In The Matter of The Arbitration:

between

Phoenix Lodge No. 315 District 15 IAMAW, AFL-CIO

And

Airco Welding Products
Airco, Incorporated

OPINION and AWARD
78K/01324

The stipulated issue is:

Did the Company violate the existing Agreement when it discontinued its employee check cashing service in May 1977? If so what shall be the remedy?

A hearing was held on January 9, 1971 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.

In February, 1959, the Company changed its method of paying its employees, from cash to check. With that change, in March, 1959 it made a check cashing service available to their employees, within the plant, following each pay day. In May, 1977 (following a two month strike by the employees of the check cashing service, during which the service was suspended) the Company permanently terminated that service. Instead, it made arrangements with a bank near the plant to cash employee checks.

The Union contends that the long period of the availability and use of the check cashing service constituted a practice which ripened into a contractual benefit, and which may not be unilaterally withdrawn by the Company. It asserts that many employees have relied on the service, have lost personal time,
incurred some expense and have been inconvenienced by its cessation.

The Company argues that the check cashing service is not a contract benefit; that it may be unilaterally withdrawn as it was unilaterally installed; that the Company had bona fide economic reasons to end it; its use by employees had fallen to no more than one half the work force of the bargaining unit; and that the nearby bank is an adequate alternative.

It is undisputed that over all these years the collective bargaining agreement made no express mention of the check cashing service. Additionally, it is conceded that the contract contains no explicit clause preserving "existing benefits," or any language either integrating past practice into the agreement or according it the status of a contract benefit.

In the absence of any such foregoing contract provisions the question simply is whether the availability and use of the check cashing service for some eighteen years ripened into a bilateral understanding, the discontinuance of which required bilateral agreement.

I conclude that it did not. In my view, the long standing availability and use of the check cashing service was an exercise of an express managerial right, and hence not a traditional past practice. By specific contract language the Company reserved the right to determine the "methods of payroll payment."

Article XII, in pertinent part reads:

......the methods of payroll payment......
are among other things vested in the Employers......"
There is no dispute that the Company had the contractual right to change its payroll methods from cash to check. And there is no contractual requirement that an in-plant check cashing service be provided. That the Company did accompany its change in payroll payment with a check cashing service was, in my view, a further implementation of its express managerial right to determine the "methods of payroll payment." And that exercise of that managerial right, as expressly negotiated by the parties in the Employer's Rights clause of the contract continued from 1959 to 1977. As such, it was not transformed into a bilateral agreement, nor did it become a benefit protected by the contract.

It follows then, that the Company's decision to end the check cashing service was the most recent exercise of that managerial right under Article XII of the contract.

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

The Company did not violate the existing Agreement when it discontinued its employee check cashing service in May 1977.

Eric J. Schmertz
Arbitrator

DATED: January 22, 1979
STATE OF New York )ss.:  
COUNTY OF New York )

On this 22nd 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.
AMERICAN ARBITRATION ASSOCIATION ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration

between

Nurses Rights Organization

and

Beth Israel Medical Center

OPINION AND AWARD

Case #1330 0017 78

The stipulated issue is:

What shall be the disposition of the Union grievance as stated in the grievance submission dated November 16, 1977?

Hearings were held on August 10, 1978 and February 26, 1979 at which time representatives of the above named Union and Medical Center appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Both sides filed a post-hearing brief or memorandum.

In pertinent part the grievance as submitted by representatives of the Union to the Medical Center, in the form of a letter dated November 16, 1977 reads as follows:

This letter is submitted as a grievance pursuant to the NRO contract.

The grievance pertains to the vacancy of a ward clerk on 4A in Bernstein. The nurses on that unit are filling this vacancy on a continuous, regular non-emergent basis.

Unit 4B in Bernstein is comparable where a ward clerk is employed to assume the clerical functions necessary for the unit to run smoothly.

It is our contention that this is a violation of Article X of the NRO contract. We further
contend that we were correct in initiating the grievance at Step 2. As the contract states this is called for if the Supervisor does not have the authority to resolve the grievance.

It appears, as the Medical Center asserts in its brief, that the grievance was not filed within the time limits prescribed in Step 1 of Article XIV (Grievance Procedure) of the contract. The ward clerk in unit 4A of the Bernstein Institute resigned in December of 1976, about eight months before the first collective bargaining agreement between the parties was signed. The grievance was not submitted until three months following the execution of the contract. Step 1 of the grievance procedure requires that non-monetary grievances be filed within ten days after the occurrence of the facts on which it is based, and within thirty days if it is a monetary claim. Assuming the Union's first notice of the facts in this case when the contract was executed, the grievance dated November 16, 1977 fails to comply with either of those time limits. Step 1 of the grievance procedure goes on to state that:

"If no such notice is served in the time specified, the complaint will be barred."

However, because the arbitrability issue was not raised at the hearing and therefore not subjected to the adversary and evidentiary procedures thereof, and because apparently it was not raised by the Medical Center at any time during the processing of the grievance, I conclude that in this case, the Medical Center has waived that defense.
Article X Paragraph 1 of the contract, which the Union asserts has been violated reads:

**Out-Of-Title-Employment**

1. Limitations. (a) Employees shall not be required to act out of title in filling vacancies in non-nursing positions except in emergent circumstances, but may be required to perform non-nursing functions to ensure continuity of care.

I conclude that the contract language and the testimony regarding whether the ward clerk in Unit 4A in the Bernstein Institute was a "non-nursing position" are respectively ambiguous and conflicting. Therefore based on the record I am unable to determine whether the contract phrase "non-nursing positions" means as the Union asserts all jobs that are not based on professional status, or as the Medical Center contends those that are not part of the Nursing Department.

But, in my judgement, a determination is unnecessary because I am not persuaded that the ward clerk in Unit 4A, or any of the ward clerks in other units that have them acquired an exclusivity over the various duties which they perform. Based on the record I am satisfied that the duties regularly performed by the ward clerk in Unit 4A prior to her resignation, were also performed, albeit in lesser amounts than at present, by the nurses in that unit when the ward clerk was absent, on vacation, otherwise away from her job, and also when on the job but occupied with some other specific assignment. Moreover, and significantly,
a number of units in the Bernstein Institute do not have and
never had ward clerks, and the duties which otherwise would
have been undertaken by such a clerk and which are substantially
the same as those performed by the ward clerk in Unit 4A and
now performed by the nurses in that unit, have always been
handled by the nurses and orderlies of those other units. The
lack of exclusivity of the ward clerk over the disputed duties
was recognized by the Union in the contract negotiations lead-
ing to the present agreement. Union Demand #22 which the
Medical Center did not grant sought:

The provision of a unit clerk at each
MMTP clinic for all regular hours and
on each unit of the Medical Center for
week day shifts.

I construe this demand as meaning that the Union recognized
that clerks were not then employed at each unit; that nurses
and others were performing the duties in question, and that
clerks should be assigned to each unit to relieve nurses of
those assignments. That the Union failed to obtain this contract
provision means that the various duties assigned to and performed
by ward clerks were and have been also performed by nurses on
a comingled basis where clerks are present, and by nurses and
possibly other employees exclusively where ward clerks are not
part of the unit complement.

That the nurses in Unit 4A are presently required to allot
a significantly greater part of their time to the clerical and
other ministerial duties previously assigned to the ward clerk does not mean that they are performing work out-of-title. Rather it means that they are doing more work of the type they always did. That constitutes a managerial decision as to what the nurses are to do within the work day, and though it may not be the most efficient use of the skills and professional training of a nurse, and may even take time away from patient care, it is an operational matter, not an out-of-title assignment, and hence within the narrow jurisdiction of the arbitrator not a contract violation.

Based on the foregoing it is immaterial and therefore unnecessary for me to decide whether the resignation of the last incumbent ward clerk on Unit 4A, some eight months before the contract between the parties was signed, created a "vacancy" within the meaning of Paragraph 1 of Article X.

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 dated November 16, 1977 is denied.

DATED: May 29, 1979

Eric J. Schmertz
Arbitrator

STATE OF New York )
COUNTY OF New York )

On this 29th day of May, 1979 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:

With regard to Dr. Gerald Hamm and Mr. John Bender, did the School Board violate the collective bargaining agreement by requiring their mandatory retirement at age 66 regardless of tenure, fitness for employment and teaching ability? If so what shall be the remedy?

A hearing was held at the American Arbitration Association in Philadelphia, Pennsylvania on January 24, 1979 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument.

The grievance is limited to the Board's mandatory retirement policy as implemented in 1976 and 1977. That policy, which substantively originated in 1967, was reiterated in 1976 by the following Board resolution:

Resolved, that no ten month employee who has reached the age of 66 years shall continue in service beyond June 30 next succeeding his 66th birthday and no 12 month employee shall continue in service beyond August 31st next succeeding his 66th birthday and be it

Further Resolved, that the Superintendent of Schools is authorized to continue in service any employee beyond the age of 66 if in his judgement this action is in the best interest of the School District, provided that no employee shall continue in service beyond
June 30 next succeeding his 68th birthday for 10 month employees, and August 31 next succeeding his 68th birthday for 12 month employees.

Pursuant thereto grievant Bender who reached his 66th birthday in 1976 was involuntarily retired at the end of that academic year. Grievant Hamm, who also reached age 66 in 1976 was permitted to continue an additional year in accordance with the second paragraph of the above Resolution, and was involuntarily retired at the end of the academic year of 1977. Bender's petition to continue beyond 1976, and Hamm's petition to continue beyond 1977 were denied by the Superintendent of Schools.

The Union contends that the mandatory retirement policy of the Board as applied to the grievants in 1976 and 1977 was violative of certain specified state and federal legislation and was unconstitutional; and that violates the collective bargaining agreement, particularly the "non-discrimination" and the "just cause for discipline or discharge" clauses of the contract. Alternatively, if the policy is found valid, the Union asserts that it is "improper and unfair" within the meaning of a contract grievance; that the Superintendent of Schools by selectively and without regard to a Board memorandum entitled Guidelines For Recommending Retention In Service Beyond Mandatory Retirement Age, retired some teachers and permitted others to continue, exercised his discretionary authority in an arbitrary and capricious manner and "deviated and misapplied.....policy", thereby invalidating that policy.

Whether the policy, as implemented and applied to the grievants in 1976 and 1977 violated state or federal legislation and/or was unconstitutional are not questions within the jurisdiction of the arbitration forum.
The stipulated issue is limited to whether the policy violated the collective bargaining agreement, not statutes, legislation or the constitution. The legality of the policy under law external to the collective bargaining agreement is exclusively for the forum with adjudicatory jurisdiction over that question, namely the designated administrative agency and the courts. Any ruling by an arbitrator could not preempt the decision making authority of those forums and therefore could be neither authoritative nor determinative.

The contract admonition to the arbitrator that he may not render an award "contrary to applicable law" means, in my view, that once "applicable law" has been determined by the forum with jurisdiction, whether that be an administrative agency, the legislature, or the courts, the arbitrator is prohibited from making a decision contrary to or in conflict therewith. In the instant case and based on the record before me, the "applicable law" regarding the validity of the Board's policy on mandatory retirement for the years 1976 and 1977 has not been fully or finally determined by the courts. Hence there is not yet a settled determination to which the arbitrator would otherwise be bound. It follows then that with regard to the legality of the Board's policy under legislation, statutes and the constitution for the relevant years, the rights of the parties are fully reserved for whatever action may be available or pending in any other appropriate forum.

With regard to what is before me, I do not find the Board's policy as applied to the grievants in 1976 and 1977 to be
violative of the collective bargaining agreement. The contract covering those years is silent on the matter of mandatory retirement. In the predecessor contract, covering the years 1972-1976, the Union obtained a moratorium on or suspension of the policy. The Union sought but failed to obtain a continuation of that moratorium in the 1976-1978 contract. By negotiating that moratorium or suspension, rather than attacking its validity under the contract, means to me that the Union accepted the contract validity of the retirement policy, seeking only to suspend its application for as long as possible. When it failed to continue the suspension for the contract years 1976-1978 that ended the only contract limitation on the mandatory retirement policy. And consequently the unchallenged validity and effectiveness of the policy was reestablished.

I also construe the negotiated moratorium in the predecessor contract as persuasive evidence that the Union did not then think that the policy was violative of the "just cause for discipline or discharge" provision of the contract. For had it thought so, it would have then, as it does now, attack the policy on those grounds. The fact is that the contract clause requiring just cause for discipline or discharge does not in my judgement cover, nor did it contemplate involuntary retirement because of age. That clause is intended to cover misconduct, incompetence and other traditional grounds for discipline or dismissal. Involuntary retirement because of age is not "dismissal or discipline" within the intent or meaning of that provision. Hence I conclude, the Board promulgated its policy
on mandatory retirement to deal with a matter not covered by the contract; and the Union negotiated a moratorium in the prior years, as the only method of staying implementation of that policy under the contract.

Moreover the "just cause" provision of the contract referred to by the Union, is applicable to teachers (and other employees) who do not have tenure. The Union merely alleges, but has not proved that with his retention for the year 1977 grievant Hamm became non-tenured. The Board disputes that assertion. Therefore the record is devoid of evidence establishing the threshold applicability of the "just cause" provision to grievant Hamm (or to grievant Bender who undisputedly, was tenured at the time of his involuntary retirement).

Nor does the policy violate the "nondiscrimination" clause of the contract. That language prohibits discrimination on the basis of "race, creed, color, national origin, sex or marital status." It says nothing about "age." It seems to me that when negotiated the question of "age" was well within the contemplation of the parties. By not including it, means to my mind, that as lamentable as age discrimination may be it is not contractually prohibited by that clause. Indeed, the fact that federal legislation effective January 1, 1979 has now changed this Board's and other employer mandatory retirement policies, indicates that the traditional nondiscrimination clause limited as here to circumstances other than age was not applicable to and not enough to bar rules requiring mandatory retirement at age 65, or as here at age 66. Of course this is not to say, nor is it to judge one
way or the other, whether mandatory retirement because of age would constitute "discrimination because of age" even if the contract clause included an express prohibition against age discrimination.

Finally, there are only allegations, but no probative evidence before me, that the Superintendent of Schools "deviated from" or "misapplied" the policy or that he failed to follow the previously referred to "Guidelines", when he retained some teachers beyond age 66 and forced the retirement of others. No evidence or testimony regarding the circumstances of any teachers other than the grievants was presented in this arbitration. Hence, I do not know why some were retired and others retained, or even who they were; and hence I cannot even make comparisons between the grievants and others who also reached age 66 in the years involved. In short there is nothing before me of an adequate evidentiary nature on which I could base a conclusion that the decisions of the Superintendent of Schools under the second paragraph of the Board's resolution were not made pursuant to the Guidelines.

The only example offered by the Union is that grievant Hamm was allowed to continue through 1977 because "a phone call was made on his behalf", but not allowed to continue thereafter even though the "same phone call was again made on his behalf." This sparse information is simply not enough to support a conclusion that the Superintendent of Schools acted unfairly, arbitrarily, or mis-applied the policy with regard to Dr. Hamm.
There may well have been reasons consistent with the Guidelines and irrespective of the calls in either or both of the years, for Dr. Hamm's retention after 1976 and his forced retirement in 1977. In short, there simply is not probative evidence in the record to support a charge of "unfairness ... deviation from or misapplication of policy" or selective and/or arbitrary treatment in the way the Superintendent applied the policy to the grievants in the years 1976 and 1977. And inasmuch as those allegations are made by the Union, it is the Union's burden to support them with the requisite quantum of evidence and proof. The Union has failed to do so herein.

