The stipulated issue is:

When under circumstances complained of by the Union, the Department details a fireman from the unit to which he is permanently assigned to another unit after the start of his tour, and when the Department directs him to return to his permanent unit from the unit to which he was detailed within his regular tour of duty, is either or both a circumvention of Article XXVI of the contract and/or a circumvention of PAID 16-72 revised, as amended, and PAID 5-74 revised? If so what shall be the remedy?

A hearing was held on December 13, 1979 at which time representatives of the Union and City appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The only incidents and examples presented by the Union in this case were those in which a fireman was detailed from the unit to which he was permanently assigned to another unit after the start of his tour and returned to his original unit before the end of his tour, when at the beginning of his tour and when he was detailed all relevant companies were fully manned pursuant
to the manning requirements of the contract.

Under that and those circumstances the City did not agree to, nor does the contract require, the payment of "portal to portal" pay, nor under that and those circumstances did the City relinquish its managerial right to order such details.

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

The foregoing stipulated issue is answered in the negative. The Union's grievance is denied.

DATED: April 14, 1980
STATE OF New York )ss.:
COUNTY OF New York )

On this fourteenth day of April, 1980 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
In The Matter of The Arbitration:
Between:
Uniformed Firefighters Association:
and:
City of New York (Fire Department):

The stipulated issue is:

Assuming that the result is a reduction in minimum manning, has the Department violated or would the Department be in violation of the collective bargaining agreement if it assigned or assigns firemen to operate departmental vans and/or spare passenger type cars for transportation of firefighting apparatus and equipment, delivery of payrolls, and transportation of departmental personnel or other persons.

If so, the Impartial Chairman retains jurisdiction over the question of whether there was or would be a reduction in minimum manning, and if so, what remedies (if any) shall be awarded retroactively and/or prospectively. The rights of the parties on those questions are expressly reserved for subsequent hearings.

Hearings were held on October 10 and December 13, 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.
The Union particularized its original grievance in a letter dated June 18, 1979 setting forth those situations which it claims are or would be contract violations within the meaning of the aforementioned stipulated issue. As recited in that letter those situations are:

1. **Messenger Duty.** Department Vans and Spare Chiefs' Cars are regularly used for messenger duty between command locations and firehouses reducing minimum manning. In particular, non-emergency messages including Department orders and directives are routinely carried between divisional headquarters and between divisional headquarters and borough command headquarters.

2. **Transportation of Non-Firefighting Equipment.** Department vehicles are routinely used to transport non-firefighting equipment, reducing minimum manning, between various locations, including firehouses, borough and divisional headquarters and repair shops, reducing minimum manning even though no emergency requires such use.

3. **Transportation of Firefighting Apparatus and Equipment.** Vehicles are routinely used to transport firefighting apparatus or equipment, reducing minimum manning, when no emergency exists. Items of firefighting equipment requiring immediate repair or replacement as a result of loss or damage during a tour are not included in this category. However, scheduled inspection, maintenance, repair or replacement on a regular basis, particularly where items are accumulated until a certain number of items are available or until a particular date is reached are included in this category. Examples of this category are movement of spare apparatus to and from Department shops, and accumulation of radios for repair on a regular scheduled basis.

4. **Delivery of Department Forms, Records, or Regular Payrolls.** Transportation of Department records, forms and regular payrolls among command headquarters or to firehouses, reducing minimum manning, where no emergency exists, is routine.

5. **Transportation of Personnel.** The Department routinely transports Department personnel and other persons, reducing minimum manning, when no emergency exists, particularly to avoid accrual of overtime.
In the course of the hearings the City acknowledged and stipulated that under the following circumstances situations no. 1. and no. 2. above were or would be contract violations, and that the same is true with regard to that portion of situation no. 4. relating to "Department forms and records."

1. Messenger Duty. Except when an emergency requires otherwise, all transportation and delivery of messages, letters, memoranda, circulars, directives, etc. to or from divisional headquarters, borough command headquarters, Fire Department headquarters, and between any of the above and firehouses.

