In The Matter of The Arbitration between
System Council U-3, IBEW
and
Jersey Central Power and Light Co.

AWARD OF ARBITRATORS

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

Consistent with a prior Award dated July 12, 1977 rendered by the majority of a Board of Arbitration under the chairmanship of Arbitrator Benjamin H. Wolf, which for the reasons set forth in the accompanying Opinion of the undersigned Chairman is accorded respect as applicable to the instant case, the Company did not have just cause for the written warning and three day suspension of J. Rosko in 1976. The warning shall be expunged from Mr. Rosko's record and he shall be made whole for three days loss of pay.

Eric J. Schmertz
Chairman

Robert Detrick
Concurring

John J. Westervelt
Dissenting

DATED: May 29, 1979
STATE OF: New York )
COUNTY OF New York )

ss.: 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.
DATED:
STATE OF }ss.:
COUNTY OF 

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

DATED:
STATE OF }ss.:
COUNTY OF 

On this day of 1979, before me personally came and appeared John J. Westervelt 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
System Council U-3, IBEW
and
Jersey Central Power and Light Co.

In accordance with the arbitration provisions of the collective bargaining agreement between System Council U-3, IBEW, hereinafter referred to as the "Union", and Jersey Central Power and Light Co., hereinafter referred to as the "Company", the Undersigned was designated as the Chairman of a tri-partite Board of Arbitration, to hear and decide with the Union and Company designees to said Board, the following stipulated issue:

Did the Company have just cause for the written warning and three day suspension of J. Rosko in 1976? If not what shall be the remedy?

A hearing was held in South Plainfield, New Jersey on January 17, 1979 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. Robert Detrick and John J. Westervelt served respectively as the Union and Company Arbitrators on the Board of Arbitration. The Arbitrators' Oath was waived; the parties filed post-hearing briefs or memorandum; and the Board of Arbitration met in executive session on April 12, 1979.

Mr. Rosko hereinafter referred to as the "grievant" was
given a written warning and a three day suspension for what the Company deemed to be an excessive quantity of absences, many of them on Mondays and Fridays. It is stipulated that over an eleven year period between 1977 and 1977 he was absent one hundred and eighty five days, seventy five of them on a Monday or a Friday. The discipline imposed is in accordance with the Company's "absentee control program." The Chairman ruled that the general validity of that program was not before the Board of Arbitration in this proceeding.

The Union asserts, and the Company stipulates, that each of the grievant's absences was due to claimed illness; that in each of the years, the number of those absences may have equalled but did not exceed the annual number of sick days permitted an employee with the grievant's seniority under the collective bargaining agreement; that at times the grievant presented medical statements in substantiation of the claimed illness; and that in no instance had the Company established that he was not sick on the days he was out.

The Union relies heavily on a prior Award by an Arbitration Board under the chairmanship of Arbitrator Benjamin H. Wolf. That case involved employee Robert E. DePew, Jr. whose absentee record (as also stipulated herein by the parties) was not significantly different from the absentee record of the grievant, though DePew had a worse record of tardiness. A majority of the Wolf Board reversed the discipline imposed on DePew. In sum,
Mr. Wolf stated that where an employee's absences are claimed to be due to illness; where in quantity they do not exceed the number of sick days allowed under the contract; and where there is no evidence that the claim of illness was untrue, the Company had no grounds to impose discipline. To quote Mr. Wolf:

"The Company claims the right to terminate employees for excessive absences even when they are due to illness and cites as authority How Arbitration Works, a treatise by the Elkouris. It is, of course, generally recognized that employers may do so. No employer must forever keep an employee who is excessively ill. The question, however, is when an employee's illness is excessive. It cannot be deemed excessive if it is within the number permitted and paid for under the agreement.

To summarize, while an employer may institute an absentee control program it does not supersede the collective agreement. If an employer grants sick leave pay it acknowledges that the employee is genuinely sick. If an employee is to be disciplined for excessive sickness it may not be for sick days permitted under the agreement.

The Union asserts that the Wolf decision is the definitive contract interpretation of the substantive issue involved in the instant case as in the DePew case; that the Company is bound to it; and that that prior decision should not be overturned by this Arbitrator or by this Arbitration Board.

We all know that as a matter of technical law arbitrators are not bound by prior decisions of other arbitrators. However, it is well settled that where the substantive issue is the same; where the parties are the same; and where the same contract
provisions are involved, a prior interpretative decision, whether it be set forth in the Award or in the accompanying Opinion, should be respected if its conclusions are reasonable and supported by the evidence, and where the contract language involved is logically susceptible to the interpretation given. Put another way, prior decisions, though not binding, and though they need not be followed, are generally not overturned in subsequent similar matters unless the subsequent arbitrator concludes that they are palpably wrong.

In the instant case I may well be in disagreement with Mr. Wolf's conclusion. But there is no dispute that the issue before Mr. Wolf was substantively the same as the issue in the instant case, and of course the parties and the contract provisions are the same. Had the case before me been of first impression, it is quite possible that my analysis would have included the view that an unusually large number of absences due to claimed illnesses, many of which took place on Mondays and Fridays, raised suspicions regarding the bona fides of the claimed illnesses, and constituted a prima facie but rebuttable case for discipline. As such the burden would shift to the grievant and the Union on his behalf to show that the absences, particularly those on Fridays and Mondays were medically rooted. But such views not withstanding, I cannot find that Mr. Wolf's reasoning was unreasonable or unsupported by the facts; nor can I find that the "just cause" provision of the contract and the contractual sick leave benefits
are not logically susceptible to Mr. Wolf's interpretation. In short, while Mr. Wolf and I may disagree, I cannot say that his interpretation is so palpably wrong or insupportable under the facts and contract terms as to be disregarded.

The reasons for the foregoing rules are obvious and I am sure well known to the parties herein. Inconsistent decisions, which provide divergent interpretations of the same contract provisions under substantially similar facts leave the parties with unsettled meanings of their contract. In the instant situation it would impose discipline on one employee where another, similarly situated, was absolved. It would result in the uneven application of "justice" and leave the parties unclear as to how subsequent similar situations should be handled. The better approach is to maintain "consistency", provided the foregoing conditions have been met, leaving resolution of the disagreement between the parties to negotiation.

A stern caveat to the Union and its members. This decision, separately or taken together with the decision by Arbitrator Wolf, should not be deemed or relied upon as a license automatically to permit absences based on claimed illness up to the maximum of the contractual sick leave benefit. As Mr. Wolf rightly pointed out regarding the sick leave benefit:

"Of course, the employee must be genuinely ill."

Hence it should be clear that the Company has both the contractual and managerial right to require employees to substantiate the legitimacy of their claimed illnesses by acceptable
medical proof, and also has the right to conduct appropriate sick leave investigations including visitations to the home of the employee claiming illness.

Dated: May 29, 1979

Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Local 1381, IBEW

and

Long Island Lighting Company

AWARD
Case No. 1730 0361 78

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

Except as hereinafter provided with regard to retroactivity, the terms and conditions of the negotiated agreement, meaning the contract between Local 1381, IBEW and Long Island Lighting Company shall not be modified. So far as the issues in this case are concerned the contract between the above named parties shall provide for a 5 per cent wage increase the first year, a 5 per cent wage increase the second year, a second paid 15 minute break, and a floating holiday. Retroactivity shall be for the period July 1, 1978 to September 15, 1978 and again from December 8, 1978. There shall be no retroactivity for the period September 15, 1978 to December 8, 1978 as this was the period during which the employees rejected the tentative agreement. We deem such rejection as a waiver of retroactivity during that period.

DATED: May 7, 1979

Eric J. Schmertz
Chairman

Matthew Procelli
Concurring
Dissenting

Robert S. Detrick
Concurring
Dissenting
DATED: May 7, 1979  
STATE OF New York ) ss.:  
COUNTY OF New York )  

On this seventh 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: May 1979  
STATE OF New York ) ss.:  
COUNTY OF New York )  

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

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

On this day of May, 1979, before me personally came and appeared Robert Detrick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Local 1381, IBEW and

Long Island Lighting Company

OPINION OF CHAIRMAN
Case No. 1730 0361 78

The stipulated issue is:

Shall the terms and conditions of the above-mentioned negotiated agreement, meaning the contract between Local 1381, IBEW and Long Island Lighting Company, be modified in any way, either more favorable or less favorable to either party and, if so, what shall such modifications be?

The Undersigned was selected as Chairman of the Board of Arbitration. Messrs. Matthew Procelli and Robert S. Detrick served respectively as the Company and Union designees on the Board of Arbitration.

A hearing was held at the Company offices on March 8, 1979, at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrators' Oath was waived. The Board of Arbitration met in executive session on April 19, 1979.

This Arbitrator is an unabashed supporter of the collective bargaining process. I believe that terms and conditions of employment should be freely negotiated by and between the employer and the duly selected and authorized union by and on behalf of the employees. I also believe that if the union has represented its members fully and fairly, has bargained diligently and has achieved
as a tentative agreement what it believes to be the best terms and conditions then obtainable, the union membership should accept and ratify that tentative agreement as the formal contract.

In the instant case the above named Union is the duly selected and authorized representative of the employees involved. It is clear to me that the Union fully and fairly represented its members, and bargained diligently on their behalf. It obtained significant improvements in terms and conditions of employment which represented the "best deal" then obtainable. That tentative agreement, so far as is relevant hereto, included a wage increase of 5 per cent the first year, a similar wage increase of 5 per cent the second year, and second paid 15 minute break, and a floating holiday. I conclude that that tentative agreement should have been accepted and ratified by the membership. The Award of the Board of Arbitration will so provide with appropriate rulings regarding retroactivity.

Eric J. Schmertz
Chairman

DATED: May 7, 1979
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between:

International Industrial Production Employees Union, Local 42

and

Lumex, Inc.

The stipulated issue is:

Was there just cause for the discharge of Leroy Robinson? If not what shall be the remedy?

A hearing was held on August 27, 1979 at which time Mr. Robinson, 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.

It is well settled that insubordination warrants discipline including summary discharge, regardless of the employee's prior disciplinary and/or work record. If the misconduct of insubordination has been shown, and the ultimate permissible penalty of dismissal has been imposed, the arbitrator should not substitute his judgement for that of the employer by reducing that penalty, even if he believes a lesser disciplinary action would have been adequate.

