board appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

It is well settled that absent an explicit contract provision to the contrary an employer has the managerial right to promulgate rules of conduct, provided those rules are reasonable, related to the nature of the employment, well disseminated and consistently and uniformly applied.

A rule or policy regarding what a teacher may or may not wear while on the job is within that managerial prerogative.
In the instant case I find that the dress code policy adopted by the Board meets the foregoing test, and I find nothing in the contract or in the relevant collective bargaining statute which restricts the Board's right to promulgate such policy.

That the joint Effective Schools Committee once handled a grievance over how a particular teacher was to dress, and in the process set forth some guidelines on that subject, did not in my judgment transform a traditional managerial right into a bilaterally negotiated condition of employment, nor did it establish a binding practice. The fact is that the Board did not adopt the guideline as its policy, and did not in any other way relinquish its authority to make official policy on that question.

This is not to say that disputes over the interpretation, implementation or application of that policy would not be the subject of bilateral discussions or even matters for the grievance and arbitration provisions of the contract. Rather it is to say that the Board did not violate the contract, established policy or its statutory duty by unilaterally promulgating the disputed dress policy. If the policy is vague, or not consistently or uniformly applied, or if there are other questions or disputes over its application and/or implementation, such questions or disputes would be proper subjects for bilateral discussions and/or for the grievance and arbitration
provisions of the contract.

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 Board did not violate the contract, established policy and the statutory duty to negotiate by unilaterally adopting an employee dress code policy.

Eric J. Schmertz
Arbitrator

DATED: February 7, 1977
STATE OF New York ) ss.
COUNTY OF New York )

On this seventh day of February, 1977, 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
Paint, Chemical, Clerical, Warehouse:
and Industrial Workers Union, Local:
1310, AFL-CIO

and
Ashland Chemical Company

In accordance with Article VII of the collective bargaining agreement dated December 1, 1976 through February 28, 1980 between
Paint, Chemical, Clerical, Warehouse and Industrial Workers Union, Local 1310, AFL-CIO, hereinafter referred to as the "Union" and
Ashland Chemical Company, hereinafter referred to as the "Company", the Undersigned was selected as the Arbitrator to hear and decide
disputes between the Union and Company involving Union grievances #s7705 and 7707.

A hearing was held at the offices of the Federal Mediation and Conciliation Services in East Orange, New Jersey, on October
5, 1977 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. Both sides filed post-hearing briefs.

The stipulated issues are:

1. What shall be the disposition of the Union's grievance #7705 dated May 10, 1977?

2. What shall be the disposition of the Union's grievance #7707 dated May 12, 1977.
In substance, grievance #7705 claims that employee Craig Mazepa who was called in Sunday, May 1, 1977 at 11 PM and worked until 6 AM May 2, 1977 would have been paid at double time for the first four hours of that work and grievance #7707 seeks four hours pay at the overtime rate for employee Theodore White whom the Union contends should have been assigned overtime work on May 12, 1977.

The Union's grievance #7705 must be denied under the clear and express language of Sections 4.05 A and 4.01 of the contract. Mazepa, worked only one hour on Sunday May 1, 1977 within the same work week. Section 4.05 of the contract reads:

An employee who works a full Monday-through-Friday schedule or is credited with working such schedule shall be paid two times his regular straight time rate for hours he works on Sunday of the same work week. (emphasis added)

There is no dispute that his regular work schedule was Monday through Friday and that he was called in at 11 PM on Sunday outside of that schedule. However the work week, for the instant purpose of defining the phrase "the same work week" is specified in Section 4.01 of the agreement. In pertinent part it states:

The work week will start at 12.01 AM on Monday and end at 12 Midnight the following Sunday.

Based on the foregoing contract language, it is clear that the grievant's hours of work following midnight Sunday May 1, 1977 were working hours at the beginning of a new and subsequent work
week and were not a continuation of "Sunday hours" which began at 11 PM Sunday, May 1st. As such the Company compensated him correctly by paying him double time for his one hour of work on Sunday May 11th within the same work week, and at the time and one-half rate for his Monday morning hours of work thereafter.

The Union asserts that by past practice employees called in on a Sunday outside of their regular work schedule have not only been guaranteed four hours of work or pay but four hours at double time. However the Union's case in this regard was limited to bare allegations and not supported either by direct evidence by the employees who allegedly received that benefit, nor by any other alternative probative evidence. However that is not material because it is well settled that past practice is binding only where contract language is ambiguous. Where as here, the contract language is clear and explicit it prevails over any contrary past practice.