For the foregoing reasons I do not find a breach of the collective bargaining agreement.

Though my Award will sustain the action of the Board, the case manifestly lends itself to a recommendation, a step which arbitrators including this arbitrator take sparingly. But in view of the fact that the basic issue of mandatory retirement has now been determined by federal legislation effective this year, and as my Award upholds the Board's policy and its application to the grievants for the years 1976 and 1977, I should think that the Superintendent of Schools is now in a position to consider anew the petition of Dr. Hamm for reemployment and/or retention on a year by year basis. The Union has advised that grievant Bender does not seek reemployment, so this recommendation does not apply to him. It is undisputed that Dr. Hamm is an excellent teacher, in good health, in full command of his faculties, and highly regarded by his colleagues and the students. Under those circumstances, in view of my Award upholding the Board's policy
and against the backdrop of the current, undisputed preemptive federal law, I can see no prejudice to the Board or to the prerogatives of the Superintendent of Schools by Dr. Hamm's re-employment without back pay. Therefore I recommend that the Board and the Superintendent of Schools so reemploy him. If reemployed his status would be a matter for determination by the Board unless the parties mutually agree on some other status. Acceptance of this recommendation is for the sole determination of the Board. If not accepted, the Award as follows, obtains.

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

With regard to Dr. Gerald Hamm and Mr. John Bender, the School Board did not violate the collective bargaining agreement by requiring their mandatory retirement age age 66 regardless of tenure, fitness for employment and teaching ability.

Eric J. Schmertz
Arbitrator

DATED: February 3, 1979
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Philadelphia Federation of Teachers,
Local #3, AFT, AFL-CIO

and

Board of Education of the School District of Philadelphia

OPINION AND AWARD
Case #14 30 0255 77 M/Q

The stipulated issues are:

1. Whether the School District violated the collective bargaining agreement by failing to remove three emotionally disturbed students from grievant's regular classroom and permitting them to remain in grievant's classroom, should the grievant be compensated for such violation in an amount equal to the salary differential paid to teachers of the emotionally disturbed?

2. Where a Federation Building Committee and a School District principal agree to certain policies, practices and/or working conditions for a particular school and such agreement is not in violation of and/or inconsistent with the terms of the Federation-School District collective bargaining agreement, may a principal subsequently alter that agreement?

3. Has the School District violated its own statement of past practice, policies and procedures concerning the elimination of athletic programs by drastically reducing the intramural program at Frankford High School in favor of the institution of an interscholastic wrestling program?

Did the elimination of intramural sports at Frankford High School comply with the previous rulings regarding the prohibition on the elimination of sports activities solely on the basis of student participation?
Did the principal comply with the provisions of the collective bargaining agreement requiring discussion with the building committee prior to the institution of the change in the intramural program?

A hearing was held in the offices of the American Arbitration Association in Philadelphia on February 14, 1979 at which time representatives of the Federation and District appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken.

**Issue No. 1**

The District Hearing Officer at the step 2 hearing determined that three emotionally disturbed students were in the regular elementary school class of Elementary School teacher Joseph Pizzo; that the District refused to remove those children and place them in a special education class for emotionally disturbed children; and that the District thereby violated Article TV 5b of the collective bargaining agreement. Pursuant to Article B-VIII step 4b and the ruling of this Arbitrator at the hearing, those factual findings of the Hearing Officer are not disputable in this arbitration because no evidence or testimony other than that presented at the step 2 hearing may be introduced in the arbitration.

I find that the presence of emotionally disturbed children in Mr. Pizzo's regular class constituted a de facto assignment to Mr. Pizzo of duties properly within the higher rated job of Special Education Teacher.

It is well accepted in the industrial setting, and I see
no reason why it should not apply here, that whether a contract explicitly provides for it or not, the appropriate remedy in such situations is for the employee assigned to higher rated duties to receive the rate of pay of the higher job classification during the period he performs those duties. This rule applies whether the employee is officially placed in the higher classification or called upon to perform duties which properly fall within the higher job classification. Under the contract, emotionally disturbed children are to be placed in special classrooms under the supervision of Special Education Teachers. That should have been done with the three students in Mr. Pizzo's class. That it was not done, and for the period of time that they were under Mr. Pizzo's supervision, Mr. Pizzo was called upon to perform duties properly within the higher paid job of Special Education Teacher. Accordingly, for the period of time that the three emotionally disturbed students were in Mr. Pizzo's class, he shall be paid the differential between his regular rate of pay and the higher rate of the Special Education Teacher classification in effect during the 1975-1976 school year.

Issue No. 2

The contract is silent on the beginning and ending hours of the after school and evening educational programs of the General Evening Division of the West Philadelphia High School. Correspondingly, the contract is also silent on the hours of work of the teachers assigned to that program.

Traditionally, in the absence of an explicit contract
provision the starting and finishing times of a work day or schedule are managerial prerogatives. It is the length of the work day or work schedule which is mandatorily bargainable.

In the instant case, and in the absence of a specific contract provision covering the subject, I find that the undisputed agreement in 1973 between the then High School principal and the Federation Building Committee to fix the teaching hours from 6:45 PM to 9:45 PM became a "policy and procedure" within the meaning of Article B-II Section 5a(ii) and 5b(i) of the contract. But any such agreement is not indefinitely binding nor does it require mutual agreement to be changed. The language of B-II Section 5b(i) clearly contemplates and provides for changes in policies and procedures. It does not require that changes be jointly agreed to, but rather that changes be the subject of discussions. I interpret this to mean that so long as there are preliminary and good faith discussions, the District may thereafter make changes in policies and procedures even in the absence of agreement with the Federation.

I find that good faith and meaningful discussions took place between the parties prior to the change in hours to which the Federation now objects. Therefore the change by the school principal in 1976 to teaching hours of 7:06 PM to 10:06 PM was properly implemented, albeit without the consent of the Federation. And as the hours of the after school/evening program, and the teaching hours attendant thereto have not been included as express provisions of the contract, that change, effectuated in 1976,
obviously was not "inconsistent with the terms of Agreement."

Issue No. 3

I deem PFT-9, promulgated by the District, to be "policy and procedure" of the District within the meaning of Article BII 5b(i) of the contract. Indeed the District recognized this by the testimony in this proceeding of the Franklin High School principal who asserted that the relevant provisions thereof were duly considered and complied with in reaching the decision to reduce or eliminate certain intramural athletic activities in favor of a newly established wrestling program, with the resultant layoff of one athletic teacher.

The District does not contend, as it did impliedly in Issue No. 2, that it changed this policy following discussions with the Federation, but rather that its reduction or elimination of intramural basketball, floor hockey, gymnastics and weight training in favor of wrestling was in accordance with "practice and policy." I do not agree. PFT-9, expressly provides standards for the "elimination, reduction or substitution" of after school athletic programs. Here, by decision of the principal there was the substitution of a new wrestling program and a reduction or elimination of other athletic activities. So Section 4A of the aforementioned policy statement is applicable.

Based on the record I do not find that the "needs and interests" of the pupils supported the substitution of wrestling for basketball, weight training, floor hockey and gymnastics. Several hundred students were active in the latter activities
and only seventy, then reduced to about thirty-six participated in wrestling. There is no showing of any special need or compelling interest of the substantially smaller group which would justify replacing the existing interests and needs of the majority. Moreover, there was no special or different budgetary constraints requiring the elimination or reduction of the original athletic program. Funds were available to continue those activities as before. Of course there may have not been enough money to add wrestling to the then existing program, but I do not deem that a "budgetary constraint" within the meaning of PFT-9 upon which the replacement of existing athletic activities in favor of wrestling can be justified.

In my judgement the failure of the principal to comply with these two standards constituted violations of District policy, proscribed, in the absence of a change in that policy, by Article B-II 5b(i) of the contract.

As to remedy the Arbitrator, mindful of the amount of time that has elapsed since this grievance arose and because he is not specially familiar with the administrative, scheduling, hiring and retention practices of the District, is reluctant to dictate to the District what athletic or recreational activities should now obtain. He believes that the instant contract violation can be best cured by a mutually negotiated agreement between the Federation and the District, both of whom are better cognizant of what would be necessary to reestablish a preexisting program or change the present program. Also, I am not persuaded that the
principal acted in bad faith. I think he believed that there was a genuine interest in wrestling which he wrongly estimated beyond the actual enrollment and participation, and that the student interest and need would be served. Under that circumstance I shall direct that the parties forthwith attempt to jointly negotiate a remedy for and resolution of this issue. If they fail to do so within thirty days from the date of this Award, the matter shall be returned to me and I shall fashion and award a remedy. I retain jurisdiction for that purpose.

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 District violated the collective bargaining agreement by failing to remove three emotionally disturbed students from the regular classroom of Mr. Joseph Pizzo and by permitting them to remain in that classroom. For the period of time in which they were in Mr. Pizzo's class, Mr. Pizzo shall be compensated in an amount equal to the salary differential paid to teachers of the emotionally disturbed.

2. Under the circumstances involved, and following meaningful discussions with the Federation Building Committee, the principal did not violate the contract when he changed the beginning and ending teaching hours of those teachers working in the after-school and evening program of the West Philadelphia High School.

3. In response to the three parts of the stipulated issue, the District and the principal violated the collective bargaining agreement by failing to follow existing policy with regard to the
"elimination, reduction or substitution" of the intramural athletic program at the Frankford High School. The parties are directed to forthwith attempt to negotiate a jointly agreed to resolution of this issue and an appropriate remedy. If they fail or are unable to do so within thirty days hereof, the matter shall be referred back to me and I will fashion and award a remedy. For that purpose I retain jurisdiction.

DATED: June 24, 1979

Eric J. Schmertz
Arbitrator
In The Matter of The Arbitration:
between
Local 369 Utility Workers Union of America, AFL-CIO: AWARD
and
Boston Edison 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 Company did not violate the collective bargaining agreement by its deletion of Paragraph 132 from General Order 101 at the time of its reissuance in January 1975, or by failing to consistently continue to make work assignments in accordance with Paragraph 132 thereafter.

Eric J. Schmertz
Chairman

John J. Godfrey
Concurring

Donald E. Wightman
Dissenting

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

On this day of May, 1979, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
DATED:
STATE OF
COUNTY OF

On this day of May, 1979, before me personally came and appeared John J. Godfrey to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED:
STATE OF
COUNTY OF

On this day of May, 1979, before me personally came and appeared Donald E. Wightman 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 369 Utility Workers Union of America, AFL-CIO
and
Boston Edison Company

In accordance with the arbitration provisions of the collective bargaining agreement between Local 369, Utility Workers Union of America, AFL-CIO, hereinafter referred to as the "Union", and Boston Edison Company hereinafter referred to as the "Company", the Undersigned was designated as the Chairman of a tri-partite Board of Arbitration to hear and decide, together with the Union and Company designees to said Board, the following stipulated issue:

Did the Company violate the collective bargaining agreement by its deletion of Paragraph 132 from General Order 101 at the time of its reissuance in January, 1975, or by failing to consistently continue to make work assignments in accordance with Paragraph 132 thereafter? If so what shall be the remedy if any?

Hearings were held on June 5 and October 4, 1978 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. Messrs. Donald E. Wightman and John J. Godfrey served respectively as the Union and Company Arbitrators on the Board of Arbitration. The Oath of the Arbitrators was waived; a stenographic record was taken; the parties filed post-hearing briefs; and the Board of Arbitration met in executive session on April 4, 1979.
Paragraph 132 which was in effect some sixteen years until January 1975 required that:

Operation of Knife Blades or Application of Leads in Stations

Whenever an operator is required to apply leads, or perform prearranged switching of hookstick operated indoor knife blades, on equipment normally operated at 2300 volts or higher, other than street lighting circuit equipment, he must be accompanied by a second person competent to check the location and performance of the operation. The second person must be informed of the operating duties to be performed and after checking the location, observe the operation from a safe distance. The person accompanying the operator may be another operator, a supervisor, or in those cases where the operating duties are being performed in conjunction with construction, maintenance or testing, a competent employee of the division doing work except when live transfer bus switching or the application of phasing leads is involved. In all cases the question of competence is determined by supervisory personnel of the operating division concerned. Switching to isolate defective equipment, to prevent damage or outage, and to restore service is a primary function of operators and does not require a second man.

Based on the record it is apparent that the mandate of Paragraph 132 was intended for purposes of safety, efficiency and to eliminate mistakes.

I conclude that General Order 101, with Paragraph 132 included therein, was an exercise by the Company of its Management Rights under Article V of the contract "to assign, supervise or direct all working forces..... and generally to control and supervise or direct all working forces..... and generally to control and supervise the Company's operations and to exercise the other
customary functions of management." Hence, the use of two persons to perform the work in question was not a "past practice" for the sixteen years it obtained, but rather the implementation of a managerial prerogative under a specific provision of the contract. Pertinent to the instant dispute, Article V goes on to provide that:

"If the Local claims that the Company has exercised any of the foregoing rights in a capricious or arbitrary manner, such claims shall be subject to the Grievance Procedure... and Arbitration..."

Both sides recognize that the issue in this case turns whether the Company's deletion of Paragraph 132 in January of 1975 and the resultant elimination of the use of a second person when the operator performed the work in question, was "capricious or arbitrary" within the meaning of the foregoing contract clause.

In my judgement the experience and consequences of the performances by an operator of the work in question without the presence or backup assistance of a second person between January 1975 and the date of this arbitration is relevant to that issue. The experience has been that though there have been some statistical differences between the pre and post-1975 periods, primarily as to mistakes in performing the operation, there have been no substantial or even significant differences when the overall quantity of work is considered. I find that in the important area of safety, there are no significant distinctions. During the post-January, 1975 period the requirement that the operator perform the work alone has not resulted in demonstrably increased
dangers. The low if not negligible accident rate has not increased and there has been no serious accident since the change in General Order 101. In sum, comparing the operational experiences of the pre and post-January, 1975 periods, I cannot find significant differences in terms of efficiency, mistakes, or accidents between when the work was performed by an operator with a second person accompanying him, or by the operator alone.

Under that circumstance, namely the absence of any significant differences between the performance of the work in question by an operator alone or by an operator accompanied by a second person, I fail to see how the Company's elimination of the use of a second person by the deletion of Paragraph 132, was arbitrary or capricious. It seems to me that where the work is performed substantially as well by one operator instead of two, and with no demonstrable increase in hazards or incidents of accident, the Company had the managerial right to make the disputed operational change, and the elimination of the "second person" cannot be judged as "without reason" or "factually insupportable."

This is not to say that the continuation of the use of a second person is not a prudent precaution which the Company might wisely continue, but rather and only that the Company's decision not to do so and its determination that the second person was unnecessary, was not "arbitrary or capricious" and hence not a contract violation.