2. Transportation of Non-firefighting Equipment. All transportation or delivery of non-firefighting equipment including, but not limited to, furniture, office equipment, supplies, and non-firefighting tools to or from any location, including division headquarters, borough command headquarters, Fire Department headquarters, and firehouses.

4. Transportation of Department Forms and Records. All transportation and deliveries of Department forms and records to or from division headquarters, borough command headquarters or Fire Department headquarters, and between any of the above and firehouses, or between firehouses.

The City stated that violations within the meaning of situations no. 1, 2 and that portion of no. 4 above cited would be discontinued and/or would not occur prospectively.

Regarding situation no. 3 the Union objects to any reduction in minimum manning of a company in service by the moving of broken down apparatus to the repair shop, the "jockeying" of vehicles from one location to another until the repair shop is capable of receiving those vehicles, and the return of the apparatus from the repair shop. It does not object to the obtaining of spare apparatus by personnel of a company that is out of service due to an apparatus breakdown while that company is out of service.
As to "equipment" under situation no. 3 the Union excludes "vital and unique tools," such as power saws, generators and Hurst tools, essential to firefighting duties which require immediate replacement. The Union stipulated that in that circumstance an "emergency" exists within the meaning of Attachment A of the contract, and that a reduction in manning to obtain and deliver those tools would not violate the contract. What the Union complains about, as set forth under situation no. 3 in the aforementioned letter, is the routine collection, replacement, repair, maintenance and other similar work in connection with regular firefighting equipment. As an example the Union cites the regularly scheduled program of repairing and replacing handi talkies, radios and spare pieces of equipment which at present are transported in the types of vehicles referred to in the stipulated issue with consequent reductions in the manning of regular firefighting companies.

In view of the City's acknowledgement and stipulation, the only disputed item remaining in situation no. 4 is the delivery of "regular payrolls." It is regular procedure for the payroll to be delivered to each Division before 6:00 p.m. each Thursday.

Under situation no. 5 the Union does not include nor does it object to the use of the stipulated vehicles and a consequent reduction in manning to relieve firemen at fires, or when a fireman has suffered a serious injury at a fire and requires
emergency transportation for treatment (even though the Union believes an ambulance should be available for that purpose). Rather it objects to the routine movement of uniformed personnel for foreseeable or planned reasons, such as interviews, the transportation of firemen from fires with non-serious injuries, when ambulances should be used, and the transportation of non-departmental personnel such as official visitors from Washington or elsewhere (e.g. picked up at the airport) when no limited service firemen ordinarily assigned to that latter work are available.

The applicable construct section is Attachment A Department Order which reads:

TO: All Officers
FROM: Chief of Department
RE: Use of Department Vans and Spare Chiefs' Cars

I continue to receive reports that manning is being reduced below minimum levels by assignments of firement to operate Department Vans and Spare Chiefs' Cars for non-emergency duties and for duties which do not result from conditions beyond the control of the Department.

You have been advised that such assignments violate the collective bargaining agreement, Department rules and regulations and Department policy. Further assignments of this nature will not be tolerated.

Your attention is directed to Article XXVII Section 7 of the collective bargaining agreement which exempts the Department from minimum Manning requirements only where a vacancy occurs during a tour due to an emergency or due to conditions beyond the control of the Department. In all other cases minimum Manning requirements must be strictly observed. Routine matters are not emergencies. It is not permissible to let routine matters accumulate until they become emergencies.

In the event an assignment inconsistent with this order is
brought to my attention, appropriate measures will be taken by the Department against the officer making such assignment.

Based on the foregoing contract language, the issue narrows to whether each or any of the foregoing disputed situations constitute an "emergency" or are "due to conditions beyond the control of the Department." It is noted that in bold type Attachment A states that:

Route matters are not emergencies.