Therefore neither by practice nor under its specific language can Section 3.05, which is principally relied upon in this case by the Union, be interpreted the Union's way. That Section provides for a guarantee of four hours pay when an employee is called in, however it stipulates that the four hour guarantee shall be "at his regular rate." In the instant case by operation of Sections 4.01 and 4.05A, the regular rate is the rate applicable to work performed on Sunday within the same work week, and the rate applicable for work performed thereafter at the beginning of a
subsequent week. Consequently in this case the grievant's regular rate for the more than four hours of work which he performed beginning at 11 PM on Sunday was properly at double time for the remaining one hour on Sunday within that work week, and time and one-half for the additional hours on Monday morning the next week. Nothing in Section 3.05 mandates the payment of the first four hours of work under that circumstance at the double time rate. Accordingly the Union's grievance #7705 is denied.

I grant the Union's grievance #7707 because I am persuaded that the Company's warehouse supervisor, whether purposefully or inadvertently, reasonably led the Union's chief steward to believe that three employees were needed on an overtime basis to perform work involving the capping and moving of drums of chemicals in the warehouse. I do not dispute the Company's argument that only two rather than three employees were needed to perform what work was available. Nor do I dispute the Company's assertion that the classification of the employees permitted them to perform the work assigned and that there was no classification or job description reason to require a third warehouseman or warehouseman-lift truck driver.

But based on the testimony, including the testimony of the Company's warehouse supervisor, I conclude that the conversation between the supervisor and the union steward concerned the former's request that the latter obtain both a warehouseman and two tow or lift truck operators for specific assignment to work on the drums.
It is undisputed that overtime on this type of work in the warehouse is scheduled by a request from the supervisor to the Union's steward, and that the steward obtains the required number of employees in the required classifications. So the procedure employed in this case was consistent with that arrangement, and if, as I have found, the Company's supervisor requested three employees to work overtime on the drums, I do not believe that the Company should now be permitted to avoid that commitment on the grounds that, after the fact, it has been determined that only two were actually required and that any use of a third employee was for other duties.

The Company argues, assuming arguendo the validity of the foregoing, that no contract provision was breached and that the Union has failed to point to any specific contract section on which its grievance is based. I do not consider it a fatal defect that the Union has not cited a specific contract breach in its case presentation. Implicit in its complaint, as I see it, is the claim that the Company's failure to call in or assign a third employee in accordance with the supervisor's request, violated Article IV of the contract and more specifically the overtime provisions therein. In other words, having asked for three
employees to work on the capping of drums, or to have reasonably led the union steward to believe that three employees were needed for that work, a schedule of overtime for three employees was fixed. Under that circumstance those employees who would have been entitled to the overtime based upon whatever overtime eligibility arrangement the parties follow, should have been afforded the opportunity to work. There is no contention by the Company that the grievant Theodore White would not have been the employee eligible for the overtime in place of Steward McGrath had in fact three employees been required and scheduled. That White had left the plant did not in my view disqualify him from the overtime opportunity in those circumstances. Accordingly, for the limited reason that I believe the warehouse supervisor scheduled three employees to work overtime on the drums and thereby bound the Company to that schedule, the Union's grievance is granted and the Company is directed to pay the grievant four hours pay at the overtime rate.

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

1. The Union's grievance #7705 is denied.
2. The Union's grievance #7707 is granted.

Eric J. Schmertz
Arbitrator
DATED: December 1, 1977
STATE OF New York ).ss:
COUNTY OF New York )

On this first day of December, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
Voluntary Labor Arbitration Tribunal

Atlantic Independent Union : AWARD

and : Case #14 30 0707 76M/D

Atlantic Richfield Company :

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

The Union's grievance dated June 8, 1976, and marked as Joint Exhibit #1 in the record, is denied.

DATED: September 1977

Eric J. Schmertz
Chairman

Frank W. Welsh
Concurring

John Nussbaumer
Dissenting
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

Atlantic Independent Union : OPINION OF CHAIRMAN
and : Case #14 30 0707 76M/D
Atlantic Richfield Company :

In accordance with Article IX of the collective bargaining agreement dated July 1, 1975 between Atlantic Independent Union, hereinafter referred to as the "Union", and Atlantic Richfield Company, hereinafter referred to as the "Company", the Undersigned was selected as the Chairman of a tripartite Board of Arbitration to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

What shall be the disposition of the Union's grievance dated June 8, 1976 marked as Joint Exhibit No. 1 in the record?

Messrs. John Nussbaumer and Frank W. Welsh served respectively as the Union and Company Arbitrators.