Here, I agree with the Company's determination that the grievant was insubordinate. Angrily, he tore up a disciplinary warning slip "in the foreman's face"; and in the presence of other employees. It was a manifest defiant and disrespectful act, contemptuous of the foreman's authority and responsibility.
Whether that warning notice which produced the incident was justified or whether the grievant's absence the day before should have been excused on medical grounds, are immaterial. The refusal of the foreman to give the grievant the day off "to see a dentist" and/or the propriety of the warning notice for that day's absence, were both matters that could and should have been grieved, if the grievant and the Union on his behalf deemed them wrong. The grievance procedure of the contract, including arbitration is fully capable of redressing any wrongfull action by the Company and the grievant had neither reason nor justification to "reject" the warning notice in the publicly defiant and disrespectful manner he employed.

Significantly, the grievant did not assert that he acted precipitously, in a fit of anger, but rather that he tore up the warning notice after conferring with and being advised to do so by his shop steward. The steward did not testify in corroboration. To my mind that means that the grievant's act was deliberate and committed after he had time to think of its consequences and was not an immediate, emotional reaction, without thought.

Though, as previously stated not traditionally relevant, the grievant's prior disciplinary record is not unblemished. He had previously received a warning and a one day suspension (reduced from three days after the Union's intervention on his behalf) for poor attendance.

Under the circumstance, though to my mind a lengthy suspension rather than dismissal would have been an adequate punishment, the Company had the right to impose the more severe penalty, and I
cannot find that its decision to do so was without "just cause" or violative of the contract.

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

There was just cause for the discharge of Leroy Robinson.

Eric J. Schmertz
Arbitrator

DATED: September 3, 1979
STATE OF New York )ss.:  
COUNTY OF New York )

On this third day of September, 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.
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration:

between

Bakery & Confectionary Workers
International Union, Local 719

and

Nabisco, Inc.

OPINION AND AWARD
Case #1330 0921 78

The issue is the Union's grievance dated June 3, 1977 which reads:

Our agreement was violated by the Company by not notify(ing) the Union about electric work performed by outside contract on the propane system. Work that our men can do. Asking 2 men 7 days pay.

Hearings were held on November 15, 1978, February 12 and April 16, 1979 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.

It is the Union's contention that the electrical wiring and "hookup" of the spare air compressor installed as part of certain propane additions should have been assigned to and performed by bargaining unit electricians and not by an outside contractor.

Effective January 30, 1973 the parties agreed on the following stipulated procedure:

The Company will inform the steward or any authorized Union representative of the proposed job prior to contract commitments to outside firms.

The authorized Union representative will, in turn, arrange a meeting within the skills
involved to determine if a job can be done by bargaining unit personnel.

It is mutually agreed between Company and Union representatives if a job cannot be performed by bargaining Union personnel for any valid reason, a memorandum will be made and duly signed by proper representatives to this effect.

On December 1, 1976 duly authorized representatives of the Union and Company reached the following agreement:

Installation of a shed addition, concrete slab, spare air compressor, liquid pump and necessary piping to be performed by an outside contractor.

The Union claims that its representative was led to believe that the air compressor would be installed in place but that it would not be hooked up electrically as part of the installation. It asserts that its steward was deceived by the Company into believing that the electrical work would be reserved for bargaining unit electricians. The Union points out that the Company did not make the installation plans or the contracts with the contractor available to the steward. Had those plans and contracts been made known, the Union contends they would have disclosed that the contractor was to perform the electrical work and the Union would have immediately objected and claimed the work. The Union argues that in the absence of such disclosure it had reasonable grounds to believe that the compressor would not be hooked up electrically by the contractor but that that work would ultimately be done by the unit electricians when the spare compressor was activated.

The Company asserts that the full installation of all of the equipment and items referred to in Requisition 12287, in-
cluding the electrical work attendant to the spare air compressor, was to be installed by the contractor under the vendor agreement and that the disputed electrical work was an integral part of the contract and part of the vendor's guarantee which went along with the installation.

It is apparent to me that I need not decide whether the bargaining unit electricians possessed the skills to perform the disputed electrical work, nor need I determine whether the work "cannot be performed by bargaining unit personnel for any valid reason" within the meaning of the January 30, 1973 stipulation. The fact is that inasmuch as on December 1, 1976 the parties jointly entered into "a memorandum....duly signed by proper representatives...." pursuant to the 1973 stipulation, those questions are mooted and preempted by the latter agreement.

Therefore the issue is a narrow one. It is whether the December 1, 1976 memorandum providing for the "installation of a.....spare air compressor....by an outside contractor" included therein and contemplated the electrical hookup of that compressor by the contractor; or whether that work was reserved for bargaining unit electricians.

I conclude the former. As I see it the Union has wrongly placed the full burden on the Company with regard to disclosure of the work to be performed by the outside contractor. The Company did not state or indicate that the electrical work was not to be performed by the contractor. Nor did the Company in any way state or otherwise inform the Union that that electrical work was to be later undertaken by the bargaining unit electricians. The fact is that any normal reading of the December 1,
1976 memorandum creates a presumption that the outside contractor was to perform all work involved in the installation of the equipment and items referred to therein, and the customary interpretation of the word "installation" includes those normal tasks attendant to making the equipment operational. That would include the necessary electrical work for any operation of the air compressor.

Significant in my judgement is that the procedure followed in this case was not unique, but was the usual method used by the parties in giving notice to and considering whether certain work was to be "farmed out" or assigned to the bargaining unit. Under the 1973 stipulation there is as much a burden on the Union to seek out information, and ask questions regarding all of the relevant details of the work to be performed as there is on the Company to disclose. As the Union representative assumes the responsibility of meeting with the skilled trades involved to determine if the job can be done by bargaining unit personnel, he, perforce, has the responsibility prior to entering into a memorandum like the one of December 1, 1976, of inquiring of the Company what precise work the Company proposes to assign to outside firms. Indeed the Union had had considerable prior experience with this very same procedure. In prior instances, as well as in prior grievances resulting from the implementation of this procedure, the Union sought and obtained information regarding all aspects of the work to be performed, and acted in many instances to protect the interests of the bargaining unit by claiming certain work which the bargaining unit could perform.

In the instant case I conclude that it was the duty of
the Union steward to question the Company about all the work which the contractor was to perform in connection with the installation of the spare air compressor, particularly in view of the aforesaid presumption that a general agreement to have that piece of equipment installed by an outside contractor carried with it and included the necessary electrical work to make the spare air compressor operational. In view of that presumption, as well as the long standing experience and practice which the Union had with this procedure, I do not find that the Company had any special duty to notify the Union specifically that the installation of the spare air compressor included the electrical hookup of that piece of equipment. In short I find that that latter work is and was an implicit part of the installation. If any special part of an installation, such as an electrical hookup was to be reserved for the bargaining unit electricians, the Union representative should have expressly excluded that work from assignment to the contractor, either as an explicit exception within the memorandum, or by an express verbal agreement before the memorandum was signed. Neither was done. Hence I find no basis to support the Union's claim that the Company deceived or even misled the Union's steward.

Under the foregoing circumstances I must conclude that with the execution of the December 1, 1976 memorandum by "proper representatives" of the Company and the Union, the Company had reasonable grounds to believe that the installation of the spare air compressor included its electrical hookup, and that that work was properly given to and performed by the outside contractor.
The Undersigned, duly designated as the Arbitrator and having been duly sworn and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The Union's grievance dated June 3, 1977 is denied.

Eric J. Schmertz
Arbitrator

DATED: September 28, 1979
STATE OF New York )
COUNTY OF New York )ss.

On this twenty-eighth day of September, 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

International Brotherhood of Electrical Workers, Locals 2222, 2313, 2315, 2320-27

and

New England Telephone Company

AWARD OF ARBITRATORS

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 Article 24.05 (c) of the 1971 Agreement between the parties.

Eric J. Schmertz
Chairman

Ralph Hannabury
Concurring

John Langlois
Dissenting
DATED: December 20, 1979  
STATE OF New York )ss.:  
COUNTY OF New York )

On this twentieth day of December, 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: December 1979  
STATE OF Massachusetts)ss.:  
COUNTY OF

On this day of December 1979, before me personally came and appeared Ralph Hannabury 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: December 1979  
STATE OF Massachusetts)ss.:  
COUNTY OF

On this day of December, 1979, before me personally came and appeared John Langlois to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

International Brotherhood of Electrical Workers, Locals 2222, 2313, 2315, 2320-27

and

New England Telephone Company

The stipulated issue is:

Did the Company violate Article 24.05(c) of the 1971 Agreement between the parties? If so what shall be the remedy if any, under said Agreement?

A hearing was duly held at which time all concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Board of Arbitration was waived; the parties filed post-hearing briefs; and two executive sessions of the Board of Arbitration were held.

Article 24.05(c) reads:

"24.05 Eligibility to apply for transfer to fill vacancies shall be as follows:

(c) To rated Basic Classes of Work: An employee shall become eligible to apply for transfer following twelve (12) months on present assignment. This restriction will not apply to employees who met the requirements for rated Basic Classes of Work on date of employment."
What is involved is whether Ms. Margaret Alymer, though undisputedly qualified, was eligible under the foregoing contract provision for transfer to the job of Station Assigner after working a little more than two months as a Plant Clerk.

The Union claims that the job of Plant Clerk was Ms. Alymer's "present assignment" within the meaning of the foregoing contract provision; that she had not worked at least twelve months in that assignment; and therefore was ineligible to be awarded the job of Station Assigner.

It is the Company's contention that the phrase "present assignment" means service within the "Basic Class" of clerical work; that Ms. Alymer had spent over two years in that Class (from December 7, 1970 to December 26, 1971 as a Field Clerk; and from December 26, 1971 to March 5, 1972 as a Plant Clerk); and consequently met the minimum twelve month "residency" requirement for transfer to the job of Station Assigner.

The parties have stipulated that if Ms. Alymer was contractually eligible, she was entitled to the job; but that if not the job should have been awarded to Ms. Marjorie Denningham.

While a traditional interpretation of the phrase "present assignment" might lead logically to the conclusion that it means the particular job which an employee occupies at the time he is transferred under 24.05(c), in this case Ms. Alymer's job as a Plant Clerk, I conclude based on the entire record, particularly a reading of all of the provisions of Article 24.05, that the
phrase "present assignment" under paragraph (c) means jobs within a Basic Class of Work. In the instant case it would apply to Ms. Alymer's work experience both as a Field Clerk and Plant Clerk, thereby satisfying the minimum twelve month residency requirement.