Based on the record before me and my knowledge of the operational circumstances involved in each of the disputed situations, I conclude that none of those complained of or objected to herein by the Union is an emergency or meets the test of circumstances beyond the Department's control. Each is either a routine function about which the Department has adequate experience, notice and knowledge, or is a development which does not require immediate or emergency attention but rather can be delayed a reasonable period of time and handled routinely. It is fully recognized that all of this work and these activities are a necessary part of the Department's firefighting function. But none of them reach the level of an "emergency" within the traditional meaning of that word or within its contractual meaning. Therefore if minimum manning is reduced by the use of Department vans and/or spare passenger type cars to carry out those activities, the minimum manning requirements of the contract and Attachment A are violated.

Disputes over whether particular functions fall within
the foregoing Decision, shall be submitted to me for case by case determination.

Eric J. Schmertz
Impartial Chairman

DATED: February 11, 1980
STATE OF New York )ss.:
COUNTY OF New York )

On this eleventh day of February, 1980, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Is the Union's grievance on behalf of Dr. Arthur B. Lee arbitrable?

A hearing was held in the Philadelphia offices of the American Arbitration Association on March 12, 1980 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The basis of the Employer's challenge to the arbitrability of the grievance is the acknowledged fact that the Union initiated the grievance at the fourth step, unilaterally bypassing the earlier steps of the grievance procedure.

Absent the special circumstance of this case, this Arbitrator would hold that he is bound to the bilaterally negotiated provisions of the contract and would require the Union to follow all the sequential steps of the grievance procedure, unless by the joint agreement the parties arranged for the handling of the grievance differently. The purpose of such traditional view of
course, is to afford full opportunity at each step of the grievance procedure for ample discussion of the problem, for full disclosure of all of the relevant information, and most importantly for attempts at resolution of the dispute at levels closest to where the problem arose and before the adverse positions of the parties harden.

However these principles are not present in the instant case, and the circumstances are such as to make preeminent the well settled legal axiom that a party need not be required to undertake or exhaust a useless act. Here it is undisputed that the decision which gave rise to the grievance, namely the level of pay for Doctor Lee, was made by the Employer's central personnel office and not by the Department or the levels of the Department represented by departmental officials at Steps I through III of the grievance procedure. It is Step IV of that procedure which would involve for the first time management officials from and representing the Employer's central personnel office where the policy decision regarding the grievant's salary level was made.

I am persuaded, based on the testimony, that while departmental officials at Steps I through III had the authority to correct ministerial errors, they had no authority, in dealing with the issue of the grievant's pay level on a substantive basis, to make any changes in the policy decision which led to this dispute. Therefore it is clear that no discussions at the Steps prior to Step IV could have produced a change in the Employer's position
regarding the grievant's salary, and the grievance could not have been adjusted in any manner satisfactory to the Union during or at those Steps.

On the other hand, it can be argued that the Employer should be entitled to demonstrate to the Union in the earlier grievance steps that the Union's grievance lacked merit; that the Union should drop it; that that opportunity is also a significant and reciprocal purpose of the grievance procedure; and that in this case the Employer was not given that opportunity.

I agree with the Employer's argument that the latter are legitimate and meaningful purposes of the grievance procedure, but again, I do not find those factors to be realistically applicable here. Inasmuch as the policy decision regarding Dr. Lee's salary was made at the Employer's central personnel office, and not within the Department for which the grievant works, I am not persuaded that representatives at the departmental level are or were in a position to freely deal with the substantive aspects of that policy, other than to implement and defend it. They could explain it, but because they were not party to its formulation, I doubt they could justify it to the extent that the Union would be persuaded that the grievance lacked merit and should be abandoned. Indeed, under those conditions, the disagreement between the parties, rather than being subject to
potential amelioration, might well have been exacerbated. For if the departmental representative at Steps I through III were in no position to change the Union's mind, the Employer's representatives at the Step IV level might well feel more compelled to support and affirm the position of the managerial representatives below, rather than deal with the issue ab initio at the level where the problem arose. Put another way, I conclude that the Employer representatives who would handle the grievance in the earlier steps were not in a policy position to persuade the Union of their belief that the grievance lacked merit any more than the Union at those levels could have convinced the Employer to change its decision regarding Dr. Lee's salary.