A hearing was held at the Philadelphia offices of the American Arbitration Association on May 9, 1977 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.

Both sides filed post-hearing briefs.

The Board of Arbitration met in Executive Session on September 12, 1977.
The Union's grievance dated June 8, 1976 reads:

The above mentioned employees are griev-ing according to their rights as stated in Article VIII of the Contract between Atlantic Independent Union and the Atlantic Richfield Company.

The grievants feel that management discrim-inated against them when their names were removed from the eligibility list for the job vacancies at the Philadelphia Refinery.

The Union and the grievants concur that the Company is in violation of Article XII, paragraph (b) of the collective bargaining agree-ment by implementing its intention to fill these job openings by hiring persons from outside rather than by promoting from within.

As the grievance indicates the Union relies on Article XII Paragraph (b) of the contract. That Section reads:

Employees desiring consideration for a particular job should register such desire with the appropriate Employee Relations office, and the COMPANY will make every reasonable effort to promote from within before hiring outside the COMPANY.

The jobs which the grievants sought are classified as Utility Operators in the Refinery. It is undisputed that those jobs are at the entry level. The Company contends that Article XII Paragraph (b) is inapplicable to the facts herein because that contract section relates to "promotions." The Company argues that the applications by incumbent grievants for entry level positions in the refinery are simply not promotions, and that therefore the Company had no contractual obligation to consider them for those jobs before hiring from the outside or recalling persons whose
recall rights had expired.

In the instant case the Company filled the Utility Operator vacancies in three ways; by employees who possessed the requisite qualifications and who had recall rights under the contract; with former employees who had refinery experience but whose recall rights had expired; and by hiring four women who had neither refinery experience nor previously worked for the Company pursuant to an affirmative action agreement between the Company and the EEOC.

Alternatively the Company asserts that not withstanding its lack of obligation under the contract, the grievants, together with those to whom the jobs were assigned were considered, but the grievants were rejected because they did not pass a job test and had not had previous refinery experience.

The Union contends that the grievants' bids for the Utility Operator jobs in the refinery constituted "promotions" within the intent of Article XII Paragraph (b). It argues that when that contract section was negotiated it was understood and agreed between the parties that any bid on a job opening would be treated as a "promotion", especially if the job sought would enable the bidder to earn more money, even if it was an entry level position, and that "a promotion is in the eyes of the beholder." Under those circumstances the Union urges the Arbitrators to interpret a job "promotion" in its "normal and customary" way, according it a liberal and broad meaning.

As I see it, the difficulty with the Union's case is that a
"normal and customary" interpretation of the word "promote" as found in Article XII Paragraph (b) would not produce the result sought by the Union. To deem the filling of entry level jobs as "promotions" would be, in my view, an unusual and non-traditional use of the word "promote." A "promotion" in an industrial relations setting has a well established and undisputed meaning. It means to move upward from one classification to a higher classified job in the job classification hierarchy. Though usually an increase in pay attends such a move, it is not invariable and hence not a determinative characteristic of a promotion. There are instances in which such upward movement may not produce an immediate pay increase, and indeed, occasionally a promotion may result in a pay decrease, albeit for a temporary period of time. To treat the filling of an entrance level job as synonymous with a promotion just because greater earnings are possible is a special and unique interpretation which, to be upheld, must be supported by clear evidence of intent and/or past practice.

The evidence in the record does not support the Union's assertion that the applications of the grievants for these entrance level jobs in the refinery constituted or should be interpreted as promotions within the meaning of Article XII Paragraph (b) of the contract. The contract negotiations relating to that section and the practice thereafter support the Company's argument and not the interpretation which the Union places on the word "promote."
In the negotiations leading to the contract clause in question, the Union urged that incumbent employees of the Company be given first consideration in the filling of job vacancies and that hiring from the outside should be confined to entry level positions. At this arbitration hearing the Union stated that it never intended to exempt entry level jobs from the priority requests of incumbent employees. If that is so it remains a bare assertion in this record, and consequently does not overturn the considerably more explicit and probative evidence that at negotiations the Union's demand for priority for incumbent employees related to job vacancies above the entry level.

Moreover, not only has there not been a practice supportive of the Union's interpretation, but the practice has been to the contrary. The Company has consistently filled entry level jobs by hiring new employees from the outside, and has not given prior consideration to incumbent employees. The Union's explanation that this occurred during a period of full employment and was not objectionable under that circumstance, is not enough to establish any contrary practice.