Article 24.05 sets up three circumstances for transfer. Paragraph (a), by its introductory language sets conditions for transfers within the same rated Basic Class of Work or from Basic Class of Work #2 to Basic Class of Work #1 (emphasis added).

Paragraph (b) sets up conditions for transfer between rated Basic Classes of Work (emphasis added).

Considering the foregoing introductory language for transfers under paragraphs (a) and (b), it is clear to me that the common denominator or categories for transfers is between and within Basic Classes of Work or rated Basic Classes of Work. Those introductory explanations perforce define the phrase "present assignment" found in paragraph (a) and together with even more explicit language in paragraph (b) the phrases "initial assignment" and "subsequent assignment."

It follows, in my view, that paragraph (c) should be and was intended to be consistent with paragraphs (a) and (b). The introductory language of paragraph (c) reads:

"To rated Basic Classes of Work."

As paragraphs (a) and (b) set forth transfer movement between
Basic Classes of Work and between Rated Basic Classes of Work, as well as within the same rated Basic Class of Work, paragraph (c) must apply to transfer movement from a particular source or location "to rated Basic Classes of Work." In the instant case the transfer was from the Basic Class of Clerical Work to a rated Basic Class of Work. For consistency with paragraphs (a) and (b) I find implicit within the introductory language of paragraph (c), so far as the instant case is concerned, the language From Basic Classes of Work to rated Basic Classes of Work. (underscored is the implicit language)

On that basis, as in paragraphs (a) and (b), the introductory language provides the definition of the phrase "present assignment" found in the body of paragraph (c). And under the circumstances of this case, that latter phrase means a transfer from the Basic Class of Clerical Work to a rated Basic Class of Work. More specifically it means Ms. Alymer's transfer from the Clerical Class, which included her services both as a Field Clerk and a Plant Clerk, to Station Assigner a job within a rated Basic Class of Work.

I am satisfied that the foregoing contractual analysis is consistent with and supported in the record by probative testimony on what was intended when Article 24.05 was negotiated by and between the parties in contract negotiations.

Accordingly the Union's grievance is denied.

Eric J. Schmertz
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

New Haven Federation of Teachers

and

New Haven Board of Education

AWARD

Case #1239 0349 78

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

Based on the testimony of the school principal together with the final testimony of the grievant herself, I conclude that the principal did observe the grievant's classes; did discuss with her what he considered to be her deficiencies; and did make suggestions and recommendations for improvement.

I believe his observations, findings and recommendations would have been more effective and impressive had they been structured and institutionalized in formal meetings and written reports, but the contract does not require that degree of formality.

Accordingly, I find that the principal met at least the minimum procedural requirements of Article VIII Section 2 of the contract, and therefore did not violate that contract provision in failing to follow the procedural steps thereof with regard to the evaluation of Maxine Richardson.
The Arbitrator's fee and expenses of the hearing scheduled for April 4, 1979 at which the Board of Education failed to appear, shall be borne by the Board. The balance of the Arbitrator's fee and expenses for the subsequent hearing and for study and preparation of the Award shall be shared equally.

DATE: June 21, 1979
STATE OF New York )
COUNTY OF New York )

On this 21st 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
In The Matter of The Arbitration:

between

Uniformed Firefighters Association: 

-and-

City of New York (Fire Department):

Respectively at hearings on June 27th and July 2nd, 1979

the above named parties stipulated and litigated the following

issues:

1. Has the Fire Department improperly denied
the requests of Daniel Gallagher and John
Thomas for reimbursement for lost or destroy-
ed personal belongings? If so what shall be
the remedy?

2. Whether the Fire Department violated the
collective bargaining agreement by schedul-
ing probationary firemen to report to the
Fire Department medical office on the off-
tours for Fourth Grade medical examination?
If so what shall be the remedy?

At the hearings, representatives of the parties appeared
and were afforded full opportunity to offer evidence and argument
and to examine and cross-examine witnesses. The Arbitrator's Oath
was waived. Post-hearing briefs were filed.

Issue No. 1

Undisputedly relevant is Section 487a-17.0 of the Adminis-
trative Code which reads:
Whenever any member of the uniformed force of the Department, while in the actual performance of his duty shall lose or have destroyed any of his personal belongings and shall present satisfactory proof thereof to the commissioner, such member shall be reimbursed to the extent of the loss sustained, at the expense of the City.

What is sharply disputed is the interpretation and application of the foregoing, particularly the meaning of "personal belongings."

In the instant case I find that I need not resolve the major interpretative dispute between the parties. Instead I am persuaded that the City is not an absolute guarantor against losses under all circumstances and that implicit within the foregoing provision so far as this case is concerned, is that the employee involved be free of any material contributory negligence in the loss. In this case Fireman Gallagher lost his eyeglasses and Fireman Thomas lost his "divers" wrist watch, both in the course of line of duty work. However, Gallagher carried his glasses in the breast pocket of his shirt. The glasses were in no way secured either by a clip, safety pin, or any other device. It is not surprising therefore that they fell out of the pocket as he leaned over from a building height and were lost. Assuming that the glasses were needed for the performance of his assigned duties at that time, I believe that he knew or should have anticipated the nature of the assignment and should have taken steps to better insure the security of his eyeglasses. That he did not do so materially contributed to their loss.
Thomas is the Department's unofficial "diver." At times he is called on for rescue and other operations underwater. In readiness for any such assignment he properly, and understandably wears a special divers wrist watch which is essential to his safety when engaged in diving operations. He was not so engaged when the watch was lost. Rather he was at work extricating a person from a car buried under gravel from an overturned gravel truck. Much of the digging was done by hand, during which the watch was lost. It seems to me that without any significant loss of time Thomas could have removed his watch for that particular assignment. The evidence shows that when called out for that rescue operation he knew it did not involve diving. He carried no other diving equipment with him. At the firehouse or enroute, the watch should have been removed, left in the firehouse, left in the rescue vehicle or placed elsewhere (including possibly in his trousers pocket) before beginning digging in the gravel. The grievant does not claim that at the scene he had no time to remove the watch, if time was of the essence to extricate the victim. Rather his contention simply is that he wears the watch at all times to be ready in case he is called upon for a diving operation. Under that circumstance I consider it reasonable and prudent for him to have removed the watch when the assignment did not involve diving. His failure to do so materially contributed to its loss.

Accordingly, without determining in this proceeding whether
the eyeglasses and wrist watch involved were personal belongings within the meaning of the Administrative Code, and even though they were lost in the performance of their duties and proof of loss supplied, the grievants' requests for reimbursement are denied.

**Issue No. 2**

The Fourth Grade medical examination is an essential requirement for probationary firemen. Satisfactory completion of that examination is a prerequisite to a permanent appointment. The Department first scheduled those examination "on-tours", which had the effect of allegedly contravening the minimum Manning requirements of the contract. When the Union complained the Department ceased that practice, and stated in the course of this arbitration hearing that it does not intend to resume examinations "on-tour." Accordingly that aspect of the original grievance is not before me, but the rights of the parties are reserved, in the event that the Department resumes "on-tour" examinations with attendant reductions in minimum Manning.

Considering the essentiality of the medical examination for probationary firemen, and the fact that their permanent status is not achieved until, among other things, that medical examination is successfully completed, I am not prepared to conclude that the probationary firemen involved are entitled to compensation for the off time devoted to those examinations; nor do I deem it unreasonable for the Department to schedule those mandatorily required
examinations during off-tour periods. Hence the Union's request for compensation and/or for an order enjoining the scheduling of the Fourth Grade medical examination on the "off-tours", are denied.

Eric J. Schmertz
Impartial Chairman

DATED: September 3, 1979
STATE OF New York )ss.:
COUNTY OF New York )

On this third day of September, 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

Uniformed Fire Officers Association and

City of New York (Fire Department)

The stipulated issue is:

Whether the current practice of the Fire Department with respect to AFID/AFRD violates a valid and subsisting agreement, practice or policy, and, if so, is compliance the appropriate remedy?

A hearing was held January 29, 1979 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived.

I find that the Memorandum of Understanding Between The Fire Commissioner and The Executive Board of the UFOA, signed by the then Fire Commissioner Robert O. Lowery and the then president of the UFOA, Joseph Lovett and published in the Union’s newspaper Trumpet in January, 1968, the authenticity of which is not disputed by the City, is a continuing, enforceable bilateral agreement, albeit separate from the basic collective bargaining agreement, which may not be changed unilaterally by the Department.

That the Department did not deviate from its terms from 1968 until possibly one special instance in the Borough of Manhattan in 1977, and thereafter not until the Borough Directives in 1978 (which gave rise to the instant grievance) constitutes
a course of conduct and practice not only in affirmation of the original agreement, but persuasive evidence of its continued effectiveness and vitality for the entire ten year period.

As such it is not an "ancient document" as alleged by the City, but rather a contemporaneously effective instrument to which the City and the Union are bound. Consequently the Department's unilateral Borough Directives which ordered AFID periods in the afternoon as well as in the morning, and which require the "make-up" of missed inspections, are violative of the express contrary provisions of numbered paragraphs 3 and 4 and the next to last full paragraph of the Memorandum of Understanding.

By negotiating and consistently performing under the terms of the Memorandum, the Department transformed what may have been a management prerogative into a bilateral condition of employment and a bargainable issue. As that bilateral agreement has remained effective, the City must bargain any changes therein with the Union.

I agree with the City that a good AFID program is needed for more effective fire prevention. Therefore I direct that the parties forthwith meet and bargain on the question of what changes if any should be made in the AFID program from those set forth in the Memorandum. That bargaining shall be pursuant to the New York City Collective Bargaining Law, including the impasse provisions thereof.

Pending the final outcome of that bargaining, the Department is directed to cease and desist from implementing the
AFID program as set forth in the Borough Directives identified in this record as Union Exhibits 6 through 10, and is directed to return to and restore the AFID program as set forth in the Memorandum of Understanding.

Dated: January 31, 1979
State of New York )
County of New York )

On this 31st 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.

Eric J. Schmertz
Impartial Chairman
The stipulated issue is:

May the Department unilaterally replace firemen working as ambulance #4 drivers and in the oxygen therapy unit with non-uniformed employees? If not, what shall be the remedy?

A hearing was held at the Office of Collective Bargaining on March 19, 1979 at which time representatives of the City and the Union appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Limited to this proceeding, without prejudice to any other matter, and based on the decision of the Board of Collective Bargaining in Case No. B-7-69, the City waived any challenge to the arbitrability of the instant dispute.