To my mind therefore, under the particular circumstances of this case and limited to this case alone, the futility of the grievance steps prior to Step IV is apparent. Therefore I am not disposed to foreclose this grievance from any adjudication on its merits. Accordingly the grievance is arbitrable and not barred from arbitration because Steps I through III of the grievance procedure were not utilized.

The Union should carefully note however that because this ruling is limited to this situation it may not be construed as a license to file other grievances in or at later steps of the grievance procedure or to unilaterally bypass any of those steps. Other situations may well be different, where utilization of all
the grievance steps may be useful and consistent with the purpose and intent of that procedure, and, in subsequent cases, other arbitrators who may feel strictly bound to the contract steps, may require precise compliance under any and all circumstances.

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 on behalf of Dr. Arthur B. Lee is arbitrable.

Eric J. Schmertz
Arbitrator

DATED: April 14, 1980
The stipulated issue is:

Whether or not the City was entitled to recover money from Dr. Arthur Lee's salary? If not what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on July 29, 1980 at which time Dr. Lee, hereinafter referred to as the "grievant", and representatives of the above named Union and City appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The grievant has a sincere and equitable case which, however, is preempted by civil service law.

I find that when the grievant was transferred from the Philadelphia General Hospital to the Medical Service of the prison system he had reasonable grounds to believe that he had moved at least laterally in professional rank and that his official status at the latter location would be that of a Physician II. At the Philadelphia General Hospital he was a Receiving Ward Physician. He went to the prison system and was assigned and performed the duties previously performed by the Director of Medical Services (who at the time was seriously ill) and was regarded as the "Acting
In terms of status and responsibility, I would judge that the Acting Director of Medical Services of the prison system was no less than that of a Receiving Ward Physician, and I can appreciate why the grievant believed his transfer was at least lateral.

Also the grievant testified that when he was interviewed for the prison job by representatives of the City he was told by a Mr. Pisicano that he would be slotted in the civil service classification of Physician II at the prison system and that the pay of a Receiving Ward Physician and Physician II were equivalent. Mr. Pisicano did not testify at the arbitration hearing. On that basis, and in the absence of contravening testimony by Mr. Pisicano, I can understand why the grievant believed that his transfer was at least lateral.

Moreover the grievant testified, again unrefuted, that he initiated his transfer from the Philadelphia General Hospital to the prison system by filing an application for the latter assignment. He did so in May of 1977, at least a month before the Philadelphia General Hospital closed. In that regard I think the grievant had reason to believe that he was not among those transferred from the Philadelphia General Hospital because it closed, but rather that his transfer, prompted by his own initiative did not put him in the category of employees covered by Section 31.23 of the civil service law.

The grievant's reasonable belief that he was accorded and occupied the Physician II classification at the prison system is evidenced by the original handwritten notation "Physician II" in
the upper left hand corner of the Application For Employment which he filled out for the transfer. I accept as truthful his statement that he was later surprised when he saw that the "II" of that written notation had been subsequently colored in with a felt pen by a city personnel representative thereby changing it to "I" on that application. (i.e. a change from "Physician II" to "Physician I").

The Union has not cited nor do I find any provision in the collective bargaining agreement covering this situation. The City argues that what is applicable is Section 31.23 of the civil service law which reads:

PHILADELPHIA GENERAL HOSPITAL PERSONNEL.
Employees of Philadelphia General Hospital who are transferred as a result of that unit's closing to a classification with a lower pay range shall retain their current annual rate but shall receive no further increase in pay until their annual rate falls within the range for the class to which they are assigned.

In the absence of an applicable provision in the contract, the Arbitrator should not ignore external law if that law is applicable. I find that despite the grievant's legitimate beliefs as to his status at the prison system, the foregoing civil service law is applicable to his situation and is controlling.

Though the grievant may have initiated his request for transfer, I must conclude that it was because he knew that the Philadelphia General Hospital would soon be closed and as a consequence he sought placement elsewhere in City employment. Based on the testimony of City witnesses, I conclude that the grievant was considered and treated as an employee who was transferred or sought transfer as a result of the planned closing of the Philadelphia
General Hospital within the meaning of Section 31.23 of the civil service law.