Dated: May 29, 1979

Eric J. Schmertz
Chairman
The stipulated issue is:

Whether the District was correct in requiring Kenneth Moss to pay his hospitalization, medical insurance and life insurance from July 1, 1979 to August 31, 1979 while he was on unpaid leave of absence? If not what shall be the remedy?

A hearing was held at the offices of the District on March 14, 1979 at which time representatives of the District and the Association 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 dispute centers on the length of the grievant's leave of absence during the school year 1978/79. It is undisputed that while an employee is on an unpaid leave of absence he pays his own hospitalization, medical insurance and life insurance premiums during that leave. At issue here is whether the grievant's leave of absence was for twelve or fourteen months. If the latter, the District is correct in requiring him to pay those premiums for the period July 1 through August 31, 1979 (the thirteenth and fourteenth month). If the former, namely that the grievant's leave is of twelve months, from July 1, 1978 through June 30, 1979, the District erred in
requiring him to continue paying his own premiums for two addi-
tional months thereafter.

The only official documentation defining the grievant's
leave of absence is the letter to him dated May 5, 1978 from the
Superintendent of schools which reads in pertinent part:

"Please be advised that the Board of
Education at a meeting conducted on
May 4, 1978, approved your request
for a leave of absence for the 1978/79
school year."

Neither the aforementioned letter nor the minutes of the
meeting of the Board referred to therein particularized the
length of the leave.

It is well settled that ordinary words in a contract should
be given their ordinary and customary meaning. I know of no
customary situation where the word "year", whether it be a
calendar year, fiscal year, school year or work year, exceeds
twelve consecutive months. A different interpretation must be
supported by explicit contract language or by an established
past practice. I find neither here.

The contract does not define the length of the "school year."
It can be logically argued that the contract reference to "work
year" is synonymous with "school year." Under Article 4B the
"work year" is defined as the period from "one day prior to the
first day that students are required to report at the opening
of school and will end on the last day that student attendance is
required....." That definition provides for a "work year" of
less than twelve months. Nor is Article 15B, upon which the
District relies helpful to the District's position. That section requires inter alia that leaves of absence will expire "so as to have the teacher returning at the beginning of the school year or at the beginning of a semester...." In either event, whether the grievant's leave of absence expired at the end of June or at the end of August the requirements of that section would be met. His leave ended early enough so as to have him return by the beginning of the school year or by the next semester in September. So that clause is not determinative of whether the grievant's leave of absence was of twelve or fourteen months duration. Nor are there any other more definitive definitions of the length of a "school year" in any of the other contract sections cited by the District.

The District relies on past practice. It asserts that in other situations involving leaves of absences comparable to the leave granted the grievant, the period of time was from July 1 until September 1 of the following year. The District asserts that that was what was intended in the grievant's case. I am persuaded that there has been such a past practice as applied to other employees, but I do not find that practice applicable to the instant case. The difference is explicit. In the case of the other employees the notification of the approval of the leaves of absence invariably set forth the period of time of the leave, with the beginning and ending dates. In those instances the District, in accordance with its discretionary authority, accorded those employees leaves of absence extending for fourteen months from July 1 through August 31st of the following year. But those
employees were on explicit notice of the length of their leaves because their letters of notification so stated. Not so in the case of the grievant. His letter of notification is different. It grants him a leave of absence "for the 1978/79 school year." It does not particularize the length of the leave. In that significant respect the grievant's leave of absence is distinguished from, and hence not controlled by any different practice involving other employees and other leaves of absence.

I note that the School District asserts that its letter informing the grievant of the approval of his leave of absence was intended for other purposes as well as that notification. And that the other purposes may have been foremost in the mind of the Superintendent of Schools. Yet that letter stands as the only official documentation of the nature and extent of the grievant's leave of absence. In the absence of more probative evidence, explicit contract language or an applicable past practice to the contrary, the District is bound to the wording of that letter and to its normal, customary interpretation.

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 leave of absence of Kenneth Moss was for the period July 1, 1978 through June 30, 1979. Therefore the District was not correct in requiring Mr. Moss to pay his hospitalization, medical insurance and life insurance for the period July 1 through August 31, 1979. The premiums for those benefits are to be paid as provided by the contract for an employee not on leave of
absence during the period July 1 through August 31, 1979.

DATED: April 14, 1979
STATE OF New York ) ss.
COUNTY OF New York )

On this fourteenth day of April, 1979 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 letters dated February 3 and February 5, 1979, the Union and the City have jointly submitted to me for decision two issues related to or arising from my Interim Award of August 9, 1978 and my Award of September 18, 1978 in Case #A-78-11.

As the parties well know, the aforementioned Interim Award and Award were the product of mediated and/or negotiated settlements between the Union and the City. Though well within the contemplation of the parties at the time those settlements were reached, neither mentioned nor provided for any back pay, overtime pay or other monetary damages for the period of time between when the City should have provided EMT training and when, pursuant to the Award, that training began. Not having been so included, I must conclude that the agreements did not contemplate any such payments. Therefore I may not and shall not read into or interpret my Awards, which are only reflections of those agreements, terms not included therein. Accordingly the Union's claim for some six months of monetary payments for "loss of overtime" due to delays by the City in providing EMT training, is denied.

The second issue involves a claim by James Keefe for EMT overtime which the Department denied him the opportunity to work
during his scheduled vacation.

The relevant part of the Interim Award of August 9, 1978 reads:

\[\text{Said overtime opportunities for EMT firefighters shall be rotated to afford each relatively equal amounts of overtime. (Emphasis added)}\]

While it is true that Mr. Keefe was apparently bypassed or denied an opportunity to work his rotational EMT overtime which fell during his vacation, I cannot conclude that the Department's denial of his request that he be called in and permitted to work that specific overtime, constituted, standing alone, a breach of the foregoing provision of the Interim Award. The Interim Award does not require that the EMT overtime be apportioned precisely equally among EMT firefighters. Rather it only requires that it be rotated to achieve relative equality. Until a reasonable measuring period has elapsed it would be impossible to determine if that requirement has been met. That Mr. Keefe missed an overtime opportunity during his vacation does not mean that over a period of six months (which I deem and herein rule to be a reasonable measuring period) he would not have been provided with other additional EMT overtime to make up for that loss, so that his standing as to quantity of overtime would be at a point relatively equal to the other EMT firefighters. If, after a six month period Mr. Keefe's EMT overtime opportunities are not relatively equal to the others, he would then have a right to grieve.

Also, for the same reasons, the Interim Award does not require that the EMT overtime opportunities be rotated unvarying in turn to each EMT firefighter. At times, for operational purposes,
emergencies, and as here, during vacations, a normal rotational opportunity might be missed. Standing alone that would not be a violation of the Interim Award so long as over any six month period the EMT overtime opportunities are adjusted and rotated so that those opportunities are apportioned relatively equally among all EMT firefighters.

Therefore the grievance of James Keefe is denied, with his right reserved to grieve, if, after and over any consecutive six month period his EMT overtime opportunities are or have not been relatively equal to those of the other EMT firefighters.

Eric J. Schmertz
Arbitrator

DATED: February 1979
STATE OF New York )
COUNTY OF New York )

On this day of February, 1979, 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 between the above named Union and Company, the undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Is the job of Mold Mechanic properly evaluated with regard to the factors Hazards, Surroundings and Responsibility for Equipment and/or Tools?

A hearing was held at the Company plant in Corning, New York, on December 12, 1978 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 and the parties filed post-hearing briefs.

There is a threshold issue over whether the factor of Responsibility for Equipment and/or Tools was processed through the grievance procedure and is properly in arbitration in this proceeding. I am satisfied that there was constructive compliance with the grievance procedure rendering that factor arbitrable in
this case. The evidence shows that that factor was part of the Union's original grievance; that it was to be discussed at a grievance meeting; but that it was not discussed because that meeting broke off and ended precipitously. I am satisfied that the Company had adequate notice that that factor was contested; that there is no element of surprise; and that the Company was not prejudiced in dealing with that factor in this arbitration.

The parties are of course fully familiar with the job evaluation plan applicable under the collective bargaining agreement, and with the method of using seventy "bench mark" jobs in determining factor evaluations for other jobs, included that of Mold Mechanic. Hence I deem it unnecessary, except as particularized herein, to recite those details.

Surroundings

For the factor of Surroundings the Company has used the bench mark job of Clay Mixer and Weigher (BM13) with a point score of 75 and in Degree IV. That Degree defines surroundings as:

"Intermittent or continuous exposure to very disagreeable surroundings as a consequence of oil, grease, water, dust and dirt."

The factor of Surroundings in the bench mark job is described as:

"Continuous exposure to very disagreeable dust from raw materials and crushing equipment."
The Union claims that the proper benchmark job should be Feeder Maintenance Mechanic Class A (BM70) with a point score of 110, at Degree V. That Degree is defined as:

"Continuous exposure to very disagreeable conditions such as extreme heat, noise and glare."

In BM70 the factor of Surroundings is described as:

"Continuous and simultaneous exposure to extreme dirt, grease and oil, heat, noise, glare."

Based on the record I judge that the gravamen of this dispute is over the question of whether the Mold Mechanic classification is continuously or only intermittently exposed to the disagreeable conditions enumerated in the foregoing definitions and descriptions.

I agree with the Union that a job and each of its factors are to be evaluated by considering the totality of the duties of the classification, not the particular duties to which one or a group of employees so classified may be assigned either exclusively or substantially. On that basis however, the Union's complaint fails. The record establishes that a substantial part of the Mold Mechanic's responsibilities and duties are carried out in the upstairs "Mold Room", the "surroundings" of which are undisputedly pleasant, and in my view well within Degree IV. It is clear that some of the duties of the Mold Mechanic, specifically "hot jobs", located primarily "downstairs" and various
aspects of mold cleaning "upstairs" unquestionably involve very disagreeable exposures continuously and simultaneously when those jobs are performed. But, the Mold Mechanic's classification is not confirmed to those "hot jobs" or mold cleaning and inasmuch as that type of work is quantitatively a small portion of the totality of duties which are or may be required of a Mold Mechanic, it cannot be said that the Mold Mechanic classification as an overall entity, carries with it or involves exposure to extreme dirt, grease and oil, heat, noise, glare, water or dust on a continuous and simultaneous basis. Rather, with proper consideration to the mix of the total duties in the mold rooms and on hot jobs, the "Surroundings" in which the Mold Mechanic classification works is "very disagreeable" intermittently, as that factor is presently evaluated. Therefore the Union's claim for an increase in the point evaluation of the factor Surroundings from 75 points to 110 points and from Degree IV to Degree V, is denied.

Hazards

The Company has evaluated the factor of Hazards in Degree II at 55 points, using the bench mark job of Tool Maker (BM63). This Degree defines Hazards as:

"Frequent exposure with moderate cuts, bruises, strains or burns possibly resulting."

The bench mark job of Tool Maker defines Hazards as:
"Frequent exposure to moderate injuries such as: strains from lifting heavy castings; cuts from machine tools."

The Union claims that the factor of Hazards for the Mold Mechanic should be at Degree III with 80 points, and that the proper bench mark job is Feeder Maintenance Mechanic Class A (BM70). The Degree III definition is:

"Frequent exposure with possible lost time injury resulting from sprains, severe strains, fractures, burns, severe cuts or heat exhaustion."

The BM70 description for Hazards is:

"Frequent exposure to lost time injuries such as: severe sprains when lifting and carrying repair parts, severe cuts and burns and fractures when repairing moving machinery."

So far as the Hazards applicable to the Mold Mechanic job is concerned, the dispute centers on whether a possible injury would or would not result in "lost time."

Without delineating the large number of jobs required of the Mold Mechanic classification, especially those characterized as "hot" jobs, and those both upstairs and downstairs which involve use of and proximity to chemicals and fumes that are caustic and carcinogenic (for which the Company wisely requires and performs regular medical examinations of the employees), I am persuaded that even where an employee is not negligent and with due regard for the presence of safety devices on the equipment and as part of the methods, there is the realistic potential for
injuries which would result in "lost time." In evaluating Hazards I am persuaded that any time a Mold Mechanic is or may be required to perform some of the various "hot" jobs and certain tasks relating to the cleaning of molds, regardless of how frequent or infrequent any such assignment may be, there is a present risk of potential injury which carries with it a reasonably likelihood of "lost time." That the Degree II does not include credit for the possibility of a "lost time" injury, means that insufficient credit has been accorded that reasonable possibility. Indeed, the Mold Mechanic job description, under the factor of Hazards, recites:

"Frequent exposure to possible lost time injuries...." (emphasis added).

I conclude that the foregoing definition set forth in the job description is a more accurate description of the type of injuries that may take place. And inasmuch as those injuries may possibly result in lost time, the factor of Hazards should be increased from Degree II to Degree III and from 55 points to 80 points.

Responsibility for Equipment and/or Tools

There is no dispute that the Company has selected the proper bench mark job, i.e. Operator and Set-Up-Bryant Grinder (RM43). That bench mark job accords 115 points and Degree II to the factor Responsibility for Equipment and/or Tools, and that point credit, to that extent, is not disputed. However the Union
contends that because that bench mark job has been utilized, the Company is required, automatically, to add an additional 25 points as provided by the "Special Investment Allowance" accorded that bench mark classification. The Union's assertion is not supported by the Evaluation Manual, Guide For Describing and Evaluating. Under Responsibility For Equipment and/or Tools the Manual directs as follows:

Determine points for Normal Base Allowance by comparison with bench marks shown in the following Guide Chart, without regard to investment level (emphasis added).

That language, together with an examination of the Guide Chart, persuades me that there is an evaluative independence between the basic determination of the degree and point score for that factor, and a determination of any additional credit for a special investment allowance. In other words the latter, namely the special investment allowance is not an inextricable or automatic part of the measurement of the degree and points to be accorded the factor of Responsibility For Equipment and/or Tools when utilizing the BM43 job. I am persuaded that the method of reaching the evaluation is to first establish the Normal Base Allowance. This the Company did when it gave this factor for the Mold Mechanic job, 115 points and Degree II. Thereafter, a decision is made as to whether a special investment allowance is to be added and that is based on whether the job "use(s) equipment and tools in which the Company has a larger than usual
In making that second or subsequent determination the instruction manual provides:

"Two special levels, High and Major Investment, have been set up in the chart and the points obtained are added to those previously determined under the Normal Base Allowance."

The foregoing means to me that a special investment allowance is added only when the job utilizes equipment and tools in which the Company has a larger than usual investment, and that the number of additional points will be either 10 or 25 depending on whether the investment is High or Major. That benchmark job 43 has been accorded a special investment allowance of 25 points is based on this latter consideration, and therefore it is not automatically or mandatorily applicable to the job of Mold Mechanic. Hence the Union's claim that an additional 25 points must automatically attach to the point score accorded that factor in the mold mechanic evaluation is unsupported by the applicable job evaluation system. The Union's claim 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 job of Mold Mechanic is properly evaluated with regard to the factors of Surroundings and Responsibility For Equipment and/or Tools.
It is not properly evaluated with regard to the factor of Hazards. That factor shall be increased to Degree III and raised to 80 points.

Eric J. Schmertz
Arbitrator

DATED: May 30, 1979
STATE OF New York ss.
COUNTY OF New York ss.

On this thirtieth day of May, 1979, 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

Bakery Drivers Local Union #5550 and

Drake Bakeries, Div. of Borden, Inc.