I decide the issue on narrow, contractual grounds, limited to the facts and circumstances of this particular case. My decision is not intended nor should it be construed as having any precedential effect on any other matter.

This case does not require a determination of whether the City may "civilianize" certain fire department jobs and duties historically performed by firemen. Nor does it require a finding of applicability or non-applicability of any aspect of the decision.
of Arbitrator Morris P. Glushien in the Matter of the Arbitration between Uniformed Sanitationmen's Association and The City of New York (Case No. A-762-78). Therefore, regarding the latter, I find it unnecessary to determine whether the UFA-City of New York collective bargaining agreement and the firemen job description expressly recited therein may be construed as providing any job exclusivity to firemen; whether the functions of ambulance #4 and the oxygen therapy unit are either "fundamental" to or "tangential" to the principal duties of a fireman; or whether I agree or disagree with Mr. Glushien's view that "in the public sector, more than in the private, an arbitrator should be chary of finding job exclusivity and job guarantee(s)...." Accordingly my decision may not be construed as dispositive of or even dealing with any of these questions or theories. Rather it is based solely on the following rationale.

I find an explicit contract provision which binds the City to continue the use of drivers who are firemen in the operation of ambulance #4 and the oxygen therapy unit. (The 16 incumbent drivers are made up almost entirely of LSS firefighters who are disabled from full duty as a result of line of duty injuries.) Article VA (Medical Offices) of the collective bargaining agreement provides in pertinent part:

The City agrees to implement the recommendations of the Medical Practices Review Committee in accordance with Attachment C of this agreement,

The Committee recommended inter alia

The Fire Department Medical Division
should be maintained and specific changes made as recommended below.

It is undisputed that as part of the City's submission to the Committee, and incorporated within the Committee's recommendation was an organizational chart of the Medical Division which included not only ambulance #4 (encompassing also the constituent oxygen therapy unit), but also the names of each of the firemen assigned as drivers. The Committee's recommended changes did not deal with the replacement of those named drivers with non-uniformed personnel. Consequently I am not prepared to conclude that the bilaterally negotiated contractual provision in Article VA "to implement the recommendations of the Medical Practices Review Committee" did not mean continued operation of ambulance #4 and the oxygen therapy unit with incumbent firemen drivers. Moreover, I am not prepared to conclude (indeed the evidence tends to point to a contrary conclusion) that the recommendation "that the Medical Division be maintained," would be fully implemented and that ambulance #4 and the oxygen therapy unit would be able to render the same substantive service and medical attention if the drivers (who historically have been firemen) were replaced by non-uniformed personnel. Under the unconditional language of Article VA, which requires the carrying out of the Committee's recommendation, I think the burden is on the City to show that the Medical Division would be "maintained" in accordance with the Committee's recommendations if the drivers of those vehicles were changed from firemen to non-firemen. The record before me discloses not only that at least one fireman driver on each shift is EMT trained
but that as firemen who suffered line of duty injuries themselves, each driver possesses and exhibits a special dedication and concern for, and in fact assists in rendering special care to injured firemen who are transported in ambulance #4, and is similarly responsive to the families of injured firemen, for whom the ambulance also provides transportation. The City has not shown that the non-uniformed driver who would replace the firemen drivers are or will be similarly trained or possess similar expertise or even dedication. Hence, I see as an unrebutted presumption, that the recommendations of the Medical Practices Review Committee would not be implemented as required by Article VA of the contract, unless it included the continued use of firemen as drivers.

In short, Article VA incorporates by express reference into the contract the recommendations of the Committee and requires the implementation of those recommendations. The reasonable and logical interpretation of the pertinent recommendation is that ambulance #4 and the oxygen therapy unit be "maintained" as before, with the incumbent drivers. And that the City has bound itself, by collective agreement with the Union, to the recommended procedures and organizational structure of the Medical Department, which absent that agreement may well be, in significant part at least, a managerial prerogative not otherwise subject to bilaterally negotiated conditions or limitations.

The Undersigned, duly designated as the Impartial Chairman under the collective bargaining agreement between the above named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:
The Department may not unilaterally replace firemen working as ambulance #4 drivers and in the oxygen therapy unit with non-uniformed employees. The Department shall continue the use of firemen as drivers as before.

Eric J. Schmertz
Impartial Chairman

DATED: March 21, 1979
STATE OF: New York )ss.:
COUNTY OF: New York )

On this twenty first 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.
OFFICE OF COLLECTIVE BARGAINING

In the Matter of:
Local 237, IBT
-and-
The New York City Housing Authority:

APPEARANCES:
For the Union:
Barry Feinstein, President
Jack Bigel, Consultant

For the Housing Authority:
John Simon, General Manager
Joseph Christian, Chairman

For the Office of Municipal Labor Relations:
Bruce McIver, Director
Robert Linn, Esq.

Before the Arbitration Panel:
Arvid Anderson
Walter L. Eisenberg
Eric J. Schmertz
The New York City Housing Authority and City Employees Union, Local 237, International Brotherhood of Teamsters, on January 27, 1979, designated the undersigned Impartial Members of the Board of Collective Bargaining as an Arbitration Panel pursuant to paragraph 15. of the Coalition Economic Agreement (Joint Exhibit No. 1) to decide the following issue:

Should Local 237, IBT/Housing Authority employees be entitled to COLA comparable to that provided for in the CEA Paragraph 3?

A hearing was held in the matter on January 27, 1979 at which time the parties jointly requested an expedited Award by the Arbitration Panel with the Opinion of the Panel to follow in a reasonable time.

The Panel having duly heard the presentations of the parties and having reviewed the record and exhibits therein make the following Award:

AWARD

1. The Housing Authority employees represented by City Employees Union, Local 237, International Brotherhood of Teamsters, are entitled to a COLA comparable to that provided in paragraph 3. of the Coalition Economic Agreement.
Said employees shall be paid that fully pensionable COLA in accordance with the following payment schedule:

   a) $300 effective January 1, 1979 and
   b) an additional $141 effective January 1, 1980.

2. Those Housing Authority employees represented by City Employees Union, Local 237, IBT, who are eligible for the Non-Pensionable Cash Payment (as described in paragraph 5. of the Coalition Economic Agreement) shall receive said Payment at the rate of $750 per year effective January 1, 1979.

DATED: New York, N.Y.
February 7, 1979

Arvid Anderson

Eric J. Schmertz
STATE OF NEW YORK )  SS:
COUNTY OF NEW YORK )

On this 7th day of February 1979 before me personally appeared ARVID ANDERSON, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF NEW YORK )  SS:
COUNTY OF NEW YORK )

On this 7th day of February 1979 before me personally appeared WALTER L. EISENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF NEW YORK )  SS:
COUNTY OF NEW YORK )

On this 7th day of February 1979 before me personally 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 duly acknowledged to me that he executed the same.
OFFICE OF COLLECTIVE BARGAINING

In the Matter of

Local 237, IBT

-and-

The New York City Housing Authority

-------------------------------x

APPEARANCES:

For the Union:

Barry Feinstein, President
Jack Bigel, Consultant

For the Housing Authority:

John Simon, General Manager
Joseph Christian, Chairman

For the Office of Municipal Labor Relations:

Bruce McIver, Director
Robert W. Linn, Special Counsel

BEFORE THE ARBITRATION PANEL:

Arvid Anderson
Walter L. Eisenberg
Eric J. Schmertz
OFFICE OF COLLECTIVE BARGAINING

In the Matter of:
Local 237, IBT
-and-
The New York City Housing Authority

ARBITRATION AWARD
AND OPINION
Docket No. A-806-79

The New York City Housing Authority (hereinafter "Authority") and City Employees' Union, Local 237, International Brotherhood of Teamsters (hereinafter "Union") on January 27, 1979, designated the undersigned Impartial Members of the Board of Collective Bargaining as an Arbitration Panel pursuant to Paragraph 15. of the Coalition Economic Agreement (Joint Exhibit No. 1, and hereinafter "CEA") to decide the following issue:

Should Local 237, IBT/Housing Authority employees be entitled to COLA comparable to that provided for in the CEA Paragraph 37?

A hearing was held in the matter on January 27, 1979 at which time the parties jointly requested an expedited Award by the Arbitration Panel with the Opinion of the Panel to follow in a reasonable time.

The Panel having duly heard the presentations of the parties and having thereafter reviewed the record and exhibits, issued its Award on February 7, 1979.
We now set forth in this Opinion the basis for our Award.

BACKGROUND

The CEA provides in pertinent part as follows (at pages 3-4):

3. "Old COLA"

Current compensation commonly known as "Old COLA" or "COLA I", whether now being received or deferred, shall be continued and paid at the present rate in all applicable titles held by the Employees. Where such COLA was previously paid in a lump sum, it shall be paid in equal shares in each regular paycheck received by the Employee. Commencing the first day of the thirteenth month following the effective date of each Separate Unit Agreement, the aforesaid "Old COLA" or "COLA I" shall be equalized for all applicable titles at the rate of $441 per annum. Commencing the effective date of each Separate Unit Agreement, the compensation provided for in this paragraph 3 shall be included in the base rate for all purposes, including but not limited to, pension, incremental salary levels, and minimum and maximum rates, except as otherwise hereinafter expressly provided in paragraph 6c of this Agreement.

The CEA also provides in pertinent part as follows (at pages 13-14):

15. Resolution of Disputes

a. Subject to the subsequent provisions of paragraph 15b, any dispute, controversy or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this Agreement shall be submitted to arbitration upon the written notice therefor by any of the parties to this Agreement to the party with whom such dispute or controversy
exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining pursuant to the rules of the Board of Collective Bargaining. Any award in such an arbitration proceeding shall be final and binding and shall be enforceable pursuant to Article 75, C.P.L.R.

Implicit in the agreement of the parties here involved to submit their dispute as to whether Authority employees represented by the Union should be entitled to COLA comparable to that provided for in Paragraph 3 (as cited above), is an understanding that Authority employees should be covered by the terms of the CEA. Thus, the issue as developed by the parties to this proceeding centered on the question of what the terms and conditions of Authority employee coverage under the CEA should be with respect to COLA.