It is unrefuted testimony of City witnesses that the only available medical positions at the prison system at the time of the grievant's transfer, and the only positions for which there was a line budget were in the Physician I classification. In other words despite the grievant's "desk" assignment as the Acting Medical Director, and despite his performance of duties that were the same or similar to those previously performed by the Medical Director who was on sick leave, the only official job available to which a salary was attached and for which funds were budgeted was that of Physician I. I find that technically and officially the City gave the grievant the only civil service title available for which funds were available, and that job was as a Physician I. (And that accounts for the felt pen change on the Application For Employment).

Under Section 31.23 of the civil service law covered employees:

    shall retain their current annual rate but
    shall receive no further increase in pay
    until their annual rate falls within the range
    for the class to which they are assigned.

Classified as a Physician I, the grievant occupied a classification with a lower pay range than what he received as a Receiving Ward Physician. When transferred to the prison system he retained "red circled", the salary which he was paid previously. Under Section 31.23 he should not have received the general contract wage increase of approximately $2500 on July 1, 1978. Instead, under that statutory provision his red circled salary of $35,991
should have remained unincreased until the wage increases under the collective bargaining agreement brought the salary of a Physician I into that range.

It appears to me that as a classified Physician I performing the duties of the Acting Medical Director of the prisons, the grievant may have been working out of title in a higher rated job assignment. I am not familiar with the civil service law of the City of Philadelphia (or the Commonwealth of Pennsylvania) but if under that law the grievant has a cause of action for higher pay because he performed the duties of a higher job, his right to make that claim and pursue that cause of action before the Civil Service Commission, in the courts, or in any other forum with jurisdiction, is expressly reserved.

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

On statutory grounds, and in the absence of any explicit contrary contract provisions, the City was entitled to recover money from Dr. Arthur Lee's salary.

Eric J. Schmertz
Arbitrator

DATED: August 14, 1980
The threshold question presented at the hearing on January 17, 1980 is whether the Union's grievance on behalf of Vera Grayson is arbitrable.

The Employer contends that the Union failed to meet the time limit set forth in Article 29 Section b of the contract.

That Section reads:

Within 5 workdays from the date of the request for arbitration, the parties shall jointly request from the Federal Mediation and Conciliation Service a list of five impartial persons qualified to act as arbitrators.

It is undisputed that the Union gave written notice to the Employer of its intents to arbitrate the grievance by memorandum dated September 10, 1979. However the Union did not present the Federal Mediation and Conciliation Service Request For Arbitration Panel to the Employer for joint request of a list of arbitrators until September 24, 1979. The Employer's position is that because more than five workdays elapsed between the date of the request for arbitration and the submission of the FMCS form, the Union failed to comply with the Article 29 Section b time limit, and
that the dispute is now time barred from arbitration.

Based on the testimony and evidence I am satisfied that the Union constructively, and therefore adequately, complied with the procedures and time limits of Sections a and b of Article 29; that under the particular circumstances of this case the Employer had timely notice of the Union's intent to submit the grievance to arbitration; and that the Employer was not prejudiced by the few days delay.

The evidence shows that the local Union president was away between September 10 and September 17. There is evidence that within that period of time the Union's vice-president inquired of an authorized representative of the Employer about processing the case to the FMCS. There is also evidence that on September 17th, the last day within the five workday period, the Union delivered another written communication to the Employer inquiring further about the processing of this grievance to arbitration.

I do not dispute the Employer's statement that it did not receive and has no record of the September 17th written communication. However I am not prepared to disbelieve the Union's testimony that that communication was delivered on that date to the appropriate office of the Employer. A copy of that communication was introduced into evidence. It is conceivable that that particular communication was overlooked or went astray. Under that circumstance the September 17th communication could be construed as a reiteration of the September 10th notice with a
new 5 workday period running from the 17th. Alternatively, I conclude that as of September 17th the Union had reasonable grounds to believe that the Employer was again officially informed of the Union's intent to arbitrate the grievance and to its readiness to select an arbitrator for that purpose. The Union's failure to submit the FMCS form to the Employer between September 10th and September 17th (as apparently has been the practice in previous matters) was, in my judgement, a ministerial error, which, in view of the September 10th notice and my findings in connection with the September 17th communication, shall not be deemed fatal to an adjudication of the grievance on the merits. By September 24th, and with no apparent prejudice to the Employer, the FMCS form was submitted.