In short, neither by the history of negotiations nor by practice is there evidence to give to the word "promote" a meaning which would apply to the filling of the entry level job of Utility Operator in the refinery.

I understand how and why the Union views these circumstances as inequitable and as a "moral issue." The Union sees new hires
coming in to the refinery or the return of former employees whose recall rights have been exhausted at a time when incumbent employees in other departments face possible layoffs in the foreseeable future. The Union thinks that incumbent employees whose jobs may be ended or transferred to other geographical locations ought to be accorded an opportunity to fill permanent vacancies in the refinery, thereby securing their employment status with the Company.

This Arbitrator is not unsympathetic to that position. Without judging whether the Union's facts are correct, he understands and appreciates what the Union characterizes as a "moral issue." However the arbitrator's authority does not extend to a "moral" resolution of a dispute but instead is confined to the provisions of the contract. If what the Company has done is permitted under the contract, the question of whether it is "morally" correct is not for the arbitrator. Here I am unable to find that Article XII Paragraph (b) supports the Union's case. Contrarywise I find that that contract section permits the Company to do what it did. If the Union believes that result to be inequitable, unfair or unresponsive to the "moral issue" it raises, redress must be sought in the forum of collective bargaining and not in arbitration.

Accordingly the grievance is denied.

DATE: September 1977

Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Local Lodge No. 1396, District #170: International Association of Machinists and Aero Space Workers, AFL-CIO

and

The Atlantic Wire Company

Case #12 30 0195 76

In accordance with Article V of the collective bargaining agreement dated March 1, 1976 between the above named Union and Company, the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Was the grievant, Henk Jansen discharged for just cause? If not what should be the remedy?

A hearing was held in Branford, Connecticut on December 1, 1976 at which time the grievant and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties waived the Arbitrator's Oath. Both sides submitted post-hearing briefs.

The charge against the grievant is that he falsely inflated the productivity of the three-man Small Cleaning House crew of which he was a member. As a consequence, the Company asserts, the grievant and the two other members of that crew (Messrs. Villane and Newman) were paid more than they earned.

Initially, all three crew members were suspended, but
following an investigation Newman and Villane were reinstated with full pay and benefits, and the grievant was discharged.

The Company explains it had no evidence that Newman and Villane were involved in falsifying the production records of the crew. It asserts however that the grievant should be held solely responsible because as the "coater", it was his job to fill out the daily production report, and that on the day involved, May 20, 1976, he did so.

The Company's case is principally directed toward establishing that the production records of May 20, 1976 were false and in excess of what the crew actually produced.

However the Company's burden in this case is twofold. Assuming arguendo that it can show that the production records were falsely recorded it has the companion and further burden of showing not only that the grievant knowingly made the recordings but that the other two members of the crew, who worked with the grievant that night, and who were paid on the basis of the group productivity, did not know what was going on.

It is well settled that where prima facie, employees are similarly situated, they must be treated similarly. And if three employees appear to be involved in an act of misconduct, the Company's decision to discipline one and to exonerate the other two must be justified by persuasive and distinguishing evidence. In the instant case, unless the Company can demonstrate that there is an evidentiary basis to treat the grievant differently
from the other two members of the crew, the grievant's discharge cannot stand even if the Company's case on false productivity reports can be substantiated.

Based on the record before me, I find that I need not determine whether the production records on May 20, 1976 were falsely inflated, because even if they were, the Company has not satisfied me that the grievant should have been treated differently from the other two members of the crew. As I see it, and as more fully explained below, either all three should have been restored to duty without penalty, or all three should have been disciplined equally, leaving the evidentiary test of distinctions between and amongst them, if any, to the grievance and arbitration forum.

The principal reason advanced by the Company to support the grievant's discharge was because he filled out the production report. However the grievant denied filling out the full report, asserting that a significant portion, including much of the disputed productivity, was not filled out by him. His testimony on that score stands unrefuted. Indeed an examination of the production sheet indicates a different handwriting for certain significant items of productivity which the Company contends were falsified. While the record does not disclose who may have filled out that portion of the production record, the allegation that the grievant was solely responsible for recording the productivity that night is not supported by the
evidence. Hence, the Company's principal reason for affixing blame solely on the grievant is unproved by the quantum of evidence required in disciplinary matters.

Moreover, I do not find it to be an adequate distinction between the grievant on one hand and the other two members of the crew on the other, for the Company to merely assert that it had no evidence of the participation of the other two employees in the alleged falsification of the production records. That simply begs the question and does not meet the Company's burden in such cases. The Company's burden is to show a substantive distinction between the employee disciplined and those exonerated, in order for the discharge to stand if the charge against the discharged employee is proved. I find no substantive distinctions in the records. The Company's explanation that it believed it had a case against the grievant but not against the other two members of the crew, does not meet the required test.