City employees, other than Authority employees, covered by the CEA have received "Old COLA" at a rate of $441 per year. City employees also have been receiving a Non-Pensionable Cash Payment ("productivity COLA") at a rate of $750 per year pursuant to the conditions outlined in the two-year CEA. Under the terms of prior agreements (in 1976-78), other City employees had received productivity COLA at varying rates, most at the rate of $882 on an annualized basis. As a result of bargaining by the City and the Coalition Unions, a two-year
CEA was entered into in June of 1978 and the $882 productivity COLA figure was reduced to a $750 Non-Pensionable Cash Payment. Authority employees represented by the Union under the terms of their contract, which expired on December 31, 1978, did not receive Old COLA, but had been receiving productivity COLA payments at an annual rate of $966. Actually they had not received the full $966 but did receive $630 in cash payments plus an $85 lump sum amount retroactive to October 1, 1978. However, such payments ceased with the contract's expiration on December 31, 1978.

POSITIONS OF THE PARTIES

The Union claims that Authority employees should receive Old COLA, described in Paragraph 3 of the CEA, at the rate of $441 per year effective January 1, 1979 and that such a payment should be fully pensionable. The Union also demands that Authority employees be declared eligible for the Non-Pensionable Cash Payment, described in Paragraph 5 of the CEA, and that they receive such payment at the rate of $966 per year effective January 1, 1979.

The position of the Authority and the City is that Authority employees should receive basically the same benefits as other City employees, but on a deferred schedule which would permit the City and the Authority to afford such payments. The City pointed out that not all City employees received the $441 COLA
at one time and, further, that not all City employees had received the full $441 until the negotiation of the CEA.

The parties here involved made comprehensive arguments and submitted documented economic statements to support their respective positions. The City and the Authority stressed the economic consequences of the Union demands measured against the City's ability to pay the requested benefits. However, in answer to an explicit question from the Panel, the City representatives have made clear that neither the City nor the legal staff of the Financial Control Board, who were consulted by the City in this matter, contend that there is an inability to pay the Union's requests within the meaning of the Financial Emergency Act. Nevertheless, the City and the Authority contend that financial prudence and equity dictate that a grant of the Union's request as submitted would be unjustified and unwise. The City also pointed out that, while the Authority employees did not receive COLA payments for a three-year period commencing January 1, 1974, the three-year contract (1973-1976) which the Authority employees had negotiated yielded benefits averaging approximately 38% over the three-year period, a sum substantially in excess of benefits negotiated by other City unions. The City asserts that when this total increase
in benefits is considered, Authority employees represented by the Union were not disadvantaged by not receiving the Old COLA as contrasted to other City employees who did receive Old COLA.

The Union argues that it is seeking only such COLA benefits as had been granted to all other City employees covered by the CEA. The Union representatives in support of their claim detailed the numerous cooperative actions which the Union and the Authority employees have taken to meet the fiscal crisis faced by the City and the Authority. Specifically, the Union cited their participation in the wage deferral agreements, the reduction of the ITHP, and the yielding of other specific contractual benefits. The Union thus urges that equity requires the Authority employees to receive the same Old COLA benefits without regard to the Union's bargaining success in any prior contract negotiations.

**OPINION**

The Panel has considered all of the well-stated, and at times impassioned, arguments and the exhibits of the parties. The Panel also recognizes the scope of the fiscal crisis and constructive role played by the City Administration, the Authority and this Union in the fiscal survival of the City. There is no need to detail these actions here.
We are satisfied that there is substantial merit to be found in the arguments of both parties. We have concluded that with reference to the disputed payments equity requires treating Authority employees as nearly as possible like all other City employees covered by the CEA, including as well the COLA provisions of Paragraph 3 of the CEA. However, in order to lessen the cost impact of such coverage, we have concluded in our Award that such COLA provision should be applicable under the conditions outlined in our Award, namely, that the $441 fully pensionable Old COLA should be paid on the schedule of $300 effective January 1, 1979, and an additional $141 effective January 1, 1980. We have further concluded that productivity COLA should be paid at the rate of $750 per year effective January 1, 1979, and that such payment should be on a non-pensionable basis, as is the case with all other City employees.

Most City employees did not receive the $441 Old COLA payment all at one time, but rather over a two-year period. By dividing the effective periods for the Old COLA payments, as we have done, as well as by reducing the annualized rate for the Non-Pensionable Cash Payment to $750, we believe we have equitably and sufficiently provided COLA benefits for the employees involved and that we have equitably and sufficiently modified the cost impact of our Award so as not to
produce an undue hardship on the City and the Authority.

For the reasons set forth above, the Panel on February 7, 1979 issued the following Award:

AWARD

1. The Housing Authority employees represented by City Employees Union, Local 237, International Brotherhood of Teamsters, are entitled to a COLA comparable to that provided in paragraph 3. of the Coalition Economic Agreement. Said employees shall be paid that fully pensionable COLA in accordance with the following payment schedule:

   a) $300 effective January 1, 1979 and
   b) an additional $141 effective January 1, 1980.

2. Those Housing Authority employees represented by City Employees Union, Local 237, IBT, who are eligible for the Non-Pensionable Cash Payment (as described in paragraph 5. of the Coalition Economic Agreement) shall receive said Payment at the rate of $750 per year effective January 1, 1979.

This Opinion is joined to and made a part of the Award issued in this case on February 7, 1979.

DATED: New York, New York
February 26, 1979

ARVID ANDERSON
WALTER F. EISENBERG
ERIC J. SCHMERTZ
Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between

Local 1930 District Council 37
AFSC&ME

and

New York Public Library

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

The credible evidence persuasively establishes that for the short period of his employment from June 29, 1978 until his discharge on August 4, 1978, the grievant Kirjath Spence, was insubordinate and disrespectful to an uncooperative with supervision; intrusive and indecorous with other employees, and had demonstrated difficulty meeting the attendance and punctuality requirements of his job.

I find that this adds up to what the Library contends is "conduct unbecoming a library employee" and constitutes grounds for dismissal.

Therefore the discharge of Kirjath Spence was for just cause, and his grievance is denied.

DATED: February 1979

Eric J. Schmertz

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 The Matter of The Arbitration between Local 453, IUE and Otis Elevator Company.

OPINION AND AWARD

The stipulated issue is:

What shall be the disposition of the Union's grievance No. 4880 dated January 15, 1976?

A hearing was held at the Company plant on September 12, 1979 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.

Union Grievance No. 4880 reads:

The Company has violated the contract Article IX Section 7. The Company has laid off various men from twenty three department. There is no lack of work. The Company continues to send dies and fixtures to various vendors while these men are laid off.

At the hearing the Union asserted that Section 6 as well as Section 7 of Article IX had been violated and that its grievance actually protested the Company's failure to "recall" on or around January 15, 1976, employees who had been laid off from the tool room the previous October and November.

Based on the record, the Union's case is in the alternative. While it concedes the Company's general right to subcontract, it contends that that right is restricted if it "causes a layoff" or if there are employees on layoff who could be recalled to
perform that work in the plant. In either circumstance, claims
the Union, the Company's right to subcontract is barred by the
second paragraph of Section 7 of Article IX which in pertinent
part accords the Company the

.....right to layoff employees because of lack
of work.

In the instant case the Union asserts that at the time the
affected employees were laid off from the tool room, work which
they could perform was subcontracted (evidenced by the return of
work from the subcontractor around February); that that work
should have remained in the plant; and that significant overtime
was worked by the remaining employees, all of which should have
foreclosed the layoff. Additionally and alternatively, the Union
claims that on or around January 15, 1976, when the grievance was
filed, work was further subcontracted and significant overtime
again was scheduled for the remaining bargaining unit employees
warranting the recall of some of the laid off employees.

Also, the Union argues that Section 6 of Article IX is a
"two-way street", and that the obligation placed on the Union by
that clause to "cooperate with the Employer in an effort to reduce
......waste" is also binding on the Company. It contends that in
the instant case the Company subcontracted work at a greater
expense then it would have cost to have it produced by the bargain-
ing unit and hence is itself guilty of "waste" in violation of
Section 6.

I deem Section 6 inapplicable to this case. By its terms
it is a promise by the Union to the Company that the Union will
cooperate in reducing "waste". It places no reciprocal obligation on the Company, and in the absence of any explicit language therein creating any such reciprocal or mutual promise, none should be implied or legislated by the arbitrator. Also, it is well settled that subcontracting may be justified (in the absence of a contract restriction) on grounds other than cost, such as the need for expedition, the existing work load of the bargaining unit and the availability of equipment. The Union has not shown herein, where there is no explicit contract restriction on subcontracting, that none of these factors were involved. Indeed, most significantly the Union's assertion that the subcontracting was "more expensive" was based solely on what some foreman allegedly told a Union witness. As such, without the requisite particularization, it falls short of what would constitute probative evidence on that point.

I find that I do not have to decide whether the second paragraph of Section 7 of Article IX is a restriction on the Company's right to subcontract in circumstances of layoffs and recall. For even assuming the validity of the Union's contractual theory, the Union has not established herein that at the time of the disputed layoff in October and November, 1975 the work which then was or may have been subcontracted, was work which the laid off employees could perform and/or was in sufficient quantity to nullify the reduction in force. Also, the Union has not shown that on or around January 15, 1976 when the grievance was filed, the work then returned or returning from subcontractors was within the
capability of the bargaining unit or in sufficient quantity to justify recall. Additionally, the Union's argument regarding the schedule of "significant overtime" similarly fails because it is not shown that significant overtime was scheduled or worked at either of the critical times - when the layoffs occurred or when the grievance was filed.

The record shows that the work returned by the vendor in February, 1976 was for the most part carbide dies, which conceded cannot and have never been made by the bargaining unit. Hence at the time of the layoff, the subcontracted work (if it was the work returned by the vendor in or around February as claimed by the Union) was neither the type nor in the quantity justifying reversal of the layoff, even under the Union's contractual theory.

Inasmuch as the same carbide dies returned to the Company in February, 1976 are relied on by the Union in support of its claim that employees should have been recalled in January, 1976, the Union's case on that point is similarly faulty.

The balance of the work subcontracted took place during the months subsequent to January 1976 and hence, in the absence of other evidence, cannot be deemed to be "available work" for the bargaining unit in January when the Union claims the recall should have been made.

Based on the foregoing the settlement of grievance No. 4668 is simply not applicable to the facts in the instant case.

As to the overtime argument, the facts do not support the Union's assertion. Rather than "significant" or "heavy" overtime, the evidence shows that little or no overtime was worked by the
bargaining unit employees of the tool room during the critical period from October 1975 through January 1976. The Union's explanation that those periods may not show an accurate record of overtime because overtime hours are not specifically recorded when an entire department is scheduled to work extra hours, is unclear, unsupported by requisite proof, and hence indeterminative.