OPINION AND AWARD
Case #1330 0243 79

The stipulated issue is:

Was the two-day suspension of Fred Pesce violative of the collective bargaining agreement? If so what shall be the remedy?

A hearing was held on August 20, 1979 at which time Mr. Pesce, 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. Post-hearing memoranda were filed.

Based on the evidence adduced and fundamental principles of tort law I must conclude that the vehicular accident resulting in the grievant's disciplinary suspension, was the grievant's fault. That negligence, albeit non-willful, would, standing alone, warrant discipline, and I would not consider a two-day suspension to be unreasonable.

However, in addition to disputing the grievant's liability for the accident, the Union asserts that the disciplinary suspension imposed was disproportionately severe as compared to no discipline or only reprimands issued in cases of other
employee/drivers who were responsible for vehicular accidents in the course of their employment with the Company. And more particularly, that unlike the grievant, no other employee was disciplined for "a first accident."

It is well settled that to be upheld, even if for just cause, disciplinary penalties must be consistently, uniformly and even-handedly applied to all offending employees similarly situated.

On the other hand, though arguably beyond an employee's control, the extent of material damage or monetary loss once causal negligence has been established, are valid distinctions for differing disciplinary penalties.

In the instant case therefore, the issue narrows to whether the grievant (and the accident for which he was responsible) is similarly situated to other employees/drivers who were involved in accidents and who either were not disciplined or who received reprimands. If so, regardless of the moderate nature of the two day suspension, that penalty, disproportionately more severe, could not be upheld.

The proofs on both sides of this critical question are uncertain and of inadequate probative value. The Company has merely alleged the amount of damages and costs sustained by the instant accident. Indeed, I do not accept the Company's proffered figures or calculations because they are unsubstantiated by bills, receipts, proof of payment and other requisite documentation, and they do not take into consideration offsets from insurance
reimbursement and the use of undamaged or reclaimable parts from the grievant's truck as spare parts for other Company vehicles. In short neither the gross amounts of the alleged damages and/or costs nor the net amounts after consideration of those offsets have been proved in this record.

Similarly and conversely the evidence adduced by both sides on the severity, amount of damage and/or liability arising from other accidents of other employees, including those where driver or passenger injury is alleged and where one or more employees have been involved in multiple accidents for which, again alleged, they were at fault, is hearsay, contradictory, undocumented and of inadequate probative value to make critical comparison between the grievant's accident and those of other employees. Not one of the employees involved in those accidents testified, nor was any first-hand documentation of the consequences of those accidents presented by either side.

It is undisputed however that in those earlier accidents by other employees, the Company imposed either no disciplinary penalty or at most a reprimand.

As a disciplinary case the burden is on the Company to show that its discipline has been evenly and uniformly applied in similar situations. More particularly here, the Company has the burden of establishing a significant distinction between the grievant's accident and those of others, to support its different levels of penalty. Based on the inadequate evidentiary record before me I cannot find that the Company has met that burden. No doubt, the Company suffered significant damage and costs
resulting from an apparent "total" loss of the grievant's truck, from the destruction of the product therein, from payments to the owner of the tractor-trailer which was struck and possibly from an increase or probable increase in its workmens compensation experience rate. But I am unable to conclude, and the Company has not shown by probative evidence the extent of those damages and losses, that they were significantly more costly and extensive than other individual or cumulative accidents of other employees. Nor has the Company shown that the other accidents were not the fault of Company drivers.

Accordingly I find no evidentiary basis to support a greater disciplinary penalty for the grievant than what the Company imposed on other driver/employees in other, earlier accidents. However some penalty is warranted consistent with what was given others. I deem a reprimand to be proper and appropriate.

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

The two-day suspension of Fred Pesce is reduced to a reprimand. He shall be made whole for the time lost.

Eric J. Schmertz
Arbitrator

DATED: October 16, 1979
STATE OF New York ) ss:
COUNTY OF New York )

On this sixteenth day of October, 1979, 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 issues are:

1. Did the Company violate the contract when it deducted monies from Ronald Beissel's pay check? If so what shall be the remedy?

2. Did the Company violate the contract when it assigned Richard Miller to another shell core machine on June 16, 1978? If so what shall be the remedy?

3. Did the company violate Article V Section 3 when it did not include in the 1978 vacation pay the wage increase on top of the average hourly earnings as recorded in the first Social Security quarter of the calendar year? If so what shall be the remedy?

A hearing was held in Reading, Pennsylvania on February 28, 1979 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.

Issue No. 1

From April 4 to June 16, 1978 Mr. Beissel, hereinafter referred to as the "grievant", worked on an incentive job as a one man operation. The incentive rate for a one man operation was 2.03. If the operation is run with two men the rate is 3.01. By error, the grievant was paid at the 3.01 rate for the period involved,
and thereby earned more than he was entitled to. As a consequence the Company recouped the extra payment from the grievant's pay over a period of time. By the time of this hearing full recoupment had been achieved.

The Union contends that the Company may only correct the error prospectively, but that it has no right to retroactively adjust the rate or retroactively deduct the overpayment. I do not agree. This is a classical case of "unjust enrichment." I make no finding that the grievant acted dishonestly, but rather that he worked under an erroneous rate as a result of the Company's clerical error. Whether he knew it or not his earnings exceeded what they should have been and were unrelated to his productivity. The Company's right to "change.....a clerical error or an error in computation" as provided by Article XX paragraph 5c carries with it, in my judgement, the right to correct retroactively as well as prospectively. This was a clerical error on the Company's part. It provided the grievant with production sheets applicable to a two man operation at a time that he was to perform the work alone.

Accordingly the Company did not violate the contract when it deducted monies from Ronald Beissel's pay check.

**Issue No. 2**

The Union charges a violation of Article III Section 3 of the contract. That Section provides in pertinent part:

> When an employee is transferred from his regular job to another job while his job is working, if for the convenience of the
Company, he shall be paid at either his regular rate, average rate, rate covering the job or incentive rate, whichever is higher.

When a temporary transfer is required within a classification, the Company will transfer the junior employee within that classification on that shift.

The dispute narrows to whether the two different shell core machines are "different jobs" within the meaning of the foregoing contract clause.

Richard Miller, the grievant, was transferred, for the convenience of the Company from the shell core machine which he regularly operated to a different shell core machine which was regularly operated by a Mr. Bubbenmoyer. The grievant was neither the junior employee within his classification on the same shift nor was he paid average earnings for the period of time of that assignment. The Company contends this was not a transfer from one job to another but merely a change in assignment within the same job and within the same classification. The Company characterizes it simply as a shift in work stations, but not a change in job, or work duties.

The foregoing contract clause refers to both "jobs" and "classification." I am not persuaded that they are synonymous. As they are sequentially bound together, those sections, read together, must mean that a classification can be made up of one or more jobs. And that transfers between and among different jobs within a classification must follow the prescriptions of that section, if the transfer is for the convenience of the
Company. That the grievant was moved from the shell core machine on which he regularly works to another shell core machine would in my opinion be a shift from one job to another within the same classification if there was some significant difference in the operation, the methods, and hence the earning capacities of or potential on the two machines. If not I would agree with the Company that it was nothing more than a change in "work stations." Obviously the purpose of the foregoing contract language is to protect the earnings of an employee when, for the convenience of the Company, he is transferred from his regular job with which he is familiar to a different job with which he is less familiar and where his earnings might suffer. Under that circumstance it is only fair and proper, as the contract provides, that he be guaranteed at least his average earnings. In the instant case the evidence adduced indicates that there was a sufficiently significant difference between the two shell core machines in question.

Testimony indicates that the machines operate somewhat differently and that one is an older version of the other. The buttons and reset procedures are different as well as some other mechanical aspects. The point is that the grievant was not as familiar with the machine to which he was assigned as he was with his regular machine, and was unable to achieve the level of earnings he would have earned had he remained on his regular machine. I am persuaded that the foregoing contract section was intended to protect against that circumstance particularly, where as here, the transfer was for the convenience of the Company and
at a time when the grievant's regular machine was in operation. I also find that under that circumstance the Company had the obligation to transfer not the grievant but an employee with less seniority on the same shift.

Accordingly the Company violated the contract when it assigned Richard Miller to another shell core machine on June 16, 1978. He shall be made whole for the difference between what he was paid and his average earnings on his regular machine for the period of time involved.

Issue No. 3

This issue requires the application and interpretation of Article V Section 3 of the contract for the limited period March 9 through March 31, 1978.

On March 9, 1978, during the "first Social Security quarter of the calendar year" the contract wage increase went into effect. As a consequence, for the balance of that quarter, the Company made an appropriate increase in the rates of the incentive jobs, so as to reflect the general wage increase in the potential incentive earnings of the employees on incentive operations. In calculating vacation pay for the year 1978 the Company included the average hourly earnings generated by the increased incentive rate, but did not add thereto the general hourly wage increase effective March 9.

The Union claims that the rate of pay for vacation, based on the earnings reported in the first Social Security quarter of the calendar year must contain two components; first all the earnings gained from incentive and second the general hourly wage increase "on top."
The Company asserts that the Union’s interpretation would accord incentive employees a double wage increase and consequently the benefit of the wage increase in excess of 100 percent. It reasons that for the employees to receive vacation pay based on increased incentive earnings generated by the increased incentive rates related to the wage increase and to then again be credited with the hourly wage increase "on top" is to give them an increase in pay for purposes of vacation for the period of March 9 through March 31, 1978 that exceeds the total wage increase and the total vacation credit accorded non-incentive employees. The Company reasons that only the incentive rate adjustment related to the wage increase for the period March 9 through March 31, 1978 should be credited to the rate for vacation pay, and that if the hourly wage increase is to be added, it should be added after March 31st.

As the parties well know the Arbitrator is bound to the explicit terms of the contract even if the result is inequitable. Any such inequities are only a reflection of the contract bargain entered into by the negotiators. Article V Section 3 (paragraph 1) reads:

The rate of pay for vacation hours shall be his or her average hourly earnings as reported in the first social security quarter of the calendar year. Average rate is all monies earned (including shift differential) divided by the number of hours worked, in the proceeding quarter, plus all wage increases added on top.

I find it to be sufficiently clear. The formula in determining average hourly earnings for the first Social Security quarter of
the calendar year is made up of two parts. The first is all 
monies earned, including shift differential divided by the number 
of hours worked in the preceding quarter. The second is "all 
wage increases." That formula fixes the hourly rate of pay for 
vacation. (The second paragraph of Section 3 which is not in 
dispute herein sets forth the number of hours of pay at that rate 
for the vacation entitlement.)

Applied to the instant dispute the monies earned by the in-
centive employees, or in other words the first part of the 
formula, included their earnings resulting from the increased 
incentive rates related to the wage increase for the period of 
March 9 through March 31. If, as the Company asserts, that is 
the full extent of their earnings for calculation of a rate of 
pay for vacation hours, the last part of the first paragraph of 
Section 3, "plus all wage increases added on top" and the second 
part of the formula would be meaningless and unnecessary. I 
am not prepared to conclude that the parties negotiated that addi-
tional language for a meaningless purpose.

Also, based on the testimony, I am not prepared to conclude 
that the general wage increase effective March 9, 1978 was sub-
sumed within the increased incentive rates for the period March 
9 through March 31, 1978 for purposes of calculating the rate of 
pay for vacation hours under Section 3 Article V. The Union 
officials testified that they negotiated that contract language 
especially to give incentive workers additional money (in excess 
of what non-incentive employees gained from the wage increase),
because in prior years the incentive workers "had not fully benefited from general wage increases." The Union witness stated that not only was that their intent but that at the conclusion of contract negotiations they specifically asked the management negotiators "if they knew what they were agreeing to." It is the Union's contention that "what they were agreeing to" was a rate of pay for vacation hours for incentive employees exactly as claimed by the Union in this arbitration.

Under that circumstance it seems to me that the burden then and now is on the Company to show that that was not what was agreed to by providing some other probative explanation of the meaning of the contract language. The Company did not and has not done so to my satisfaction.

Accordingly the Company violated Article V Section 3 when it did not include in the 1978 vacation pay the wage increase on top of the average hourly earnings as reported in the first Social Security quarter of the calendar year. The Company is directed to do so and to make appropriate adjustments in the 1978 vacation pay of the affected employees.

DATED: April 16, 1979
STATE OF New York )
COUNTY OF New York )

Eric J. Schmertz
Arbitrator

On this sixteenth day of April, 1979 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 discharges of A. Korton and A. Shaw? If no what shall be the remedy?

A hearing was held on January 15, 1979 in Plainview, New York, at which time Messrs. Korton and Shaw, hereinafter referred to as the "grievants", and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's Oath was waived. At the conclusion of the hearing, at the request of the parties, and accompanied by the grievants and representatives of the parties, the Arbitrator made a plant visitation to and observed the location involved in the dispute.

Based on the entire record before me I conclude that the Company has met its burden of establishing, for disciplinary purposes, that the grievants were playing dice for money, in the plant, in violation of rule 5c (Causes for Immediate Release) of the Company's Disciplinary Standards Policy. As the propriety of those rules is not challenged by the Union in this procedure, and inasmuch as a violation of rule 5c which prohibits "gambling", calls for the termination of the offending employee, I have no
choice but to sustain the Company's action in discharging the grievants.

More specifically, I find the testimony of the Company witnesses, who first observed the grievants from outside the plant through a hole in an entrance door, and then entered the plant and confronted them, to be accurate and credible. I find no reason why those security officials would falsify their testimony. From my observation at the location, through the hole in the door, I conclude that the Company security officials could and did see the grievants throwing dice, and did see money present in their hands and/or on the bench. I conclude that the dice found by the security personnel at the location, was the dice used in the game.

By contrast the testimony of the grievants was unpersuasive and equivocal. By example, at the hearing they denied that they had any money out. Yet, the credible testimony discloses that at the grievance meetings, they had asserted that they had money in their hands which they were counting for use later that morning when they planned to go "bar hopping." This marked inconsistency casts serious doubt on the veracity of their entire story and on their denial of the gambling charge.

There is evidence that the Company security officer either offered or led one of the grievants to believe that his discharge would be reversed and he would receive a money payment if he "cooperated" and disclosed the identity of others in the plant who gambled or engaged in other prohibited activity. The offer or what may have appeared to be an offer was not accepted.

I interpret this to have been extra-contractual negotiation.
which was not consummated. On that basis, and under that particular circumstance I am not prepared to find that the Company compromised or waived the enforceability of rule 5c. And it is not my role or within my jurisdiction to pass judgement on what the Company security officer termed a "plea bargaining" effort, particularly when, as here, it did not involve the Union as the certified bargaining agent, and did not reach a point of agreement.

With the foregoing decision, the Arbitrator wishes to make a recommendation. Undisputedly, the dice game in which the grievants were engaged, was not the "big game" which the Company was told was underway involving upwards of sixteen employees. It was not the "big game" that the Company sought to discover, and for which in military "invasion" fashion, the Company organized and directed into the plant, four teams of security personnel, to surprise and apprehend the players.

Also, it is conceded that though the grievants are of short service with the Company in their present jobs, they both were employees for some time previously of an independent guard service assigned to the Company, and that they were good employees in that capacity.