The fact is that there are circumstances which bind all three employees together and make them similarly situated, guilty or innocent. The first is that each member of the crew is paid based on the productivity of the entire crew. It is inconceivable to me, and contrary to my experience, for employees who are jointly paid based on joint productivity not to be fully familiar with how much they produced at any given time. I simply do not believe, irrespective of whether the disputed
productivity was accurate or inflated, that all three members of the crew did not know precisely how much production was recorded for their shift on May 20, 1976. In this connection, the grievant and Villane were each overpaid $11.61 and Newman was overpaid $11.11 if the production was falsified. I do not accept the notion that Newman and Villane would not have related their pay to their productivity or would not have known if there was a discrepancy between what they produced and what was recorded.

Also significant to my mind is the fact that on prior occasions the Company suspected that this very crew was engaged in a practice similar to what the grievant is singly charged with in the instant case. On those occasions supervision cautioned all members of the crew. Thereafter, by the Company's own testimony, the alleged fraudulent practices ceased, or, took a different form. The significance is inescapable - namely that following individual and joint notice of the Company's suspicion, the crew as a whole changed its practices, whether or not any prior practice was improper. In short, in a number of relevant and evidentiary ways the Company has tied each member of the crew together. Having done so, I fail to see how in the instant case it can now separate the grievant from the crew as a joint entity, for radically disparate disciplinary action.

This is not to say that the grievant did not falsify the
productivity records. I do not decide whether he did or did not. Instead it is my determination that if he is responsible, the Company has not shown that that responsibility or culpability was unique to the grievant. Therefore, the well settled rule of even-handed treatment must apply. All three should have been treated alike, because if there was misconduct, the evidence does not show that it was any more the individual misconduct of the grievant than the group misconduct of all three members of the crew. To reinstate Newman and Villane with full benefits and to discharge the grievant is to discriminate against the grievant, the falsification of the production records notwithstanding.

For the foregoing reasons I have no choice but to direct that the grievant be reinstated with full back pay and benefits in the same manner accorded Villane and Newman.

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

The discharge of Henk Jansen is reversed. He shall be reinstated with full back pay and benefits.

DATED: February 7, 1977
STATE OF New York ) ss :
COUNTY OF New York )

On this seventh day of February, 1977, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with the arbitration provisions of the collective bargaining agreement effective May 1, 1975 to April 30, 1978 between International Union of Operating Engineers, Local 542, AFL-CIO hereinafter referred to as the "Union", and Bechtel Corporation, hereinafter referred to as the "Company", the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

1. Were the layoffs of Robert J. Hansbury and Thomas Maberry, Jr. in violation of Article IV Section 4 and/or Article II Section 2(c) of the collective bargaining agreement? If so what shall be the remedy?

2. Was the layoff of Joseph Polito in violation of Article IV Section 4 and/or Article II Section 2(c) of the collective bargaining agreement? If so what shall be the remedy?

3. Was the layoff of Ralph Zarnowski in violation of Article IV Section 4 and/or Article II Section 2(c) of the collective bargaining agreement? If so what shall be the remedy?

4. Was the layoff of William J. Garlick in violation of Article IV Section 4 and/or Article II Section 2(c) of the collective bargaining agreement? If so what shall be the remedy?
A hearing was held at the Philadelphia office of the American Arbitration Association on August 29, 1977 at which time each of the above named individuals, hereinafter referred to either by name or as the "grievant(s)" and representatives of the Union and Company, appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Article IV Section 4 reads in pertinent part:

Weekly Pay

When employees covered by this agreement report for starting work, they shall be entitled to work until the end of his job and shall not be replaced before the conclusion of their job except for just cause. If their job continues for more than five (5) days, said employees shall be on forty (40) hour weekly guarantee basis at the weekly rate for the elapsed working days while their job lasts .........

The pertinent part of Article II Section 2(c) reads:

".......no employee shall be discharged except for just cause."

In each case the Union, on behalf of the grievant(s) contends that the layoffs were violative of Article IV Section 4 of the contract in that the grievant(s) were not permitted "to work until the end of his job" and "were replaced before the conclusion of their job."

Because the Union deems the layoffs to be "permanent", it also contends that they were discharges within the meaning of Article II Section 2(c).