Finally the Union states that it has been impeded in proving its case by the Company's refusal to produce certain production and subcontracting records which the Union sought prior to the arbitration hearing, and suggests that the Arbitrator draw inferences unfavorable to the Company because of that refusal. Without determining the scope or relevancy of the data requested, the Arbitrator must note that the Union did not ask him to direct the Company to produce the data, nor did the Union exercise its subpoena power under the arbitration statute of the State of New York. Moreover the dispute over the production of that data is the subject of a NLRB proceeding, with an adjudicatory hearing scheduled in the future. Therefore without prejudice to the rights of the parties in that proceeding, and under the circumstances present, I must reject the Union's suggestion that inferences unfavorable to the Company be drawn. The fact is that under these circumstances, I draw no inferences, one way or the other.

The Undersigned duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD
Union Grievance No. 4880 dated January 15, 1976 is denied.

The balance of the Arbitrator's fee for the first hearing at which Union counsel did not appear is assessed against the Union. The Arbitrator's fee for the second hearing shall be shared equally.

Dated: September 24, 1979

STATE OF New York
SS.
COUNTY OF New York

On this twenty fourth day of September, 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
The stipulated issue is:

Did the Company violate the agreement between the parties dated December 22, 1976 by involuntarily transferring Ralph Gutierrez for disciplinary reasons from the second shift to the first shift effective August 21, 1978, and if so what shall be the remedy?

Hearings were held on April 23 and May 16, 1979 at which time representatives of the above named Union and Company and Mr. Gutierrez, hereinafter referred to as the "grievant", appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The involuntary transfer referred to in the stipulated issue was the disciplinary penalty which the Company imposed on the grievant for his alleged insubordinate refusal to perform a work assignment on July 28, 1978. The grievant and the Union on his behalf dispute the insubordination charge and assert, alternatively, that an involuntary transfer from one shift to another is an impermissible disciplinary penalty.

Based on the record before me I am persuaded that the grievant, who is classified as a EDT Coordinator, did in fact
refuse to perform certain work on a computer when he was repeatedly directed to do so by his supervisor on July 28, 1978. It is immaterial whether that assignment was within his job classification because it did not fall within the limited exceptions to the well settled rule that an employee must perform duties as assigned and then grieve the propriety of the assignment. It is equally well settled that an insubordinate refusal to carry out a work order is a serious offense for which a disciplinary penalty, including discharge is warranted.

Therefore the issue in the instant case, narrows to the gravamen of this dispute, namely whether the Company had the right to discipline the grievant, not by a traditional penalty of suspension or discharge, but by transferring him from the second shift to the first shift in the same job classification, but with the attendant pay loss of the shift differential.

Though the penalty imposed is unorthodox, I am not prepared to conclude, under the particular circumstances of this case, that it was either improper or violative of the collective bargaining agreement. The contract is silent on disciplinary penalties except for the penalty of discharge which must be justified by "just cause." Manifestly however, this does not mean that the Company may not impose lesser penalties such as warning and/or suspension. And in my view, if the circumstances warrant, and if there are relevant legitimate reasons, there is no contract bar to an involuntary transfer from one shift to another for disciplinary reasons. Put another way, in the absence of an express contract
bar I see no reason why the Company should be prohibited from transferring between shifts for disciplinary reasons when the purpose and rationale for the transfer are reasonably related to the offense committed.

I conclude that in the instant case this latter test has been met. In addition to the offense of July 28, 1978, the grievant had had prior difficulties of a similar nature including an incident in October 1975, when he directed obscene, abusive and insubordinate language to his supervisor, for which he was first discharged but which was mitigated to an eight day suspension following intervention on his behalf by the Union. That incident and penalty which was not then grieved may not now be disputed in this proceeding. Between that misconduct and the instant offense there were other difficulties between the grievant and supervision which have been substantiated in the record. The Company explains, and I accept the explanation as valid, that in addition to imposing the transfer from the second shift to the first shift as a disciplinary penalty, it was done also to put the grievant in a different and better structured supervisory setting. One of the purposes of discipline short of discharge is to attempt rehabilitation. Though the rehabilitative potential of such a transfer is of course speculative, nonetheless the possibility of that effect constitutes some reasonable basis for the use of that approach, in addition to the fact that it is a penalty. Hence, on that limited basis, namely the proximate relationship between the offense committed and the purpose of the transfer, and again in the absence of any explicit contract pro-
hibitation, I cannot find contractual fault with the Company's action.

That there has been a long standing practice, based on a verbal understanding, that employees will not be involuntarily transferred from one shift to another, is not material to this case. That agreement, which I find in fact was made and which has been evidenced by long standing implementation is limited to involuntary transfers for operational purposes. The parties did not discuss nor did they in any way deal with the question of transfers for purposes of discipline as part of that agreement. Therefore it is simply not applicable to this special situation.

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

Limited to and under the particular circumstances of this case the Company did not violate the agreement between the parties dated December 22, 1976 by involuntarily transferring Ralph Gutierrez for disciplinary reasons from the second shift to the first shift effective August 21, 1978.

DATED: June 14, 1979
STATE OF New York )
COUNTY OF New York )

On this fourteenth 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.
In The Matter of The Arbitration between Local 376, UAW and Product Identification Corporation:

The stipulated issue is:

Did the Company violate Article IV of the contract by refusing to pay Philip Boudreau holiday pay for November 23rd and November 24th, 1978? If so what shall be the remedy?

A hearing was held in Hartford, Connecticut on July 19, 1979 at which time Mr. Boudreau, 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. In accordance with statute the Oath of office was administered to the Arbitrator.

The grievant claims that he did not work his scheduled shift the day immediately preceding and following the holidays of Thanksgiving Day and the day after Thanksgiving for the reason that he was sick; and that he sustained an accident in his immediate family; and that his absence did not adversely affect production requirements; all within the meaning of Sections (a) (b) and (d) of Article IV of the contract.

Subsequent to the hearing, the Union and Company stipulated that the Arbitrator was not to consider the grievant's allegation of an accident in his immediate family (the assertion that his mother broke her hip in a fall and was hospitalized) in determining
his eligibility for holiday pay, because the facts of that claim were
not presented by the grievant during the course of the grievance
procedure, nor "had any information of this nature......ever been
given to the Company" prior to the hearing.

The evidence has shown that the grievant's absences prior
to and following the two holidays adversely affected production
requirements. Testimony by the Company that a certain job order
for the Bostich Company was delayed beyond the scheduled delivery
date because of the grievant's absence, stands unrefuted. Con-
sequently the exception set forth in Paragraph (d) cannot be relied
on to establish the grievant's eligibility for the holiday pay.

The issue is therefore narrowed to whether the grievant
was ill within the meaning of Paragraph (a) on his scheduled
working days preceding and following the holidays. In pertinent
part Paragraph (a) requires that the "absence (be) justified by
a bona fide illness" (emphasis added). As the details of an illness
are within the knowledge of the employee affected, the burden
rests with the employee, and in this case with the grievant, to
demonstrate the bona fides of any claimed illness. Based on the
record before me I cannot find that the Company acted unreasonably
or arbitrarily in concluding that the grievant was not ill on
both of the requisite working days within the meaning of Paragraph
(a) of Article IV. In short the grievant did not meet his burden
of establishing the bona fides of his illness on both days to
the reasonable satisfaction of the Company, and has not met that
burden in this arbitration proceeding.
Assuming the accuracy of the grievant's testimony that he became ill following his return from a hunting trip and that he was still ill on the working day prior to the Thanksgiving Holiday, I am not persuaded, nor is there probative evidence to show, that his illness continued through both holidays and the succeeding work day.

Though his allegation that his mother fell, broke a hip and went to the hospital for an operation is not to be considered by the arbitrator in judging the grievant's eligibility for holiday pay within the exception set forth in Paragraph (b), it is relevant in determining the grievant's physical condition on Thanksgiving, the day following Thanksgiving and the first working day thereafter. By his own testimony, following his mother's fall on November 20th, his time was fully consumed making arrangements for her care, hospitalization and convalescence. In his telephone conversations during that period with the secretaries in the Company's office, he spoke of "problems with his mother" (without specifying the nature of the accident or hospitalization) but made no mention or claim that he was ill. I think it most likely that if he were sick, as well as caring for his mother, he would have mentioned both circumstances, particularly when as here, he was cautioned by one of the secretaries regarding the contract requirements for holiday pay.

Additionally, though the contract does not require employees to verify illnesses with a statement from a physician, the letters from Dr. Nakhoul of December 1, 1978 and January 11,
1979 (Union Exhibits 1 and 2) are not helpful in meeting the grievant's burden of establishing the bona fides of the claimed illness. Neither verify the grievant's claimed illness of November 22nd. Rather they merely confirm that he called the doctor on that day, claiming that he was sick and that medication was prescribed over the phone. That the grievant was seen by the doctor on subsequent dates does not answer the question of whether he was sick on the critical days involved in this case.

Considering the stipulations entered into by the parties; the grievant's testimony of his activities on behalf of his mother; and the nature of the grievant's telephone conversations with secretarial personnel at the Company, I conclude that though the grievant may have been ill beginning November 20th, following his weekend hunting trip (and his illness on that day is supported by the testimony of an assistant foreman with whom he had gone hunting), I conclude that the illness did not persist to and through subsequent days, or not to the extent that would have prevented him from coming to work at least on the day following the holiday. Rather I conclude that he took subsequent time off to take care of what he told the Company were "problems concerning his mother." Inasmuch as the allegation that his mother suffered a broken hip and was hospitalized has been ruled out of consideration in determining the grievant's eligibility for holiday pay, I must conclude that the grievant has failed to show that he was ill during the full relevant period and hence has not
established eligibility for the holiday pay under the terms of the contract.

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

The Company did not violate Article IV of the contract by refusing to pay Philip Boudreau holiday pay for November 23rd and November 24th, 1978.

Eric J. Schmertz
Arbitrator

DATED: August 23, 1979
STATE OF New York ) ss.
COUNTY OF New York )

On this twenty-third day of August, 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

Local 2060 IBEW

and

Public Service Electric and Gas Company

AWARD

Case #1330 0963 78

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 grievance relating to the termination of Lewis Brown is no longer arbitrable.

Eric J. Schmertz
Chairman

David A. Helming
Concurring

Joseph L. Jasmine
Dissenting
DATED: March 1979
STATE OF New York ) ss.:
COUNTY OF New York )

On this 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.