For the foregoing reasons and limited to the particular circumstances of this case, the Union's grievance on behalf of Vera Grayson is arbitrable.

DATED: April 14, 1980
STATE OF New York )
COUNTY OF New York )

On this fourteenth day of April, 1980 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

Lay Faculty Association, Local 1261

and

Diocese of Rockville Centre, Department of Education

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OPINION AND AWARD

Case #1739 0206 79

The stipulated issue is:

Did the assignment of Nicholas Velmachos and Agostino Lari to proctor Regent and final examinations at St. John The Baptist and Maria Regina High Schools respectively during June 1979 violate Article V (Teaching Assignments) Sections B, C, D and E of the collective bargaining agreement 1977 - 1979 between the Diocese of Rockville Centre Department of Education and the Lay Faculty Association Local 1261? If so what shall be the remedy?

A hearing was held on December 6, 1979 at which time representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Both sides filed post-hearing briefs.

The case centers on the interpretation of Article V D (5) of the contract which in pertinent part reads:

Except as otherwise provided herein, non-teaching assignments shall not be given to one (1) representative of the Association in each school in order for such representative to attend any Association activity. This privilege applies to an Association representative who is carrying a full schedule of five teaching periods a day.
Messrs. Velmachos and Lari were Association representatives during June of 1979. Velmachos proctored three final examinations and three Regents examinations that month. Lari proctored one final examination that month. In accordance with the Employer policy they proctored examinations taken by students whom they had not instructed during the regular school term.

The parties are in disagreement over whether the proctoring of final and Regent examinations on the stated basis are "non-teaching assignments" within the meaning of the foregoing contract section. The Employer asserts that proctoring is a natural part and extension of the teaching process and that it is a regular teaching assignment from which Association representatives are not excused. It also claims that "non-teaching assignments" are enumerated in Article V D (1) of the contract, and as set forth therein are limited to supervision of home room groups, study halls, and cafeteria assignments. The Employer argues that the introductory phrase "except as otherwise provided herein" in paragraph D (5) must refer back to those assignments delineated elsewhere in Article V, specifically the supervisory functions enumerated in D (1).

The Union relies primarily on the contract negotiations leading to the current 1977-79 Agreement. It claims that its negotiators told the Employer negotiators that the phrase "non-teaching assignments" which was introduced into the contract for the first time in 1977, included proctoring of Regents and final examinations as well as the undisputed supervisory duties
referred to in D (1). It points out that the supervisory duties set forth in D (1) were covered and contemplated in the predecessor contract by the general provision in the then Section D (5) which excused the Association representative from "one supervisory period per day...." It asserts that the supervisory duties of the predecessor contract were perpetuated in the current contract by enumerating those duties; by removing the "supervisory" reference from D (5) and placing the reference and the enumerated duties in Section D (1). It argues therefore, that the purpose of adding the phrase "non-teaching assignments" in 1977 as a new part of D (5) was to cover assignments beyond those enumerated as supervisory.

The contractual arguments of the parties notwithstanding, I find Article V D (5) unclear as to what is meant by "non-teaching assignments." The contract contains no specific definition of that phrase. The interpretations advance by both sides, though different, are equally logical. Hence the phrase is ambiguous. It makes sense to interpret "non-teaching assignments" as those specific supervisory duties referred to in D (1).

However because two different phrases are used it makes as much sense to interpret non-teaching assignments as a new benefit accorded the Association representative, because it was newly introduced in the 1977 contract.