Let me first deal with the latter contention. The
grievant(s) were not discharged but were laid off. Under the terms of the contract they had specific recall rights subsequent to the layoff and continue to have recall rights generally within the Industry. Accordingly Article II Section 2(c) is not applicable to the facts in this case and the Union's reliance thereon is misplaced.

Each grievant, with the exception of Hansbury was an operator of some type of mobile vehicle or crane which was being used in the construction of a large nuclear power plant in Limerick, Pennsylvania (Hansbury was an oiler on the vehicle operated by Maberry). Maberry and Hansbury were assigned to a seventy ton P and H truck crane and worked moving steel with a crew of iron workers. Polito was the operator of a cherry-picker and worked with pipefitters in moving pipe. His general assignment included the handling of various construction material such as lumber, iron, concrete, dirt, "men in cages", as well as pipe.

Zarnowski was the operator of a seventy-five ton P and H crane and worked in the layout area of the project with a crew of pipefitters.

Garlick operated an eighty-two ton link belt crane, and also worked with the crew of pipefitters in the layout area.

The Union's case is: 1. that Maberry and Hansbury were laid off and their crane deactivated before they completed the work assignment with the iron workers and that immediately after receiving notice of the layoff their crane was replaced in the
exact same location by another seventy ton crane operated by a
different operator and different oiler, and that it used the
rigging previously used by Maberry and Hansbury and continued
the same job assignment with the same crew of iron workers; 2:
that when Polito was laid off and his cherrypicker deactivated,
another cherrypicker operated by a different operator replaced
him at the same location and continued his assignment with the
same crew of pipefitters; 3: that when Zarnowski was laid off
and his seventy-five tone P and H crane deactivated he was re-
placed by an eighty-two ton link belt crane which took his place
and continued the work that he had been performing with the
crew of pipefitters; 4: that when Garlick was laid off and his
eighty-two ton link belt crane deactivated he was replaced by a
one hundred and forty ton P and H crane which continued the same
work which he had been performing in the layout area with the
same crew of pipefitters.

Additionally Polito, a Group I employee contends that
when he was laid off the operator of a remaining cherrypicker
was a Group I-A employee and that to retain a Group I-A employee
in preference to a Group I employee is violative of Article II
Section 2(k) of the contract, and hence a breach of the "just
cause" provision of Article IV Section 4.

It is also the Union's case, and the contention of all
of the grievants that their layoffs were politically inspired
because of their opposition to a particular Union District Agent
in an upcoming Union election, and that such political retaliation
is also contrary to the "just cause" language of Article
IV Section 4 of the contract.

Finally, with regard to the Zarnowski grievance, it is contended that Zarnowski's crane was in better mechanical and operating condition than the cranes which were retained, and to select his crane is evidence of the political nature of Zarnowski's displacement; and with regard to the Garlick grievance it is asserted that his machine was restored to operation two months after his layoff with another operating crew, and that this is evidence of the political nature and illegitimacy of his layoff.

The Company denies that any of the layoffs were politically motivated, or that it had any specific knowledge of who the grievants were supporting in the Union election, or that Union politics influenced its decisions. Rather, the Company asserts that the layoffs were due solely to a reduction in the available work for those pieces of equipment and that the layoffs were in accordance with the provisions of the contract based on a general diminution in construction activity at the project. The Company asserts that the determinations to deactivate the pieces of equipment involved were strictly managerial decisions in accordance with managerial authority; that the contract does not prescribe that layoffs follow seniority; that in the case of Polito the contract allows layoffs of employees in Groups I and i-A equally and interchangeably; that Zarnowski's crane was not in better mechanical or operating condition than the two other cranes which remained, but that in any event there is no contract provision requiring
the continuance of the equipment that is mechanically better; that the reactivation of Garlick's machine with a different operator is irrelevant in that the contract guarantees the right of recall for only one week after layoff, (and thereafter recall is discretionary with the Company); and finally that where relevant, the decisions were also based on the Company's determination that the remaining cranes, because of specific mechanical characteristics could better perform certain remaining assignments.

The heart of this case rests with the interpretation of Article IV Section 4 of the contract and particularly the meaning of the "job" referred to therein. That Section mandates the continuation of active work "until the end of (the) job"..... and until "the conclusion of (the) job, except for just cause." The parties sharply differ over what constitutes a "job" within the meaning of that Section.