DATED: March 1979
STATE OF
COUNTY OF

On this day of March, 1979, before me personally came and appeared David A. Helming 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: March 1979
STATE OF
COUNTY OF

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

Is the grievance arbitrable? If so, was the termination of Lewis Brown for proper cause under the terms of the agreement?

A hearing was held at the offices of the American Arbitration Association on December 11, 1978 at which time 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 Undersigned served as Chairman of the Board of Arbitration. Messrs. David A. Helming and Joseph L. Jasmine served respectively as the Company and Union designees on the Arbitration Board. The Arbitrators' Oath was waived.

The Board of Arbitration met in executive session on March 1, 1979.

ARBITRABILITY

The instant grievance was processed through the contract grievance steps, preliminary to arbitration by November 22, 1977. By letter dated December 1, 1977 the Union informed the Company
that it intended to submit the dispute to arbitration.

The Union formally submitted the grievance to the American Arbitration Association for arbitration some 256 days later, on August 14, 1978.

In contesting arbitrability, the Company raises essentially the same arguments and contract references it relied on in a prior matter between the same parties and before me (as Chairman) (System Council U-2 IBEW -and- Public Service Electric and Gas Company American Arbitration Association Case #1330 1036 73). In response the Union defends on the grounds it asserted in that same earlier case.

In that case, I followed an earlier decision of Arbitrator George Moskowitz who found that neither the contract nor the particular facts there involved required the Union to make timely filing to the arbitration forum of a dispute that had completed the grievance procedure unresolved. I stated:

"Both cases put in issue the question of whether under the contract the Union is obligated to file for arbitration within any specific time limit or within some reasonable time after the completion of the preliminary grievance steps. In neither case was evidence or witnesses unavailable nor had the memories of the witnesses faded as a consequence of the extended passage of time. Additionally, in the instant case there is no "running" liability...." (emphasis added)

In choosing not to reverse Arbitrator Moskowitz, I stated inter alia

"Where the parties are the same, the same contract language is in dispute, 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...."

But I cautioned:

".....a stern word of caution to the Union. Neither this determination nor the Moskowitz decision should be construed by the Union as a license to delay, for extended and unreasonable periods of time, the submission of grievances to the arbitration forum after the internal Union-Company grievance steps have been completed.

It must be noted that Mr. Moskowitz found no prejudice to the parties by the delay, and similarly I found none in the instant proceeding. But....... not all my colleagues in the arbitration profession accept that view. Therefore it is quite possible that in (a) subsequent case, though the facts and the contract issue may be sufficiently similar, a subsequent arbitrator may unhesitatingly judge the timeliness question de novo and differently, even to the point of rendering a decision contrary to Mr. Moskowitz' and mine.

Additionally the facts in a subsequent case may be different.....making timeliness of the filing for arbitration a highly relevant factor." (emphasis added)

Finally I stated:

".....the Union should bear in mind that a course of conduct which once or twice may be contractually tolerable may, if repeated, constitute an abuse.....and I believe that a subsequent arbitrator (including this arbitrator) would not hesitate to find a grievance non-arbitrable and untimely if the Union's reliance on the Moskowitz decision and my decision reached the point of too wide an application, constituting an abuse of the latitude allowed by those rulings." (emphasis added)

In the instant case the delay in submitting the grievance to the arbitration forum was as excessive as in the two prior cases
aforementioned. In the instant case there is an important fact that distinguishes it from the matter before Mr. Moskowitz and the prior case before me. And that is that here there is running liability because it involves a termination of employment and a demand for reinstatement and back pay. So that unlike the two prior matters, there is potential prejudice to the Company by unreasonable delay between the completion of the grievance steps and the submission of the dispute to arbitration. That the Union asserts herein that the matter of back pay is within the discretion and jurisdiction of the arbitration board means only that the Company is not prejudiced if the Board declines to award back pay. But by being required to put the matter in the hands of the arbitrators the Company runs the risk of an adverse ruling. That risk, present in the instant case significantly was not present in the two prior matters and I consider that a "relevant factor."

This is now the third case of an excessive delay in submitting a grievance to arbitration. Despite my not so subtle hint in my prior decision that I too would invoke the principle of laches in subsequent, relevant circumstances, the parties selected me as Chairman for the instant case. Under that circumstance, and in view of what I have previously said, both herein, and in my prior decisions, the burden is on the Union to "show cause" why my prior words of warning should not be implemented into a ruling. In short I conclude that the Union must come forward and show good and acceptable reasons justifying this the third time it has delayed so long in taking a grievance to arbitration. The Union has failed to meet the burden. No special reason is offered to explain the delay. That the Union was preparing for or
engaged in contract negotiations at the time does not mean that it could not have filed the case for arbitration. The two activities are hardly mutually inconsistent nor is one pre-emptive of the other. At the risk of triteness, and to use the baseball analogy, this is the Union's "third strike."

Accordingly I conclude and hold that the grievance is not arbitrable.

Dated: March 1979

Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between
System Council, IBEW and
Public Service Electric and Gas Company:

AWARD

Case #1330 0708 78

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

At the six named generating stations, the Company's change in practice with respect to overtime meal allowances was not in violation of Article V Section L (1) of the contract and Personnel Instruction No. 3. Union grievances 1697, 1698, 1699, 1708, 1709 and 1742 are denied.

Eric J. Schmertz
Chairman

Malcolm C. Sawhill
Concurring

Joseph L. Jasmine
Dissenting
DATED: March 1979
STATE OF New York )ss.:
COUNTY OF New York )

On this 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.

DATED: March 1979
STATE OF
COUNTY OF

On this day of March 1979, before me personally came and appeared Malcolm C. Sawhill 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: March 1979
STATE OF
COUNTY OF

On this day of March 1979, before me personally came and appeared Joseph L. Jasmine 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:

At six named generating stations, was the Company's change in practice with respect to overtime meal allowances in violation of Article V Section L (1) of the contract and Personnel Instruction No. 3? (The issue covers grievances 1697, 1698, 1699, 1708, 1709 and 1742).

A hearing was held at the offices of the American Arbitration Association on December 4, 1978 at which time representatives of the above named Company and Union appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Messrs. Joseph L. Jasmine and Malcolm C. Sawhill served respectively as the Union and Company designees to the Board of Arbitration. The Under-signed served as Chairman of that Board. The Board of Arbitration met in Executive Session on February 26, 1979.

Article V Section L (1) reads:

Employees who are required to work for more than two hours beyond the scheduled quitting time shall be entitled to a meal furnished or paid for by the Company and to an additional meal for each additional five hours worked thereafter.
Personnel Instruction No. 3, promulgated December 17, 1943 reads in pertinent part:

The allowance for meals shall be 85 cents.

It is undisputed that Personnel Instruction No. 3 has been updated by Article V L (7) of the current collective bargaining agreement which reads:

The allowance for meals shall be
$3.00 (effective May 1, 1978 -
$3.25 and effective May 1, 1979
$3.50).

In my Opinion in case #1330 1150 75 dated February, 1976 between the above named parties I stated:

"The parties well know that an arbitrator is bound by the terms of the contract when those terms are clear and unambiguous, regardless of any past practice to the contrary."

I find the foregoing contract provisions, namely Article V Section L (1 and 7) to be clear and unambiguous. They mean that if the Company does not furnish a meal under the circumstances set forth in Section L it is to pay the eligible employees the amount of money set forth in Section L (7).

That meal allowance provision, included as it is in the collective bargaining agreement between the Company and the System Council on behalf of the various local Unions, is applicable company-wide and is uniform for all of the Company's locations and generating stations. It does not provide for or contemplate local variations depending on local circumstances.
Therefore, at those generating stations where the Company did not furnish or no longer furnished a meal, and where employees were directed or required to take meals at restaurants and where those meals were paid for by the Company or the employees were reimbursed in amounts in excess of the stipulated contract allowance, a practice developed and obtained that was contrary to the contract terms. However, no matter how long these variations persisted, they cannot preempt or supersede the clear but contrary contract language. Therefore, in this case, the Company had the right to terminate practices that differed from the contract and to require, prospectively, explicit adherence to the negotiated terms regarding meal allowances.

In this case there was no showing or even a contention that the restaurants or non-Company eating facilities at those generating stations where the employees received a higher meal allowance than provided for in the contract or where the Company paid for meals in excess of that allowance, were more expensive than non-Company meal facilities at other generating stations which adhered to the contract allowance.

If there are differing conditions at various Company locations which warrant different arrangements regarding the payment of a meal allowance, that is a matter for collective bargaining between the parties and not for arbitration.

Accordingly I find no contract violation or violation of the Personnel Instruction by the Company's change in practices with regard to the overtime meal allowance.

Eric J. Schmertz
Arbitrator
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 termination of Lewis Brown is changed to a disciplinary suspension. He shall be reinstated without back pay and the period of time from his termination to his reinstatement shall be deemed the disciplinary suspension.

Eric J. Schmertz
Chairman

David A. Helming
Concurring
Dissenting

Joseph L. Jasmine
Concurring
Dissenting
DATED:
STATE OF New York ) ss.,
COUNTY OF New York )

On this of 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 of 1979, before me personally came and appeared David A. Helming 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 of 1979, before me personally came and appeared Joseph L. Jasmine 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.
Following the arbitrability Award in the above matter, the parties reinstated the authority of the Board to make a determination of the issue on the merits. A Board meeting was held on April 16, 1979.

I agree with the Company that the only probative medical evidence in the record is the medical testimony offered by the Company. Consequently I am persuaded that the grievant was medically capable and therefore should have returned to work on the date fixed by the Company. However, I also think it probable that he did not do so, not in willful defiance of the Company's authority, but because he was or thought he was under the instructions of his own doctor that he was not yet to return to work.

Under that circumstance and particularly because there was a relatively short period of time between when the Company instructed him to return to work (when he should have or should have made an attempt to do so) and when his own doctor indicated when he would be able to do so, I conclude he should be disciplined, but short of dismissal. In my judgement, the appropriate penalty is a suspension for the period of time from his termination to his restoration to work.
The stipulated issue is:

What shall be the disposition of
Grievance No. C185230 dated July 10, 1978?

A hearing was held at the Company offices in New Bedford, Massachusetts on February 5, 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.

Grievance No. C185230 reads:

It is the Union's contention that Angelo Calheta (1212) does have an eight hour job on the 8-4 shift. The combining of job 12-8 plus 8-4 shifts is against contract and another form of harassment toward this employee.