Nor am I prepared to say that by customary or traditional interpretation, "proctoring" is or is not part of the teaching
process. Technically the teaching part of a course is concluded before the final examination. The examination is for the purpose of determining what the student has learned. On the other hand the completion of a course by a teacher normally includes giving and presumably the proctoring of a final examination. In the instant case however, the grievants did not proctor their own students, but by design, were assigned to examinations taken by students whom they did not teach. So, I find no help or resolution in any application of a customary interpretation of "proctoring".

Considering the lack of clarity of the critical contract language, the apparent ambiguities, and the plausibility of the respective arguments, the answer, if there be one, must be found in what took place during negotiations when the disputed language was agreed upon.

The evidence in that regard substantially supports the Union's grievance. Several Union witnesses who participated in the negotiations testified unequivocally that the Union repeatedly informed the Employer representatives that "non-teaching assignments" included proctoring final and Regent examinations as well as the supervisory duties previously stated. They further said that at no time did the Employer negotiators dispute or object to that as an example of a "non-teaching assignment."

The Employer representatives who participated in the negotiations and who testified at this arbitration were not that
unequivocal or certain that proctoring had not been cited as an example of a "non-teaching assignment." Those witnesses testified that they "did not remember" that inclusion, or that the Union had "not given that example, to the best of their recollection." I accept the unconditional testimony of the Union witnesses as accurate.

With this finding, I conclude that during the give and take of negotiations of 1977 and the discussions between the parties, particularly the Union's explanations to the Employer as to the meaning of a "non-teaching assignment", there was a bilateral agreement that "non-teaching assignments" included the proctoring of final and Regents examinations. (It should be noted that this case does not involve the proctoring of regular course examinations, other than Regents or final exams, given by teachers to the classes and students which they have taught during the semester or school year. The Union does not claim that those regular and routine examinations are "non-teaching assignments" within the meaning of D (5).)

Finally the Employer asserts that the purpose of excusing the Association's representative from "non-teaching assignments" is, as the section provides, "in order for such representative to attend any Association activity." The Employer points out that during the period of final and Regents examinations in 1979 there were no "Association activities" and hence D (5) must not
have been meant to apply to that examination period. I do not accept that reasoning. That there were no Association activities during that precise period in 1979, does not mean that a scheduled Association activity was a condition precedent to be excused from a non-teaching assignment. Rather I think that the purpose of D (5) was to give the representative certain time off, during which he could undertake or complete any of his required duties or work as a teacher, so that he would have other time available to participate in an activity of the Association, irrespective of when the Association activity was scheduled. For the Employer's interpretation to prevail the parties would have and should have written language which expressly conditioned any excusal from a "non-teaching assignment" on a scheduled Association activity during the same time. D (5) falls short of such specificity.

The record is unclear as to whether Mr. Lari qualified under the foregoing interpretation. D (5) is applicable to the Association representative provided he "is carrying a full schedule of five teaching periods a day." The evidence appears to indicate that Mr. Lari's weekly work schedule rotated between four teaching periods a day one week and five teaching periods a day the next. If that is so it would seem that he was not carrying a full schedule of five teaching periods a day on a continuing basis, and may not be eligible to be excused from proctoring the final and Regent examinations even under the
interpretation that I have made. The rights of the parties are reserved to return the matter to me in the event that there is a dispute or disagreement over Mr. Lari's schedule and his eligibility under D (5). There is no such problem with Mr. Velmachos.

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 assignment of Nicholas Velmachos to proctor Regent and final examinations at St. John The Baptist High School during June 1979 violated Article V (Teaching Assignments) Section D (5) of the collective bargaining agreement dated 1977-1979. The Diocese shall pay Mr. Velmachos for the time he spent performing that duty at his regular rate of pay.

It appears that Agostino Lari did not "carry a full schedule of five teaching periods a day," and hence was not eligible for the benefits of Article V D (5). However the rights of the parties are reserved to refer back to this arbitrator any dispute over Mr. Lari's eligibility, in the event that the parties are in disagreement over whether Mr. Lari was carrying a full schedule within the meaning of Article V D (5).