During the course of the hearing the parties did agree that "the job" did not mean the completion of the nuclear power plant. For if that was to be the interpretation it would mean that all of the cranes and other equipment involved would have to be maintained on the property and their crews on the payroll long after there was any need for them. However the Union does contend that the "job" is the particular assignment on which the equipment is working at the time of the layoff. Based on that interpretation the Union points to the fact that the specific assignments on which the grievants were working, (i.e. moving
material with the iron workers or the pipefitters or in the layout area) had not been finished and that other equipment replaced the laid off grievants and continued the very same work.

The Company argues that Article IV Section 4 is not intended to define "the job" but rather, because it is entitled "Weekly Pay" is nothing more than a contract provision which guarantees a forty hour work week if employees work for more than five days. However the Company offered testimony of an official of the Contractors' Association who negotiated this contract on behalf of the various employer signatories. He stated that Article IV Section 4 does define "the job" and that the industry-wide interpretation of a "job" for equipment operators is "so long as the employer decides to use that particular piece of equipment." Or in other words so long as a particular crane or cherrypicker is in operation the operator (and oiler) on that equipment may not be replaced on that piece of equipment by another operator (and oiler), but that if an employer decides to discontinue any such piece of equipment his decision to do so brings an end or conclusion to "the job" of that vehicle within the meaning of Article IV Section 4. Additionally, based on its case, it is the Company's position that the job for any particular piece of equipment ends when any such equipment is deactivated and its crew laid off because of a diminution in work that is available for all equipment performing work to which any or all of them may be assigned.

The pertinent language of Article IV Section 4 together
with the foregoing various interpretations compels the conclusion that the meaning of a "job" is undefined, unclear, and hence ambiguous. As such, the ambiguity must be clarified by traditional and well accepted methods in such cases, namely intent gleaned from negotiations and evidence of practice in implementation of that intent.

The practice in the Industry represents good evidence of what was intended when Article IV Section 4 was negotiated by the Union and the various employer signatories to the contract represented by the Contractors' Association. The Union offered no testimony or evidence of what transpired during negotiations in order to establish the meaning and intent of the critical language of Article IV Section 4. However the negotiator for the Contractors' Association testified without refutation that an employee's job ended within the meaning of Article IV Section 4 when the employer decided to discontinue the use of the equipment on which he worked. He testified that that has been the practice in the Industry in implementation of Article IV Section 4. I accept that interpretation subject to the further clarification below.

The "replacements" about which the Union complain in this proceeding I find were not replacements within the proscription of Article IV Section 4, but rather reassignments of work because of a drop in the quantity of work at the job site in general, together with a drop in the overall manpower and a diminution in the specific work available to be performed by the
cranes and other equipment involved in this case. Less equipment was required and hence the deactivation of some of that equipment and the layoff of some of its operators followed. In that respect what the Company is saying, what the practice has been, and what I deem to be the most realistic and appropriate definition of "a job" is the overall and total quantity of available work to which the cranes and other equipment involved in this case are or could be jurisdictionally assigned. When that total available work diminishes, so that for example only two cranes rather than three are necessary to meet the Company's needs, the "job" for one of the cranes has ended, and it may be deactivated and its operator (and oiler) laid off. That the remaining crane or cranes physically take over the very same functions previously performed by the laid off crane is immaterial. The cranes are concededly mobile. It is conceded that they may be assigned to different locations and different work on a daily basis. In other words they may be shifted around to cover the available work. If the available work diminishes and one crane is deactivated as a result, it is not improper nor surprising that the remaining crane or cranes would at some point, and possibly immediately be reassigned to cover the available work including, if that work enjoyed priority, the very duties previously handled by the crane and employees laid off.

Based on the substantial evidence submitted by the Company regarding the diminution in manpower and the drop in available work for the cranes and the cherrypicker in the instant
situation, I am persuaded that the layoffs of the vehicles operated and worked on by the grievants, and the layoffs of the grievants followed the foregoing formula and were due to those circumstances. I appreciate the fact that in each instance it may have looked to the grievants as a proscribed "replacement" before their job was completed. But considering the definition of a job based on contract negotiations and industry-wide practice, what the grievants saw was not a "replacement" within the meaning of Article IV Section 4 of the contract but rather a reassignment of remaining vehicles within the same job, but to a new function within that job, and only to cover the diminished available work.

If the Union's interpretation of a "job" was accepted it would mean that the Company had to retain the services of all its cranes and other equipment so long as something remained to be done on the particular function assigned to that equipment on any particular day. That would mean that even if a full days work was not available for each piece of equipment, all that equipment nonetheless had to be fully maintained on the portions of work which remained. In the absence of evidence of that intent at the time the contract was negotiated and in the absence of any practice supportive of that interpretation, I am unable to conclude that Article IV Section 4 intended that inefficient and uneconomic result. In the instant case the grievants and their equipment could have been retained instead of some other comparable equipment, and if in that case the grievants had been reassigned the next day to some work functions previously performed
by a vehicle and crew laid off, it would not be the grievants in this case who would complain but rather the employees of the other laid off vehicle. That possibility demonstrates that the definition of the "job" is the totality of available work to which any of the cranes or other relevant equipment may be jurisdictionally assigned.