The Union's complaint is that the Company violated the contract and my prior Award of February 21, 1978 when it combined the job of sheet mill order chaser (of the 8-12 shift) with the job of sheet mill furnace lighter (of the 4-8 shift) creating the combined job sheet mill order chaser-sheet mill furnace lighter to be worked during the 4 AM to 12 noon shift; that the
combination deprived grievant Calheta of a job because, undisputedly, he is medically unable to tolerate the fumes attendant to the furnace lighter duties; that the combination was unnecessary because the grievant was fully occupied as an order chaser-overhauler; and that the Company made the new combination to "harass" the grievant and force him out of active employment after being required to reemploy him with back pay pursuant to my prior Award.

Additionally, and in the alternative, the Union contends that the Company was required under Article VI Section (13)(d)(I) of the contract to grant the grievant the job of hand overhauler which the Company posted but did not fill.

There is no evidence in the record of "harassment" or any effort by the Company to deprive the grievant of active employment. On the contrary, the record indicates that prior to and during his layoff following the new job combination, the Company conferred with Union representatives and made a good faith effort to consider the grievant for a job or job combinations which he might be able to perform and which would consume a full day's work. This effort continued into the arbitration hearing, during which the Company showed a willingness to look into that possibility.

In my prior Award of February 21, 1978 I barred the Company from making an interdepartmental combination of jobs. However, I explicitly stated that I was persuaded the Company had bona fide economic reasons to make job combinations to provide full duties for incumbent employees, and that job combinations within...
the same department were not barred by the contract. In the instant case the Company has combined two jobs that fall within the same department. That combination, as I stated previously, is not violative of the contract. That the two jobs combined had been separately worked on different shifts is also not a contract breach. The contract does not fix the shift hours of any particular job or combination of jobs. On the contrary Article V provides that:

The regularly established work week shall include any hours between 12:00 midnight Sunday to 12:00 midnight the following Sunday. (emphasis added)

The instant combination of order chaser and furnace lighter is to be worked during the foregoing contract hours, and hence it is not a contract violation that the new shift established for the combined job differs from the respective shifts worked when the jobs were separate.

With the Company's right affirmed in my prior decision to combine jobs within the same department, I cannot contractually fault the Company's action in establishing a combined job which the grievant was medically incapable of performing, even if it meant eliminating the job duties which he did and could perform up to that point. Supportive of this right is evidence in the record that the grievant's prior duties were not officially as an order chaser-overhauler but rather as an order chaser with additional duties assigned from the overhauler classification to fill out his work day, in immediate response to and compliance with my prior Award. Moreover and most particularly, the Company
in this proceeding, as it did previously, has shown its current economic difficulties and the continuing need to combine jobs to provide a full days work for its declining work force in the face of declining business. Here, statistics offered by the Company show that a combination of order chaser and overhauler did not or would not constitute full employment on a continuing basis. Accordingly a new and different intra-departmental combination, order chaser and furnace lighter was economically justified, as well as permitted under the contract, and by my prior Award.

Finally, I must deny the Union's claim that the grievant was entitled to the job of overhauler. I do not read Article VI Section (13)(d)(I) to require the Company to fill a job which it has posted and for which there are no bids. Rather, I read it to mean that if the Company posts a job for bids, and there are no bidders, and it decides to fill the job nonetheless, it must give the job to:

"an employee whose regular job is suspended due to business activity ......

In the instant case the job of overhauler was posted; there were no bids; but the Company decided not to fill it. I accept the Company's testimony that subsequent to the posting it learned and decided that the job was unnecessary and not warranted by available work. It is well settled that an employer need not fill a job vacancy which he does not need. That well settled rule is implicit within the meaning and interpretation of Article VI Section (13)(d)(I).
For all the foregoing reasons the Union's grievance is denied.

Without in any way changing the foregoing ruling, it is recommended that the parties continue to explore jobs or job combinations which the grievant can perform. He has been a long service employee who is entitled to that consideration. His present medical status and medical limitations are not clear. He apparently is willing to try to work at various jobs, but is foreclosed by the diagnosis of a doctor selected by the Company. I think that he should be reexamined with the duties of the job or jobs under consideration called specifically to the doctor's attention, so that the grievant's present disabilities, if any, can be more precisely ascertained. I would hope that the adoption of this recommendation would lead to his reemployment in some full and productive capacity. Unless and until this recommendation is implemented by the discretionary action of the Company my Award, as follows shall obtain.

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 No. C185230 dated July 10, 1978 is denied.

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.

Eric J. Schmertz
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between
Roosevelt Teachers Association and
Roosevelt Union Free School District:

The stipulated issue is:

Did the disputed duties assigned to Roosevelt Teachers Association President Joan Phillips during the school year 1978-1979 violate Article XVIII Section B8 of the contract? If so what shall be the remedy?

A hearing was held at the offices of the school District on April 5, 1979 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Arbitrator's Oath was waived.

Article XVIII Section B8 reads:

The RTA President shall be relieved of all duty periods. A secondary teacher who is president of RTA shall have a reduced teaching load by one period daily. An elementary teacher who is president of the RTA shall have his/her teaching day reduced by 90 consecutive minutes.

Ms. Phillips is an elementary teacher. The District asserts that the last sentence of the foregoing contract clause is the totality of the time and duties for and from which she will be relieved. The Association asserts that the first sentence of the
foregoing clause also applies to all incumbent presidents of the RTA whether secondary teachers or elementary teachers, and therefore Ms. Phillips is entitled to released time not only for 90 consecutive minutes referred to in the last sentence but is to be excused also from "all duty periods" as provided in the first sentence. Hence the Association seeks an Award directing the District to relieve Ms. Phillips from certain "duties" she is presently required to perform.

Based on the record I am persuaded that although there are certain "duties" required of an elementary teacher, the elementary schools and elementary teachers do not have "duty periods" within the meaning of the first sentence of Article XVIII Section B8 of the contract. The history of the negotiations of that Section of the contract supports this conclusion. Before an elementary teacher was president of the RTA and when that position was occupied by a secondary teacher, the predecessor contracts did not contain the last sentence of Section B8. That Section was expressly negotiated when Ms. Phillips assumed the presidency of the RTA. Obviously there must have been something different about her work assignments and the schedules in the elementary schools which required an addition to the previous language of Section B8. Otherwise the newly negotiated last sentence would be unnecessary, and the first two sentences could have obtained just as well to Ms. Phillips as it did to her predecessor who came from a secondary school. Though the fore-
going contract clause is not artfully worded, and could be construed to accord all RTA presidents released time from duty periods, I am satisfied that the first sentence was not intended to apply in the event that the RTA president was an elementary teacher. In addition to the reason already expressed, namely that the last sentence was negotiated to cover the different work assignments and schedules of an elementary teacher, the evidence further shows that the "90 consecutive minutes" accorded Ms. Phillips, is roughly equal to the total amount of released time granted her predecessor, who was a secondary teacher, including the latter's release from duty periods. In my judgement to grant the Association's grievance in this case would be to give Ms. Phillips more released time than was enjoyed by her predecessor, and I do not believe that was intended. Finally, based on the testimony and evidence, I conclude that the term "duty periods" has the definite meaning of a specific, scheduled, continuous amount of time equal to a class period and comparable to the schedule and time allotted to an academic subject. That type of "duty period" is simply not part of the schedule or an assignment in the elementary schools; but rather is found in the secondary schools. I am not satisfied that "duties" such as "home room duty, before class duty and recreational duty after lunch", which Ms. Phillips is required to perform, are duty periods within the aforementioned definition or within the meaning of that phrase as set forth in the first sentence of Section B8.
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 disputed duties assigned to Roosevelt Teachers Association President Joan Phillips during the school year 1978-1979 did not violate Article XVIII Section B8 of the contract.

DATE: May 29, 1979
STATE OF New York )
COUNTY OF New York )ss.: On this twenty ninth 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
Engineers Union, Local 444,
International Union of Electrical
Radio, and Machine Workers, AFL-CIO
and
Sperry Division of Sperry Rand
Corporation

In accordance with Article 26 Section F of the collective bargaining agreement between the above named Union and Company, the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

What shall be the disposition of the Union's grievance No. 76-12?

A hearing was held at the Company offices on March 19, 1979 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. Post-hearing briefs were filed.

Despite contentions to the contrary I find the critical contract language, namely Schedule D Sections 1, 2 and 3 and the Memorandum of Understanding dated October 31, 1976, considered separately or jointly, to be unclear and logically susceptible to either of the divergent interpretations advanced herein by the Union and the Company. Following the traditional approach under such circumstances to find meaning and intent, an examination of the "legislative history" of the language when it was
negotiated and its implementation thereafter lead me to conclude that the Union is estopped from advancing an interpretation or application different from what has been agreed to and/or accepted by the other IUE local unions (Locals 445, 450 and 470).

It is a fact that the Union and the other locals aforementioned bargained jointly with the Company and agreed to the very same contract language and Memorandum of Understanding involved herein.

The Union acknowledges that at the time of those negotiations it had little interest in the Memorandum of Understanding and/or its relationship to the relevant contract sections under Schedule D. Indeed, it is undisputed that the other local unions made the demands and sought the benefits ultimately set forth in the Memorandum of Understanding; that representatives of the Union were present and heard those discussions, and that sometime subsequent to agreement with the other local unions, the Memorandum and its provisions were automatically and uniformly included as part of the contract bargain with the Union at the Union's request and as a consequence of joint bargaining. However it is undisputed that when so incorporated there were no discussions between the Company and the Union regarding the meaning and intent of these benefits different from the earlier detailed discussions between the Company and the other locals.
Indeed there were no substantive discussions on the subject at all.

Hence, the meaning, intent and purpose of the critical contract language and the Memorandum of Understanding, and the interrelationship, if any, was cast by one or more of the other local unions in negotiations with the Company, and not by the Union herein. It is significant to me that none of the other locals have grieved or advanced an interpretive theory similar to the claim of the Union herein or in any way different from the position taken by the Company. The local unions which were responsible for the disputed language have not contested the interpretation and application placed thereon by the Company. Consequently, the meaning of the critical contract language and Memorandum of Understanding is evidenced by what was agreed to by the unions which undertook the substantive negotiations thereof and their subsequent acceptance of the Company's application and implementation of those terms.

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

The Union's grievance No. 76-12 is denied.

DATED: July 23, 1979
STATE OF New York )
COUNTY OF New York )

On this twenty-third day of July, 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.