There is no evidence that they have had any prior disciplinary offenses or penalties, either with the Company or with the security service.

Accordingly, I think that a suspension, rather than discharge would be an adequate penalty under those particular circumstances. That is not my Award, because to so award would be inconsistent with the Company's unchallenged work rules and
hence beyond the arbitrator's authority. However, inasmuch as mitigation is for the Company, and now that the Company's right to discharge for gambling and the effectiveness and propriety of rule 5c have been upheld, the Company may be willing without prejudice to the foregoing right and rule, to reduce the penalty of discharge to a suspension and reinstate the grievances without back pay. It should be clear that acceptance of this recommendation is within the sole discretion of the Company. If it rejects the recommendation the Award as set forth below stands.

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 discharges of A. Korton and A. Shaw.

Eric J. Schmertz
Arbitrator

DATED: January 22, 1979
STATE OF New York )ss.: COUNTY OF New York )

On this 22nd day of January, 1979, 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 Steel Workers of America AFL-CIO, & Local Perth Amboy Smelter: And Refinery Workers Union #365
and
Federated Metals Company
OPINION AND AWARD

The stipulated issue is:

Is the claim for security and severance pay arbitrable? If so, did Federated Metals Company violate the security and severance provisions of the collective bargaining agreement by failing to pay said security and severance to employees eligible? If so, to what are those employees entitled?

A hearing was held on October 30, 1978 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey at which time representatives of United Steelworkers of America, Perth Amboy Smelter and Refinery Workers' Union No. 365, AFL-CIO, hereinafter referred to as the 'Union' and Federated Metals Company, hereinafter referred to as 'Federated', 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 was taken and post-hearing briefs were filed.

I do not find the facts and relevant contract clauses of the instant case significantly distinguishable from Nolde Bros., Inc. v. Local No. 358 Bakery Workers, 430 U.S. 243, 94 LRRN 2753 (1977). Despite any private reservations about the majority decision in Nolde, as a decision of the United States Supreme Court on the matter of arbitrability, I am bound to its holding
and may not under similar facts and law substitute my judgement for that of the Court.

The "distinction" upon which Federated relies - namely that in the instant case unlike Nolde the arbitration forum is one of several contractually named and rotationally appointed arbitrators whose term of office ends with the expiration of the contract - does not, standing alone, constitute within the meaning of Nolde an express or clearly implied intent to exclude from arbitration contract disputes arising after termination of the agreement. Absent explicit language to the contrary, the bare use of named arbitrators cannot be construed as terminating the obligation to arbitrate after the end of the contract any more than if the contract provided for the appointment of the arbitrator by an agency or by some other ad hoc means. The fact is that if under Nolde, a dispute under the contract remains arbitrable even if it arises after the contract expiration, the forum for arbitration, as set forth in the contract must perforce maintain its vitality and effectiveness in order to ensure the implementation of the right to arbitrate. And that is so, absent explicit language or a clear intent to exclude such disputes from arbitration whether the arbitration forum be ad hoc appointments, a permanent umpire, or as here a rotating panel.

Consequently, irrespective of any personal reservations I may have about the majority decision in Nolde, I find it applicable to the dispute before me, rendering that dispute arbitrable.
The issue involves the application and interpretation of Article XV (Security and Severance Plan), the pertinent part of which reads:

**PAYMENTS:**
Laid-off employees (for lack of work only):

This arbitrator is mindful of and has researched the many arbitration decisions dealing with plant closings. The question of whether plant closings cause a "lay-off because of a lack of work" of those workers whose jobs end with the plant closing is hardly well settled. Citing one of my own AWARDS, I ruled in **Brewery Workers Joint Local Executive Board of New Jersey and Locals 843, 153 and 4, IBT and - P. Ballantine & Sons, and Balco, Inc. (June 14, 1972)** that the permanent shutdown of the Ballantine plant in New Jersey and the sale of its assets to the Falstaff Brewing Company constituted a "layoff" of the affected employees under a relevant contract provision, requiring continuation of welfare payments for a stated period following the cessation of operations.

On the other hand, in the instant case Federated did not close down its operations under circumstances unrelated to the Union, but rather closed, in part at least, for lawful economic reasons while confronted with an on-going lawful strike by the Union and its members. It can be argued that in **Ballantine** the employer was in complete control over whether he made work available or not to the employees who were at work, and that the cessation of operations was a unilateral managerial act that created a "lack of work" beyond the employees fault or control.
By contrast, in the instant matter, the employees were not at work, presumably would not have accepted work even if made available unless a new contract with acceptable terms had been agreed upon and hence may be deemed to have contributed to or shared in some of the responsibility for the plant closing.

However, as the strike and plant closing in the instant matter were both apparently lawful economic actions, I conclude that it would be wrong if in this proceeding either side gained a benefit or suffered some prejudice by those actions. Hence I shall not deem them determinative or even probative.

To my mind what is significant is that under the same contract and same contract provision, Federated's parent, ASARCO some months earlier closed a large portion of its operation at this location, and made security and severance payments under Article XV of the contract to its employees whose jobs ended and who were not retained in employment for certain continuing operations by Federated. Because I do not find any significant difference between the plant closing of ASARCO and the later cessation of operations by Federated, I judge the application of Article XV of the contract by ASARCO to have a precedential effect on the closing of its subsidiary, Federated. I conclude both closed down essentially for economic reasons; that the employees of both lost their jobs under similar conditions and that how ASARCO, under Article XV treated those employees whose job ended is, both contractually and equitably the way Federated, who undisputedly assumed ASARCO's collective bargaining agreement with the Union covering the instant affected
employees who continued in employment from ASARCO to Federated, should have treated its employees when it closed.

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 claim for security and severance pay is arbitrable.

Federated Metals Company violated the security and severance provisions of the collective bargaining agreement by failing to pay said security and severance to employees eligible. It shall make such payments to eligible employees in accordance with Article XV of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: March 6, 1979
STATE OF New York )ss.: 
COUNTY OF New York )

On this sixth day of March, 1979 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 applicable collective bargaining agreement between the above named Union and Company, and pursuant to a stipulation entered into in connection with a Federal court proceeding (more particularly referred to below), the Undersigned was selected as the Arbitrator to hear and decide a dispute over the discharge of Lucille Crandall Jones.

Six hearings were held over the period from October 12, 1978 through January 22, 1979 at which time Mrs. Jones (hereinafter referred to as "Jones"); representatives of Jones 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. An extensive stenographic record of the hearings was taken; a large number of exhibits were introduced into evidence and both sides filed comprehensive post-hearing briefs. With the agreement of the Union Jones was actively represented throughout these proceedings by the Connecticut Women's Educational and Legal Fund, Inc. (by Phyllis Gelman, Esq. and Susan R. Meredith, Esq.). The Company was represented throughout by the law firms of Foley, Hoag and Eliot (by Henry M. Kelleher, Esq. and Scott Moriearty, Esq.) and Robinson, Robinson & Cole (by John F. Murphy, Esq.).
The Company discharged Jones on March 1, 1978. She claims she was discharged without just cause. She claims further that the discharge was wholly or partially an act of retaliation against her for having made claims against the Company in a federal suit and with federal and state administrative agencies in which she alleged the Company had violated federal laws against sex discrimination. The Company denies its conduct in any way was the product of retaliatory motives, and it claims the discharge was for just cause.

I. Background

Jones began her employment with the Company on October 15, 1973 and became a Painter/Cleaner in the Paint Department on November 18, 1973. Along with all the Painter/Cleaners in that Department she was terminated for lack of work on January 10, 1975. Of the 61 workers laid off, 49 were women. Aware of the impact of these layoffs on women, the Company's affirmative action office reported it to the Maritime Administration of the Department of Commerce, the agency charged with overseeing the Company's compliance with the anti-discrimination laws. By letter dated January 17, 1975, Jones filed a complaint with that agency. The Company received notice of the complaint the same month. Upon investigation the Maritime Administration found no apparent sex discrimination practices in those layoffs.

In an attempt to lessen the effects of the layoffs on women, the Company sought to place the laid off workers in other jobs or training programs. Jones was offered or considered for three positions which she either did not want or for which she was not
qualified. Ultimately she was rehired on January 12, 1975 as a probationary employee in the Bindery. She was discharged on February 14, 1975 before the expiration of the 60 day probationary period. During her tenure in the Bindery she received a warning slip for "argumentative attitude, probably as a result of lack of interest in the job." Her claim that she was retaliatorily discharged from the Bindery, filed with the Connecticut Commission on Human Rights and Opportunities, was rejected by that Commission.

On or about February 19, 1975, Jones filed complaints with the state and federal commissions charging the Company with sex discrimination in its employment practices. On March 2, 1976, she received a right-to-sue letter from the State Commission. On March 19, 1976, the state agency dismissed the complaint. On July 16, 1976, the federal agency found no probable cause to believe there was a sex discrimination violation.

On March 11, 1976, Jones commenced a federal lawsuit charging the Company with sex discrimination in its employment. The suit is styled, National Organization for Women and Lucille Crandall v. General Dynamics Corporation, etc., U.S. Dist. Ct., Dist. of Conn. (Civil H-176-123). (Crandall and Jones are the same person; she married Jones after the suit was commenced.) She was recalled as a Painter/Cleaner on March 22, 1976. Following her discharge on March 1, 1978, and pursuant to an agreement approved by the federal court in that suit, the propriety of Jones' discharge was made the subject of this arbitration under the collective bargaining agreement between the Union and the Company.
II. The Stipulated Issues

The following are the stipulated issues for decision in this arbitration (1-39-40):*

1. Was the disciplinary action taken by the Company against Mrs. Jones, identified in grievance MTC-1460A-8, taken in retaliation for her having filed complaints of sex discrimination against the Company before federal, state agencies or in the United States District Court?

2. If not, was the discharge of Mrs. Jones for just cause?

Both before and after entering into the foregoing stipulation, the parties disputed its meaning (1-7-14, 1-21-24, 1-62-64). This dispute also is reflected in their briefs. The Company claims that the arbitrator must rule on both issues. Thus, even if he finds that Jones was not discharged for just cause, he must make a finding as to whether the discharge was retaliatory (C.Br.2).** On the other hand, Jones takes the position that the issues as framed provide the arbitrator with alternative grounds for finding that she should be reinstated. I conclude that the terms of the stipulation require that I decide both the just cause and the "retaliation" issues.

III. Contentions

The Company claims that Jones was discharged for just cause and not in retaliation for having filed charges of sex discrimination.

*References are to the volume (in roman numerals) and pages (arabic numerals) of the hearing minutes.

**References are to the Company's brief (C.Br.) and Jones' brief (U.Br.)
discrimination. According to the Company, this is a traditional "progressive discipline" case in which Jones "was properly discharged for her cumulative record of infractions of legitimate Company rules over a short period of time." The Company asserts that Jones had been "cited for infraction of Company rules six times within less than four months, and twice received five-day suspensions before being discharged." The Company submits that in each instance, taken separately, discipline was properly imposed, and that, cumulatively, these infractions warranted discharge. (C.Br.12).

The "progressive" disciplinary actions upon which the Company relies are:

(1) October 28, 1977, a recorded warning for failure to wear required safety equipment in a designated work area;

(2) A five-day suspension on December 1, 1977, for "disrespect and threatening a member of management";

(3) A warning on December 21, 1977, for loafing;

(4) A warning slip for failure to wear safety equipment on December 22, 1977;

(5) A written warning and a five-day suspension on January 9, 1978 for loafing and being out of the assigned work area; and

(6) Discharged on February 10, 1978 for being away from her work area after the resumption of her shift. (This is the incident which "triggered" her discharge and resulted in the grievance involved in this arbitration.)

Though the extent of consideration is disputed, the Company considered three additional warning slips issued to Jones on February 4, 1975, January 13, 1977, and February 2, 1977, in
reaching the decision to discharge her.

Article VII Paragraph 1 of the collective bargaining agreement provides:

Warning slips, except for absenteeism, will be eliminated from the personnel records of an employee after a period of six (6) months provided no other warning slips have been issued in the interim period.

As previously noted, the next warning slip was issued on October 28, 1977, almost nine months after the February 2, 1977 warning slip. The Company concedes the applicability of the foregoing contract clause to the three earlier warning slips, but denies that the manner in which the Company utilized these slips violated the agreement.

Citing her overall disciplinary record the Company argues that Jones' history as an "industrial citizen" is such that it does not present circumstances which warrant mitigating the penalty of dismissal. It further argues that in connection with the final or "trigger" offense, Jones violated a proper and enforceable rule. The Company denies that Jones was subjected to a harsher penalty than has been imposed on other employees in similar situations.

The Company contends that Jones has the burden of persuasion on the issue of whether she was discharged in retaliation for having filed sex discrimination complaints against the Company. It claims she has not sustained this burden. Not only is there no probative evidence of retaliation, the Company argues, but the evidence is wholly inconsistent with a claim of retaliation.
(The pertinent evidence on this issue adduced by both sides as with the other issues is examined later in this Opinion.)

Jones denies that she committed a violation of the rule which was the subject of the "trigger" incident. Alternatively she argues that the rule constituted a violation of the collective bargaining agreement; that it was not uniformly enforced; that discharge is too harsh a penalty for her alleged misconduct in view of lesser sanctions imposed on others similarly situated, and that the Company's action was in retaliation for the litigation and other actions she took in court and before the administrative agencies in which she charged the Company with sex discrimination.

Discussion

On the issue of "just cause", and as a discharge case, the burden is on the Company to show, clearly and convincingly, that Jones committed the offense(s) charged. If that burden is met, the Company then has the further burden of showing that the ultimate penalty of discharge was proper for the offense(s) committed.

Jones' discharge was "triggered" by the final incident of February 9, 1978, when, as alleged by the Company, she was away from her work area without permission. Manifestly, if the Company does not meet its burden of showing Jones' culpability in that incident, the last step in the Company's progressive discipline sequence would be unsupported, and the discharge based on that full sequence could not be sustained. In that event, so far as the "just cause" issue in this case is concerned, Jones' prior disciplinary record would be immaterial.
The incident which precipitated Jones' discharge, the last in a set of six violations in four months, occurred on February 9, 1978. On that day Jones had lunch with her husband, a Company employee. Their authorized lunch period was from 9:00 to 9:30 AM. At about 9:25 AM she claims she started to return to her work area when she realized she had to go to the restroom.

Jones testified she tried to find a supervisor in her work area in order to obtain written permission, but she found only an unidentified welder supervisor. He refused to sign her LTC saying it was no longer required. Pressed by the need, she decided to go without written permission. When she arrived at the area in which the restroom was located, she saw Curt Lowden, the Yard Superintendent. He was taking badge numbers from a group of men, apparently as part of his duties to monitor "floating."

Jones claims that she asked Lowden for permission to go to the bathroom; that he gave it, and she entered the restroom. In the restroom, she found 10-15 other women and advised them Lowden was outside taking badge numbers. It was too crowded for her to be able to use the toilets, she left after a short period. When she left, four others followed her and all five were stopped by Lowden. He took their badge numbers. Jones protested that he had given her permission, but he ignored her plea as well as her request that a union steward be called. Jones stated she went to another restroom after this incident.