With regard to the question of layoffs and seniority, the Company is contractually correct despite the priorities which unions generally accord employees with greater seniority. In this contract there is no such restriction in layoff situations. The employer is not barred from laying off senior employees and retaining junior employees. The only relevant restriction is that he first layoff employees in Group III, then employees in Group II, "before laying off employees in Group I or I-A" (emphasis added). The Company has complied with this restriction. In the case of Polito the Union and the grievant are in error when they contend that a Group I-A employee must be laid off before an employee in Group I. The contract places employees in Group I and I-A together for purposes of layoff and the Company may layoff in either group interchangeably without according either seniority or priority to one over the other. Therefore that the Company retained an employee classified in Group I-A as the operator of a cherrypicker when it laid off Polito who enjoyed Group I status was not in and of itself a contract violation. I find it unnecessary to determine whether in fact the remaining cherrypicker operator was a Group I or Group I-A employee because the Union does not allege a breach of
Section 2(k) of Article II of the contract.

Based on the evidence in the record I am unable to conclude that the grievants were selected for layoff because of a policy of political retaliation or because of their political opposition to an incumbent Union leader. There may very well be an intense internal union dispute over the union election, and within the union the grievants may be subject to some adverse reaction to their political disposition. However, in order to establish that their layoffs were due to political considerations, the grievants must make a connection between the internal Union dispute and the actions of the Company. That connection has not been made. No place in this record has the Union or the grievants been able to impute to the Company or to the Company representatives who made the layoff decisions either knowledge of the grievants political views, their support of one candidate over another, or any political influence in the Company's decision as to which employees and which equipment was to be laid off. The fact is that even if political considerations entered into the decision, the arbitration forum would not be the place to seek redress if the Company's decisions were nonetheless consistent with the contract. Here, under the contract, because the Company may effectuate layoffs irrespective of seniority, it may select whichever employees and whichever equipment it wishes. If the laid off employees happen to be in political opposition to an incumbent Union leader, it would be a matter for consideration of the Labor Board, the courts or some other forum. But it is not for arbitration, where the
arbitrator's authority is confined to the interpretation and application of the contract.

Finally, the Company is correct when it asserts there is no contract provision covering the mechanical quality of equipment to be retained or laid off, and no contract obligation to recall an employee to the piece of equipment on which he previously served after the expiration of one week following his layoff. Therefore it is immaterial whether Zarnowski's crane was in better shape than those that were retained and there is no violation of the contract nor may any adverse inferences be drawn from the Company's failure to recall Garlick to his machine some two months following his layoff.

In sum, though I appreciate how intensely the grievants feel about what they consider to be improper layoffs, I must conclude that the evidence shows a substantial reduction in available work for the vehicles which the grievants operated and therefore a justifiable basis for a reduction in the numbers of those vehicles based on the inherent managerial right to reduce the work force when the available work has dropped and the right to retain equipment the Company deems better suited to the remaining work. Political considerations in the selection of the grievants for layoff have not been proved for reasons indicated. However in that regard the rights of the grievants, if any, for any action in any other appropriate forum are expressly reserved, inasmuch as I have ruled that this arbitration forum is not the place to raise that challenge. In the absence of any relevant contract restriction on the Company's right to decide which
employees are to be laid off and which are to be retained, the fact that the grievants may have been senior to those who continued at work does not constitute a violation of this particular collective bargaining agreement.

For these and the other reasons referred to herein, the grievances must be denied.

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

1. The layoffs of Robert J. Hansbury and Thomas Maberry, Jr. were not in violation of Article IV Section 4 or Article II Section 2(c) of the collective bargaining agreement.

2. The layoff of Joseph Polito was not in violation of Article IV Section 4 or Article II Section 2(c) of the collective bargaining agreement.

3. The layoff of Ralph Zarnowski was not in violation of Article IV Section 4 or Article II Section 2(c) of the collective bargaining agreement.

4. The layoff of William J. Garlick was not in violation of Article IV Section 4 or Article II Section 2(c) of the collective bargaining agreement.

DATED: September 6, 1977

Eric J. Schmertz
Arbitrator