For the Company, Lowden denies he gave her permission to go to the bathroom on February 9. He did admit he had given her permission some days prior to that day (II-30). He claims that
he heard laughter coming from the women's restroom and suspected a number of employees were where they should not have been at that time. Lowden waited outside. When the five came out, he took their badge numbers. He recalled Jones' demand for a union steward, but denies she claimed she had permission. He referred the badge numbers to Mr. John E. Fogarty a Company official.

Another employee, Sally Sowell, testified in support of Jones' version. She stated she heard Lowden give permission to Jones while she was inside and Jones was in the outside hall. Sowell corroborates what Jones said when she entered. Her version of what took place in the restroom differed in some respects from Jones'. She recalled nine women in the restroom; Jones recalled 10-15, and later said 15. Sowell said a woman left after Jones entered, but was not stopped by Lowden. Sowell also testified Jones had used the facilities; whereas Jones said she had not. Coleman, the EEO supervisor, testified that one of the four women, named Sally, told him the women had no business being there. He did not say it was Sally Sowell.

The Company relies on Lowden's version and the inconsistencies between Sowell's and Jones' testimony. It also argues that with all the talk by the women within the restroom, it is "incredible" that she could have heard Lowden giving Jones permission to enter. The Company points out that Lowden was talking with the men at a distance from the women's restroom, not close enough for Sowell to hear Lowden speaking to Jones. The Company characterizes the corroborating features of Sowell's testimony as "pat" and the evidence offered on behalf of Jones as an attempt
to prove she was "set up" by Lowden. Lowden was there, the Company claims, as part of his "general sweep" of the restrooms in which Jones and the others were found. The Company argues that inasmuch as there were restrooms closer to Jones' work area than the one in the building in which she was found, she must have been trying to avoid a timely return to the work area. In response, Jones claims she was fearful of going to the closer bathroom because these were areas patrolled by supervisors with whom she had had a number of disciplinary and other unpleasant experiences over a period in the very recent past. She feared they would again discipline her because of their hostility.

The Labor Time Cards

The Rule
Some understanding of the operation of the LTC rules is important because the "triggering incident" is based on an alleged unauthorized or overextended restroom visit. On Monday, November 28, 1977* the Company introduced a daily time card called a labor time card (LTC) to replace the weekly time card the worker had previously punched.* Work assignments were entered on the card. In addition, employees were required to obtain a supervisor's written permission to leave a work area for any reason,

*The announcement of the LTC system, dated November 22, 1977, states it was to begin on November 27. (U.Ex.3) Actually it began on November 27th or 28th. Jones' assertion that the unilateral imposition of the LTC was an invalid exercise of power by the Company is not determined in view of my disposition of this case.
including trips to restrooms. The time of day an employee left the area and the time of return, as well as the reason for leaving, were required to be noted on the card. Entries were to be initialed by the supervisor. Several witnesses testified with respect to the implementation of the LTC rules. While there were some differences in their testimony there appeared to be general agreement that the hourly workers did not react kindly towards the new rules which were instituted by a new management team concerned with what they viewed as nonproductive utilization of working hours. There appears to have been no real disagreement between union and management that this was a problem which should be addressed. (On March 20, 1978, shortly after the "triggering incident" now under discussion, the rule was changed.)

According to the Paint Department supervisor the rule was intended to operate in the following manner when an employee had to go to the restroom. A supervisor was expected not to refuse permission to go to the bathroom. However, written permission signified by an entry on the LTC was required. Permission was to be obtained from the employee's own supervisor or another supervisor, if the former was not available. If a worker could not find a supervisor after returning from the restroom, the employee was to return to work and not expend time looking for a supervisor to sign him in. In the event of an "emergency" and the non-availability of a supervisor, the employee could inform a co-worker that he was going to the restroom. Restroom visits were not limited to lunch periods.
Enforcement of The Rule

There is a dispute between the parties over whether the rule was generally or uniformly applied in the context of restroom visits. Thus, John Stevens, Chief Steward of the painter's union for the past ten months and the holder of various union positions for several years prior to the hearing testified (II-141):

"it was a haphazard rule. It was being done in some areas and no others. Some cases you could tell your co-worker and some cases you couldn't. And in some cases they would sign and some cases they won't."

***

"It wasn't consistent, and often we go from one boss to another, and one supervisor may have had it one way and you go to work for another boss for one day on a specific job and he would have a different way to do it."

Albert Austin testified it was his impression the rule was not uniformly enforced throughout the yard and he had first-hand knowledge of non-enforcement in his own Inside Machine Shop. (II-164).

Several other workers testified they rarely obtained written permission to go to the bathroom (IV-12, 74, 84, 95) and Jones testified that on the day of the triggering incident a welding supervisor refused to sign her LTC explaining they did not do that anymore. (II-182).

The Company relies in part on the testimony of Gary Burgess, the Assistant Superintendent in the Welding Department on the second shift in Building 260 where Jones claimed a supervisor would not sign her LTC. He testified he had personally instructed
his supervisors that written permission was required. The Company concludes it is "incredible that an unidentified welding supervisor would have stated (to Jones) that it was no longer Company policy to sign people out." (C.Br. 40).

The Company also points out that much of Austin's impressions were not first-hand, but were obtained second-hand from his brother-in-law. In addition, the Company asserts that the LTCs of at least one employee (Robert Laurence) show he often received written permission to leave the area, and the Company offered explanations of why the cards of others did not show written permissions. (C.Br. 48-49). The Union brief asserts that Laurence's LTCs did not comply with the rule because they contained only the notation "permission to leave" without sign in and sign out times.

The Company also points out that Jones' LTC shows many written permissions. (Indeed, too many, the Company argues).

OPINION

Based on the record before me, I find that the evidence on whether Jones did or did not get permission to go to the restroom on the day and at the time in question, is sharply contradictory, offsetting, and hence inconclusive one way or the other. I do not find that Jones did get permission from Lowden; but rather that the Company, with the burden to do so, has not clearly shown that she did not obtain some form of acceptable permission.

Perhaps the most telling fact which creates the offsetting nature of the evidence is that Lowden, the supervisor who "wrote up" Jones for the "triggering incident" concedes he had given her verbal permission to go to the restroom on a day earlier than the
triggering incident (II-30). That is evidence not only that he utilized oral rather than written permission as an acceptable implementation of the rule, but that it would not have been unusual or inconsistent with his practices if he gave Jones oral permission on the critical day of February 9th. Hence, a disciplinary penalty would not be justified if an employee obtained oral but not written permission. The narrow question here therefore is whether the Company has shown by the quantum of probative evidence required in such cases, that Jones did not obtain oral permission to go to the restroom on February 9th.

I do not consider it unlikely or improbable that in the tumult of the "sweep of the restrooms", Lowden forgot that he had given Jones permission. Lowden's denial is countered not only by Jones' testimony, but by the testimony of Sowell that when Lowden took the badge numbers of the women, Jones was courteous, asked for a union steward, and, significantly, advised Lowden that she had asked him for permission.

The Company's reliance on the inconsistencies between Sowell's and Jones' version does not go to the core of the event. At most collateral, and certainly not determinative of the critical issue of permission, are the matters dealing with whether Jones had used the facility or how many (10, 15 or 9) women there were in the restroom at the time. Nor do I find those "inconsistencies" so unusual as to bear on credibility. Nor is it inherently "incredible" that Sowell heard Lowden and Jones speaking outside the restroom. Obviously, if sound traveled to the outside from within, the reverse is also possible. Again this is not to say that what
Sowell said she heard has been proved, but rather, that her testimony, with the possibilities stated, is a relevant ingredient in the offsetting and indeterminative nature of the evidence on the core question.

Additionally, that Lowden had given Jones permission on a previous day, adds credibility to the reasonable possibility that he gave permission on February 9th. Indeed, under that circumstance, would he have refused permission if asked? Is it not possible that, through confusion, the permission he concedely gave was not on an earlier day, but actually February 9th? In short, I find as an evidentiary matter, that I cannot discount the testimony of Jones and Sowell and accept only the testimony of Lowden. Weighing it all against the standard and burden required of the Company to show to the arbitrator's satisfaction that Jones went to the restroom without permission, I must find that the Company's case falls short of meeting that essential test.

Regarding the Company's rule requiring employees to obtain written permission, noted on their LTCs, to leave a work area, it is well settled that to be disciplinarily enforceable, a work rule, unilaterally promulgated by an employer must be reasonable, well publicized and/or disseminated to and among the affected employees, and must be consistently and uniformly applied. I make no determination on whether the rule was reasonable. I find that it was promulgated and probably made known to the affected employees; but that it was not consistently and uniformly applied to employees similarly situated. The inconsistent or non-uniform application of the rule has been adequately documented. An analysis
of the entries on the Paint Department LTCs, together with logical inferences drawn therefrom, and the testimony of Austin, Stevens and other employees support that conclusion.

Exhibit U-36 consisted of all Paint Department labor time cards for the week ending February 10, 1978. (The incident for which Jones was discharged occurred on February 9, 1978.) The uncontradicted analysis of these cards shows (U. Br. 46-49):

1. 20.7% of the cards had permission which could be construed as being for the restroom. This includes entries where the card does not state the reason for which permission to leave was granted;

2. 23.5% of the 20.7% or 4.87% expressly state that permission was for the restroom;

3. 1/3 of the 20.7% fail to show the sign out and sign in time, contrary to the rule.

4. Jones had a slightly higher rate of signed permissions than others who obtained permission as well as a higher rate than the entire group of Paint Department workers, 80% of whom show no permission.

It is difficult to believe that 80% of the workers in this department did not go to the bathroom during their shift. Of course, they all might have gone during their half hour lunch break. However, if they went before or after lunch, they needed written permission. In what surely must be an unscientific survey but one which does appeal to common experience six witnesses were asked how frequently they went to the restrooms during working hours. Three responded twice, one stated he went 2-3 times and two 3-4 times.

It is not likely that 80% of the work force either never went to the restroom during working hours or went only during the lunch break. What is more likely is that the permission rule
was not uniformly or generally applied for bathroom visits and, except for Burgess and Lowden, this is the thrust of the testimony of those who addressed the subject.

One additional fact supports this conclusion. On March 20, 1978, the Company altered the rule and eliminated the requirement that written permission be obtained for restroom visits. The change is not referred to in order to excuse violations of the prior rule. It is of significance only because it is improbable, in my view, that a prior rule would be unilaterally withdrawn or changed if it had been effective and uniformly administered. The Company offered no reason for the change.

It is my conclusion that the Company has failed to show that the permission rule (whether permission was given or obtained in writing or verbally) was uniformly applied at the time of the triggering incident; that there is probative evidence showing that its application was inconsistent and non-uniform; and hence discipline imposed for its violation cannot be justified.

The Reference to the Warnings of February 4, 1975 and January 13 and February 2, 1977

The Company, argues that it was proper for it to take the "stale" warning slips into account for either of the following two reasons without violating paragraph I of Article VII of the collective bargaining agreement. First, they could be used to rebut a claim by the employee that she was unaware the current violations were serious and that the Company deemed them to be serious. Second, they may be used as a mitigating factor in determining what sanctions should be imposed. More particularly the Company contends that warning slips which pre-date the
contractual cut-off period may still be used for an "overall review of the employee as and industrial citizen....to show what type of an overall employee that person had been (II-44)".... and "in terms of mitigation...."(11-71). It also asserts that it may resort to an earlier safety violation to rebut Jones' claim that she was unaware that a later safety equipment violation was serious. Though it is obvious, inasmuch as Jones was discharged, that the old warning slips were not considered "in mitigation", and though there is some question as to whether Jones really asserted a lack of awareness of the seriousness of the safety violation, those matters are irrelevant in my judgement. Article VII paragraph 1 of the contract is clear and unconditional. It requires the "elimination" from the personnel record (emphasis added) of warning slips after six months. To my mind "elimination" means that they no longer exist for any purpose. "Elimination" precludes and proscribes use, reference to, or any consideration of those warning slips. Hence, the Company erred and Mr. Fogarty was contractually wrong when as he conceded, the three earlier warning slips "played a part", albeit a "minor part" in his decision to discharge Jones. Indeed the Company's "mitigation"argument is illogical. It advances the impracticable argument that evidence of prior violations can serve to mitigate the penalty. It is obvious that they can serve to increase the penalty, but not mitigate it. The very authority relied on by the Company refutes its position. The Company refers to two arbitrations involving it and the Metal Trades Council (C.Br. 57, 58) as examples of the use of these stale warning slips on the
issue of mitigation. Although I am not bound to follow them, they are clearly distinguishable from this case. They present the question of whether the arbitrator may consider the employee's entire record in determining whether or not to mitigate a penalty. They do not authorize the Company to use them in the first instance to determine either the probable existence of a violation or the extent of penalty. In addition, in each case a dispute about the method of calculating the six months period was resolved in a manner which would have kept the warning slips within the six months limitation period.

Even if there is some merit to the position that the employee's entire record including the three warning slips, should be considered in determining whether or not to mitigate an imposed penalty* it does not follow that it may be taken into account by the employer in determining whether there was a violation and in assessing the penalty in the first instance. As mitigation of the penalty did not result, I can only conclude that resort to the three earlier warning slips played some part in the Company's decision to impose the extreme penalty of dismissal. Accordingly, the Company's consideration of those earlier warning slips was prejudicial to Jones, and violated the contract.

*As a result of what I deem to be a typographical error the Company's brief inaccurately quotes from one of the decisions when it notes it is to be used in considering modification of "a proposed penalty." The decision refers to "an imposed penalty." See C.Br. p.58 and General Dynamics Corporation and Metal Trades Council, (MTC Grievance 1309A-8) (Sept. 18, 1978) at 35-36.
I agree with the Company that Jones has the burden of showing that her discharge, in whole or in part, was retaliatorily motivated, within the terms of the stipulated issue. Jones has not met that burden.

There is credible evidence that a number of Company employees resented or disliked Jones. The reason for these attitudes varied. They ranged from just plain dislike of her personality through resentment of her because the employee did not like women on the job. Some resented her because she did not appear sufficiently physically attractive. Others believe she was not carrying her weight, while some believed a woman is incapable of doing the work assigned. Directly related to the retaliation issue, some, including the Company, viewed her lawsuit and other official complaints as an unwelcome attack or as an attempt by her to obtain something for nothing. However none of this makes out a case of retaliation. The real question is whether the discharge was a response to Jones' legal and administrative complaints against the Company. I conclude the evidence falls short of establishing that response. In Jones' brief, citing court decisions the elements of a prima facie case of retaliation are set forth as:

1. The employee engaged in protected activity;
2. The employer knew about it;
3. The employee was subsequently discharged and
4. Direct evidence of retaliatory motive or in the absence of direct evidence, that the discharge followed the protected activity within such a period of time that the court can infer a retaliatory motive.
Upon such proof, the burden shifts to the employer to show a legitimate reason for the discharge. If shown, the employee may show the reason is a pretext. (U.Br. p.30).

The issue in this case centers on item (4). Jones argues that the change in her record before and after January, 1975, plus the records of how others were treated, plus evidence of retaliatory motives on the part of some supervisory personnel establishes a prima case of retaliation; and that it rebuts the Company's just cause claim by proving the alleged reason for discharge was a pretext for retaliation.

She relies on the difference in her record before and after January 1975, when she filed her first complaints. Prior to that time she had received a commendation, a satisfactory performance evaluation and no warning slips. Thereafter she received warning slips, suspensions, "harassment" and was discharged.

The fact is that she also received two unsatisfactory work reviews and was discharged from a job in the Bindery for unsatisfactory work. Also the events cited by Jones in alleging retaliation, may be logically interpreted as a deteriorating attitude on her part, following her 1975 dismissal. In short, the facts on which she relies are just not persuasive evidence from which retaliation can be inferred, within the meaning of the foregoing court opinion.

Jones also claims that she received harsher treatment than others similarly situated. The evidence presented was sparse on this point. It consisted of some impressions by witnesses with limited information (e.g., IV-28-30) and several disciplinary
records of selected employees. (U.22-30). The Company introduced other records in rebuttal. (C.Br. 33-40). It is not possible to conclude anything from these records; the total number, 17, is very small and it was apparent that factors unique to each determined the penalty imposed. In some instances, there was no penalty recorded because the employee resigned in lieu of being discharged. Jones' own witnesses conceded that a particular penalty was not automatic (e.g. III-167), and that it did not automatically attach to a particular stage of the progressive discipline program. Obviously, discretion was properly exercised, on a case by case basis, depending on the circumstances thereof. Standing alone, the records of other employees placed in evidence in this proceeding do not show unexplained or discriminatory differences between the Company's treatment of Jones and its treatment of the others, to support the charge of retaliation.

Jones states that named supervisory personnel engaged in specific acts of retaliation and harassment for a period of slightly more than one year prior to this discharge. She argues that the Company had the responsibility to put a stop to this, but failed to do so and acquiesced in the discipline imposed on her by those supervisors (U.Br. 33-37). There is testimony that some supervisory personnel were motivated by revenge in their relationship with Jones, and there is offsetting testimony that they were not. Even assuming the accuracy of the former there is insufficient evidence of official Company knowledge of or acquiescence in any such motivation or of Company policy founded on such motive. Most importantly there is insufficient evidence that connects any such motives to the Company's decision to discharge, or specifically to the person who effectuated it. There is no
evidence that Mr. Fogarty, the person who decided to discharge Jones, engaged in, knew of or acquiesced in such conduct or had a retaliatory motive. Rather, the evidence shows he was concerned about the motives and conduct of some supervisors in connection with earlier incidents (II-55,83) and Mr. Coleman had ordered supervisors to treat Jones like any other employee. Indeed, the evidence shows that some employees and supervisors were angered because they believed the Company was providing special favorable treatment for Jones in order to avoid even an appearance of retaliation. Whether the Company, in fact, was bending over backward, is unclear. What is clear however is that those Company officials charged with policy and decision making, such as Fogarty and Coleman, tried to avoid the fact and appearance of special treatment for Jones because of the pending disputes. In view of that policy, a radically different act, in the form of retaliation would have been both incongruous, and highly precarious. I simply am not persuaded that any retaliatory motivation can be imputed to Fogarty or Coleman, or can be inferred as Company policy.

For all the foregoing reasons, 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 Lucille Crandall Jones was not in retaliation for her having filed complaints of sex discrimination against the Company before federal, state agencies or in the United States District Court.
The discharge of Lucille Crandall Jones was not for just cause. She shall be reinstated with full benefits and back pay less her earnings, if any, from gainful employment during the period of the discharge. If she received any unemployment insurance benefits she shall return the amount received to the appropriate agency of the State of Connecticut to be credited to the Company's account.

Jones' request for counsel fees and for the costs of this arbitration is denied in this arbitration forum. However this is without prejudice to any petition she may file with the Federal Court for such fees and costs and is without prejudice to the rights of all parties hereto in connection with any such petition.

Eric J. Schmertz
Arbitrator

DATED: October 2, 1979
STATE OF New York ) ss.
COUNTY OF New York )

On this second day of October, 1979, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company violate Article XXVIII Section 1 of the 1976-1979 GE-IUE National Agreement on April 4, 1977 when it hired Jesse Harris for the Laborer-Truck Driver, R-14 position rather than upgrading James Braswell to the position? If so, what shall be the remedy?

A hearing was held in Cleveland, Ohio on November 8, 1978, at which time Mr. Braswell, hereinafter referred to as the "grievant" and representatives of the above named parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Article XXVIII Section 1 of the contract 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.

I stated in the former and reiterated in the latter that:

The ..... 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.

I went on to state in the latter case that:

"The issue is not whether this Arbitrator thinks the grievant is qualified or unqualified for promotion..... but rather whether the Company's decision that he was unqualified was so devoid of factual basis and so unsupported by relevant work criteria as to be arbitrary, capricious or discriminatory."

In the instant case the grievant was found by the Company to be unqualified for the Truck Driver, R-14 job because of monocular vision." His sight in one eye is significantly impaired. That he is afflicted with this condition is undisputed.
that circumstance, and no matter how much I admire the grievant's determination to maintain and undertake normal occupational activities, and even if there was a possibility that he would operate the vehicles required by the job classification without accident, I cannot judge his disqualification by the Company to be arbitrary, capricious or discriminatory.

That he drove the Tractor-Front Loader during the winter of 1976-1977 and again in 1978 to remove snow does not mean that he is or became physically qualified to drive the three vehicles (a tractor, a payloader and a 3/4 ton pick-up truck) required by the Labor-Truck Driver R-14 classification. More to the point, in my view, is that a physical condition which as here, is manifestly related to the safe operation of vehicles, including one vehicle which leaves the property (the pick-up truck), is neither cured nor waived as grounds for disqualification merely because the Company, imprudently or otherwise permitted the grievant to operate one of the vehicles (the tractor-front loader) on the Company's property previously.

The Company's determination was not a violation of Article IV (Addendum) 4(a). It did not discriminate against the grievant because of a physical handicap. Rather and regrettably for the grievant, his physical handicap is clearly relevant to the safe operation of the vehicles in question, and hence his disqualification was reasonably based on that relevant disability. A fair and logical reliance on a relevant physical disability as the
basis for disqualification, is not, "discrimination against (an) employee because of physical .... handicap .... in regard to any position for which the employee is qualified." (emphasis added)

The fact is that because of the grievant's handicap, he was found physically "unqualified." I have held that for that reason the Company had reasonable grounds to disqualify him from the promotion he sought. It follows therefore that he was not deprived of a job for which, his handicap notwithstanding, he is qualified.

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

The Company did not violate Article XXVIII Section 1 of the 1976-1979 GE-IUE National Agreement on April 4, 1977, when it hired Jesse Harris for the Laborer-Truck Driver, R-14 position rather than upgrading James Braswell to the position.

Eric J. Schmertz
Arbitrator

DATED: January 1979
STATE OF New York ) ss.:  
COUNTY OF New York )

On this day of January, 1979, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Was there just cause for the discharge Robert Nelson? If not what shall be the remedy?

A hearing was held in Schenectady, New York on October 3, 1978 at which time Mr. Nelson, 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.

I accept as credible the testimony of the complaining employee and the testimony of the witnesses in support of the Company's case. Based on that testimony together with the grievants' undisputed prior offense involving a similar type of misconduct, I am satisfied that the Company has met its burden in establishing that the grievant committed the acts charged. Those acts constitute a dischargeable offense.

I do not believe that the complainant and the other witnesses fabricated the charge against the grievant to cover up, neutralize or distract from any allegation by the grievant that he found them smoking marijuana in the boiler room. That the boiler room
may have been used for that purpose by some employees (and may thereby account for the particles of marijuana later found among the sweepings from the boiler room floor) does not mean that the grievant did not personally and physically abuse the complainant. The same is true, even if the other witnesses were in the boiler room smoking marijuana at the time that the grievant committed the acts against the complainant. The point is that the former allegation, even if true, does not automatically vitiate or even cast evidentiary doubt on the charge against the grievant. Significant in this regard, in my view, is that, even in the grievant's testimony, there is no direct charge that the complainant was smoking — but only that one of the other witnesses was doing so (with a pipe) and that the grievant "assumed they passed it around." The fact is that the complainant did not enter the boiler room with the other witnesses, but rather with and at the suggestion of the grievant. Even under the grievant's theory and defense, in the absence of direct evidence, it is far fetched and unbelievable that the complainant, who was in the boiler room at the grievant's suggestion to discuss a work problem, would change from that purpose to join other employees who entered subsequently, in smoking marijuana.

In short, I am in no way convinced that the complainant had anything to hide or "cover-up", even under the grievant's defense, and therefore I fail to see why the complainant would join in any "conspiracy" against the grievant or support any false story of what he did. Hence the grievant's "conspiracy" defense is not believable.
The Undersigned duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

There was just cause for the discharge of Robert Nelson.

Eric J. Schmertz
Arbitrator

DATED: January 8, 1979
STATE OF New York )ss.:
COUNTY OF New York )

On this eighth day of January, 1979, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company violate Article XXVIII Section 1 of the 1973-1976 G.E.-IUE National Agreement when Roland Mailloux was upgraded to an IR-20 assembly classification on March 2, 1976, rather than downgrading Joseph Roselli to the classification? If so, what shall be the remedy?

Hearings were held in Boston, Massachusetts on May 20 and July 21, 1977 and June 19 and 20, 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. Both sides filed post-hearing briefs.

The Company upgraded Roland Mailloux on March 2, 1976 from the R-19 position to a job opening in the IR-20 assembly classification. Mr. Roselli, hereinafter referred to as the "grievant", who held an R-23 rated job and had greater seniority than Mailloux claims that the Company's action is in violation of Article XXVIII Section 1 of the contract. That contract provision 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 Union asserts that based on the grievant's greater seniority he was entitled to the IR-20 assembly job under both sentences of the foregoing contract provision.

Based on a careful study of the considerable record in this proceeding I am satisfied and conclude that the identical contract questions as presented herein were previously decided in the prior arbitration Awards of Arbitrators Sidney L. Cahn and Louis Yagoda (N.D. 46,158 and 38,509 respectively).

Arbitrator Cahn stated that the first sentence of the foregoing contract provision

"makes no reference to nor provides for the filling of open jobs on the basis of length of continuous service. (it) could well be deemed applicable only to those situations in which 'present employee' must be measured either for 'job opening' or an 'upgrading' against applicants from the street."

Arbitrator Yagoda ruled similarly. He stated that the first sentence

"does not provide the parties with a means or standard by which to choose between or among more than one candidate for a job opening, whether as a sole management prerogative, or according to comparative qualifications, or on the basis of length of service or any combination thereof. In short, it merely establishes the principle
that qualified and available incumbent employees are to get the preference over new hires, to the extent that it is practical to do so. The Management complies with this sentence when, as in the present instance, it fills the vacancy from its present personnel rather than resorting to outside recruiting. Such result is proof that first consideration has been given to an insider."

Applied to the instant dispute where the competition for the IR-20 assembly job was between two persons employed by the Company, it is obvious that the grievant's reliance on the first sentence would be misplaced and that in that respect his grievance would have been denied by Arbitrators Cahn and Yagoda.

Arbitrators Cahn and Yagoda also ruled that the second sentence of the pertinent contract provision applies only to upgrade situations. Cahn stated that

"the length of continuous service may be disregarded by the Company in cases where the move does not involve an upgrade to a higher rated job."

In that case Cahn ruled against a grievant seeking a lateral transfer even though the grievant had greater continuous service than the employee selected.

Yagoda reasoned that the terms "upgrade" and "higher rated" were "more probably intended by the parties as references to an existing rate structure or schedule rather than as references to earning results."

He therefore declined to construe "rated" as referring to anticipated or potential earnings and instead accepted the Company's position that the R number system governs upgrades. Consequently he, like Cahn, upheld the Company's action in
upgrading one employee while refusing to laterally transfer a grievant with longer continuous service. Additionally, Yagoda, noting that the Union unsuccessfully sought to modify the contract language in the 1969 and 1973 negotiations so as to apply seniority to all job openings as well as upgrades interpreted those efforts as a

"recognition by the Union that the omission of 'job openings' in the second sentence of Article XXVIII Section 1 did not afford employees the right for 'lateral' movement of the kind in issue here and the fact that their effort to widen the statement in that respect was unsuccessful may legitimately be construed as a recognized retention of the meaning which the Union now challenges in these proceedings."

In the case before me the grievant claims a right based on his seniority to the IR-20 job because it will pay him more total compensation and that in that regard it should be deemed an upgrade. Clearly, under the Cahn and Yagoda rulings, the job which the grievant seeks is neither an upgrade nor even a lateral transfer but rather a downward move within the hierarchy of the job classification system. The IR-20 job which the grievant seeks is a lesser rated job than the R-23 job he held within the Company's rated system, as previously interpreted. Moreover in view of the prior rulings that earnings are not determinative of the rating of one job compared to another, the transfer the grievant sought would not be construed as an "upgrade" merely because it may result in higher incentive earnings. Hence it is manifest that the grievant's claim to a lower rated job within the classified hierarchy on the theory that it was an "upgrade"
because of higher earnings, would be denied by Arbitrators Cahn and Yagoda under the second sentence of the applicable contract language.

The question narrows to whether I should deem the prior decisions of Arbitrators Cahn and Yagoda as dispositive of the instant case, or whether I should judge the present matter de novo.

We all know that arbitrators are not technically bound by the decisions of other arbitrators in prior arbitration cases. We also know that this does not mean that prior Awards and Opinions in point are to be disregarded or lightly overturned. The accepted rule seems to be that where the parties are the same, the same contract language is in dispute, where the facts are substantially similar and where there is sufficient evidence in support of the prior arbitrator's decision or where the contract is reasonably susceptible to the interpretation which he places on it, that prior decision should enjoy a presumption of validity. I accept that view. I am not persuaded that a subsequent arbitrator should overturn a prior decision by a different arbitrator, thereby presenting the parties with conflicting and irreconcilable decisions on the same contract question, unless in the judgement of the subsequent arbitrator the prior decision is contractually and evidentially insupportable—or in short, palpably wrong. That is not the case with the decisions of Cahn and Yagoda. I find their decisions to be reasonable and supportable interpretations of the critical contract language. Therefore, as the facts in the case before me are sufficiently similar to the facts before those two arbitrators, under contract language
undisputedly the same, and between the same contracting parties, the rulings of those two prior decisions shall obtain to the present dispute.

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 1 of the 1973-1976 G.E.-IUE National Agreement when Ronald Mailloux was upgraded to an IR-20 assembly classification on March 2, 1976, rather than downgrading Joseph Roselli to the classification.

Eric J. Schmertz
Arbitrator

DATED: April 16, 1979
STATE OF New York )
COUNTY OF New York )ss.

On this sixteenth day of April, 1979 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Was there just cause for the discharge of Patrick Keefe? If not what shall be the remedy?

A hearing was held in Schenectady, New York on April 2, 1979 at which time Mr. Keefe, 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 parties filed post-hearing briefs.

The grievant was discharged after receiving a "fourth warning notice" within a thirteen month period. His fourth offense was "for falsification of production vouchers."

For some time the Company has had a policy and has followed the practice of imposing the penalty of discharge for a fourth disciplinary offense within a one year period. More recently it has extended the measuring period for its progressive discipline sequence to one year "plus." (e.g. in the instance case, thirteen months). Its one year policy and practice was not and is not contested by the Union. However the Union questions herein the propriety of extending that policy to additional months beyond
I do not find the expansion of the disciplinary measuring period to thirteen months to be unfair or unreasonable, and indeed prior arbitrations have upheld the implementation of the Company's policy and practice for periods up to and including fifteen months. I do not disagree with those prior rulings.

However, to sustain the Company's policy and practice does not mean that there cannot or should not be any flexibility in its implementation or that there may not be occasions, albeit infrequent, where the penalty of discharge after the accumulation of four warning notices within the measuring period may be inappropriate, unjust or subject to mitigation.

Based on and limited to the particular circumstances of the instant case, I conclude that the latter exception is applicable. The grievant's "falsification of production vouchers", though certainly not excusable, was not as egregious as the charge suggests. He recorded two hours of work on two operations which he did not perform and on two machines he did not operate. I am satisfied that he did it not to gain idle time for himself, but to camouflage what he thought was an excessive amount of time he had consumed on another operation and to avoid criticism for that from his supervisor. He gained no monetary benefit and had planned to cure the fictitious time credit by actually manufacturing the small amount of claimed production over the next following days. Though he initially lied about what he had done, he quickly thereafter admitted the offense, apologised,
expressed contrition, and, in my view, is now sincerely contrite.

His prior disciplinary record, including the earlier three relevant warning notices do not show a similar type of offense.

Importantly, though I am persuaded that the grievant's offense was different from and more serious than the apparent long standing practice by employees of accumulating "kitties" of items produced for different time and credit allocation, and from the apparent practice of some supervisors who manipulate time and production records to hide excessive "down-time" or the use of more time than is acceptable in "setups," I believe that the "climate" created by those two latter practices, contributed to his actions.

"Kitties" differ from the grievant's offense in that they are made up of goods actually produced, though credited at times other than when made and often to employees who did not do the work. Though the Company has not approved of "kitties", and the record is unclear on whether Company officials have full knowledge of the practice, I do not believe that they have been totally unaware of that practice. It is apparent to me that the Company did not take vigorous steps to stop this particular type of record "falsification." The manipulation of time records by supervisors is another acknowledged record "falsification" which arguably may be less serious than the grievant's undisclosed falsification because, having done it, supervision can account for it. But, obviously it is a "rearrangement" of Company time and production records, different from what actually took place. To the extent practiced by supervision it constituted
condonation of imprecise records which, together with the maintenance of "kitties" reasonably could have led the grievant to believe, albeit erroneously, that his offense was within the same frame, and not serious.

In short I find the foregoing circumstances as mitigating factors, which in this case should temper the otherwise legitimate and proper Company policy of imposing the penalty of discharge with the fourth disciplinary offense within the measuring period. The just penalty in this case is a disciplinary suspension and a stern warning to the grievant that any further offenses by him would be grounds for dismissal.

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 Patrick Keefe is reduced to a disciplinary suspension. He shall be reinstated without back pay. The period of time between his discharge and reinstatement shall be deemed the period of his suspension. He is expressly warned that if he commits any further offenses within a reasonable measuring period, in the judgement of this Arbitrator he would be subject to discharge.

DATE: June 11, 1979  
STATE OF New York ) ss.:  
COUNTY OF New York )

On this 11th day of June, 1979, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz  
Arbitrator
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

International Union of Electrical, Radio & Machine Workers, Local 283

and

General Electric Company
Providence, Rhode Island

The stipulated issue is:

Did the grievants, Raymond Berg and Ronald Seynave have the minimum qualifications required under the provisions of the second sentence of Section 1 of Article XXVIII to be upgraded to the General Maintenance "A" (R-19) classification in December 1978?

If the arbitrator determines that the grievants did have the minimum qualifications required for such upgrading, did the Company violate Article XXVIII when it upgraded Russell DesGranges and John Pina rather than the grievants? If so, what shall be the remedy?

A hearing was held on September 5, 1979 at which time representatives of the above named Union and Company appeared. All were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

1. The grievance of Sabino Albanese was included in the original grievance, but because of his failure to appear at the hearing, was dismissed without prejudice.
I find that in deciding the instant case I am bound by three of my prior decisions in which I interpreted and applied the second sentence of Section 1 of Article XXVIII\(^2\) of the contract.

To deal with the instant matter in the manner requested by the Union would be to ignore those prior decisions and to reverse my interpretation of the foregoing contract clause, as set forth therein.

This is not to say that this Arbitrator is obdurately wedded to his prior decisions. Rather, those decisions, interpreting the very contract clause in question in the instant case, and under the same collective bargaining agreement, must be accorded at least a presumption of continued validity and applicability unless, in a subsequent proceeding, that interpretation is appropriately relitigated, I am asked or required to reconsider my prior ruling, and I am shown that that prior ruling was wrong.

The trouble with the Union's case in the present matter before me is that it does not reargue the critical contract interpretation involved and it does not ask that I reconsider my prior interpretative rulings. Indeed the Union made no mention of my

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three prior decisions either in its case presentation at the hearing or in its brief. Additionally, as further explained below, its case on the merits does not allege let alone rely on those circumstances set forth in my prior decisions under which the Company's decision in determining the qualifications of employees for upgradings would be reversible.

In the three prior decisions I held inter alia:

The...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.

The issue is not whether this Arbitrator thinks the grievant is qualified or unqualified for promotion.... but rather whether the Company's decision that he was unqualified was so devoid of factual basis and so unsupported by relevant work criteria as to be arbitrary, capricious or discriminatory.

Therefore the restriction on the Company which I found to be applicable in the implementation of the initial step of Article XXVIII Section 1 is that its unilateral determination of which employees are qualified may not be arbitrary, capricious or an abuse of discretion.

The Union in the instant case neither recognizes that limited restriction, nor does it assert that the Company has failed to meet it. Instead the Union contends that based on job performance, job duties and other factors, the grievants
were substantively qualified to be upgraded to the General Maintenance "A" (R-19) classification. It asks this Arbitrator to make a judgemental evaluation of the qualifications of the grievants and to find, based on a de novo analysis of their respective qualifications that the grievants possessed the requisite qualifications. In short, I am asked to determine not whether the Company's decisions were arbitrary, capricious or an abuse of its discretion but whether it erred in its factual determinations. Manifestly, the Union seeks the application of a much different standard and a much wider factual determination than what I held to be required of the Company under my three prior interpretations of the pertinent contract language.

By approaching the case in this manner, the Union, implicitly, does not claim that the Company's decisions regarding the grievants were arbitrary, capricious, or an abuse of discretion. Therefore, in the absence of any such allegation, either expressly or otherwise, and in view of my holding that I remain bound by my three prior decisions, it is unnecessary for me to analyze or particularize the various reasons set forth in this record by the Company for its decision that the grievants did not possess the minimum qualifications required for the upgradings they sought. Suffice it to say that those reasons if not persuasive in a de novo fact finding proceeding, do at least rebut any claim of arbitrariness, capriciousness or abuse of discretion. Based on the standard I have previously promulgated, I cannot find that the grievants possessed the minimum qualifications within my interpretation of the meaning
of Section 1 of Article XXVIII of the contract.

Let me return to my first point, namely that the Union has advanced neither argument nor evidence supportive of a change in or reversal of my prior interpretations of Section 1 of Article XXVIII. Presently I am satisfied that my prior interpretations were correct. I have not been shown otherwise. In an appropriate case I am willing to hear new argument and evidence on that issue and to consider reconsidering my position. Whether or not I would be persuaded that I was wrong or that for some other valid reason a change or modification is in order, remains to be seen. The point however is that the Union took no steps in the instant proceeding towards that end, and hence this case does not qualify for that purpose.

For the foregoing reasons, the Undersigned, duly designated as the Arbitrator, makes the following AWARD

Within the meaning of the provisions of the second sentence of Section 1 of Article XXVIII as previously interpreted and applied by this Arbitrator, the grievants, Raymond Berg and Ronald Seynave did not have the minimum qualifications to be upgraded to the General Maintenance "A" (R-19) classification in December, 1978.

DATED: November 6, 1979
STATE OF New York ) ss:
COUNTY OF New York)

On this sixth day of November 1979, 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
Greater New York Health Care Facilities Association
and
Local 144 SEIU, AFL-CIO

In accordance with a written agreement between Local 144, SEIU, AFL-CIO, and the Greater New York Health Care Facilities Association (formerly the Metropolitan New York Nursing Home Association), I have been named arbitrator to hear and resolve non-wage contract issues. In accordance with said agreement dated April 4, 1978, hearings were duly held and briefs were received from the respective sides.

The Union and the Association have submitted a vast number of non-wage items for binding arbitration and award. I have determined that these issues shall be resolved by the issuance of several awards. At the present time I shall make the following interim Awards, reserving jurisdiction on the other issues for further Awards later.

The pension benefit proposal requested by the Union in an amount of $300 per month effective April 1, 1978 (ref. Pension Benefit Fund (1), page 2, Union proposal), is denied. I award on the issue of pension benefit the following. The parties are directed to increase the pension benefit at the following rates and on the following effective dates:

January 1, 1979  Pension Benefit $225 per month
December 15, 1979  Pension Benefit $275 per month
December 15, 1980

The parties will meet to discuss additional increases in the Pension Benefit pursuant to the Union's original position. In the event the parties are unable to resolve this issue, it shall be referred back to the arbitrator for a final determination.

With regard to the welfare fund contribution, the parties have submitted the issue of the monthly rate of contribution. The Union has requested a rate of 10.5%. Alternatively, the Association has proposed a rate of 4%. After review of the facts I make the following Award:

For the period April 1, 1978 to October 1, 1979 the rate in effect shall be 8 1/2% per month. The parties shall meet to discuss the rate of contribution on September 1, 1979. For the period October 1, 1979 to the conclusion of the contract the parties shall meet to discuss the contribution rate at that time. In the event the parties are unable to agree, they shall submit this issue to binding arbitration before this Arbitrator. The Arbitrator shall be limited to an award range no greater than 9 1/2%.

With regard to the additional outstanding issues, I hereby Award that the following be submitted to a committee comprised of no less than three Union representatives and three Association representatives. The committee shall review these issues and make recommendations to the parties:

1. Job classifications that reflect the various job titles in the clerical unit.
2. Job descriptions for all job classifications to be included in the contract.
3. Establishing a file cabinet for ward clerks.
4. Requiring employers to set aside unused sick pay on a monthly basis.
5. Extra pay for aides and orderlies when left short on a floor.

6. Extra pay for aides and orderlies when working on two floors.

7. Additional pay for remaining employees when laid off, discharged or retired employees are not replaced.

I further Award that the parties establish a special attorneys committee to update language in the grievance procedures.

Pursuant to the Association's proposal for a forgiveness of the balloon payment referred to in my Award of April 1977, I hereby make the following Award:

1. Employers shall be granted an additional six months grace period.

2. Employers that have fallen behind in their current pay-outs are cautioned to correct their delinquency in order not to risk loss of the benefits of my April 14, 1977 Award.

DATED: May 8, 1979
STATE OF New York )ss.:
COUNTY OF New York )

On this eighth day of May, 1979, 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

Greater New York Health Care Facilities Association

and

Local 144 SEIU, AFL-CIO

AWARD

In accordance with a written agreement between Local 144, SEIU, AFL-CIO, and the Greater New York Health Care Facilities Association (formerly the Metropolitan New York Nursing Home Association), I have been named arbitrator to hear and resolve non-wage contract issues. In accordance with said agreement dated April 4, 1978, hearings were duly held and briefs were received from the respective sides.

The Union and the Association have submitted a vast number of non-wage items for binding arbitration and award. I have determined that these issues shall be resolved by the issuance of several awards. At the present time I shall make the following interim Awards, reserving jurisdiction on the other issues for further Awards later.

The pension benefit proposal requested by the Union in an amount of $300 per month effective April 1, 1978 (ref. Pension Benefit Fund (1), page 2, Union proposal), is denied. I award on the issue of pension benefit the following. The parties are directed to increase the pension benefit at the following rates and on the following effective dates:

- January 1, 1979  Pension Benefit $225 per month
- December 15, 1979  Pension Benefit $275 per month
December 15, 1980

The parties will meet to discuss additional increases in the Pension Benefit pursuant to the Union's original position. In the event the parties are unable to resolve this issue, it shall be referred back to the arbitrator for a final determination.

With regard to the welfare fund contribution, the parties have submitted the issue of the monthly rate of contribution. The Union has requested a rate of 10.5%. Alternatively, the Association has proposed a rate of 4%. After review of the facts I make the following Award:

For the period April 1, 1978 to October 1, 1979 the rate in effect shall be 8½% per month. The parties shall meet to discuss the rate of contribution on September 1, 1979. For the period October 1, 1979 to the conclusion of the contract the parties shall meet to discuss the contribution rate at that time. In the event the parties are unable to agree, they shall submit this issue to binding arbitration before this Arbitrator. The Arbitrator shall be limited to an award range no greater than 9½%.

With regard to the additional outstanding issues, I hereby Award that the following be submitted to a committee comprised of no less than three Union representatives and three Association representatives. The committee shall review these issues and make recommendations to the parties.

1. Job classifications that reflect the various job titles in the clerical unit.
2. Job descriptions for all job classifications to be included in the contract.
3. Establishing a file cabinet for ward clerks.
4. Requiring employers to set aside unused sick pay on a monthly basis.
5. Extra pay for aides and orderlies when left short on a floor.

6. Extra pay for aides and orderlies when working on two floors.

7. Additional pay for remaining employees when laid off, discharged or retired employees are not replaced.

I further Award that the parties establish a special attorneys committee to update language in the grievance procedures.

Pursuant to the Association's proposal for a forgiveness of the balloon payment referred to in my Award of April 1977, I hereby make the following Award:

1. Employers shall be granted an additional six months grace period.

2. Employers that have fallen behind in their current pay-outs are cautioned to correct their delinquency in order not to risk loss of the benefits of my April 14, 1977 Award.

DATED: May 8, 1979
STATE OF New York ) ss.
COUNTY OF New York

On this eighth day of May, 1979, 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
  Greater New York Health Care
  Facilities, Association
  and
  Local 144, SEIU, CIO

Pursuant to my continued authority over unresolved provisions of the collective bargaining agreement between the above named parties for the period April 1, 1978 through March 31, 1981, and having duly heard the proofs and allegations of said parties, I make the following AWARD:

The following clause shall be included in said collective bargaining agreement:

The Employer will not be required to make contributions to the Funds on behalf of casual employees who work less than the ERISA casual vesting hours as specified in the Trust indenture of Local 144 Nursing Home Pension Fund in a calendar year. In the event that total gross payroll for employees exceeds 20% of the total gross annual payroll of the facility, the employer shall be required to make contributions on that amount exceeding 20% of the gross bargaining unit payroll. The casuals shall be subject to union security provisions of the contract, and shall receive other contract benefits applicable to casuals. To ensure against abuses in the administration or implementation of the foregoing, the arbitrator shall review this matter upon request of either or both sides.

Eric J. Schmertz
Arbitrator
DATED: May 22, 1979
STATE OF New York ) ss.:
COUNTY OF New York )

On this 22nd day of May, 1979, 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.