DATED: February 13, 1980

STATE OF New York )
COUNTY OF New York )

On this thirteenth day of February, 1980 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 issues are:

1. Did the District violate Section 30.2 of the collective bargaining agreement when it denied the application of Frank Hess to attend a conference on November 5 and 6, 1979? If so, what shall be the remedy?

2. What shall be the method for the District to pay employees who attend conferences under Section 30.2 of the collective bargaining agreement, commencing on and after the date of the Award?

The Association also advanced the following additional issue:

Did the District violate the collective bargaining agreement in the manner it has paid employees who have attended conferences from October 26, 1979 to the present?

With regard to the latter issue the District challenges its arbitrability on the grounds that neither that question nor its substantive aspects were part of the grievance processed through the grievance procedure, and that it has been raised by the Association for the first time at this arbitration hearing.

A hearing was held on June 16, 1980 in Ellenville, New York at which time Mr. Hess, hereinafter referred to as the "grievant" and representatives of the above named Association and District appeared. All concerned were afforded full opportunity to offer
evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The District's claim that the latter aforementioned "issue" is not arbitrable is affirmed. Based on the record I conclude that that question was not part of the "Hess" grievance and was not raised or discussed in the grievance procedure preliminary to this arbitration. It is well settled that issues not processed through the grievance procedure may not be submitted to arbitration without the mutual consent of the parties and the same is true when one side seeks to add issues at the arbitration level. The latter "issue" falls into both categories. It is a new question, albeit arising out of the same contract provision, and also constitutes an additional matter which the Association now seeks to arbitrate. In neither respect was it subject to the preliminary grievance steps, nor is there agreement by the District to include it in this arbitration. Therefore the latter "issue" is procedurally not arbitrable. However, the Association's right to process that question as a grievance through the grievance steps of the contract for subsequent arbitration is expressly reserved.

Section 30.2 of the collective bargaining agreement reads:

Professional Conference Attendance

(a) Teachers are encouraged to take an active interest in professional meetings. A teacher who desires to attend a professional conference will submit his request on the proper form to the Principal.

(b) Normal expenses and the cost of providing a substitute for the teacher who attends a conference with the approval of the Board will be paid by the Board of Education.
The grievant requested permission to attend a New York State Science Teacher's conference scheduled for November 5 and 6, 1979. The District denied his request because it would not pay his "normal expenses" connected with attending that conference. It was prepared to pay only "the cost of providing a substitute ... " for the time that the grievant was away. Technically, it was the position of the District that it had no objection to the grievant attending the conference but that for financial reasons it would not pay his expenses. Whether this constituted an express or constructive denial of his application is immaterial, because the grievant and both parties treat it as a denial.

The denial was based on a "policy", enacted by the Board of Education by resolution in 1975. That Resolution, 75-134, which was intended to be applicable for each of the school years 1976-77 through 1979-80, during which time the District operated under austerity budgets, stipulated the granting of approval to attend educational conferences:

"... at no expense to the District other than the cost of a substitute."

Obviously this policy was based on the District's difficult financial condition and its lack of funds for collateral activity during the time that it operated under austerity budgets. However, as understandable and as economically justifiable that policy may be, I find that its unilateral enactment by the Board and its promulgation by the District, without the agreement of the Association, effectively nullified Section 30.2 of the contract. The policy was applicable to all applications to attend educational conferences.
It meant that no teacher could attend a conference and be reimbursed for normal expenses incurred. Its effect was not simply a change in sub-paragraph (b) of Section 30.2 (by deleting the provision therein for the payment of "normal expenses") but nullified the granting of any and all applications. I am satisfied that the parties did not negotiate Section 30.2 of the contract to have it fully nullified or constructively inactivated by any unilateral policy of the Board.

The record before me shows that the grievant's application was denied on the basis of the Board's policy. I do not find that his application was judged standing alone, or even that it was denied because at that particular time and under existing circumstances the District did not have the funds to pay both his normal expenses and the cost of a substitute. Rather, it was denied by the automatic application of Board policy. In the respect that the Board policy impermissibly nullified a section of the contract on an overall and all inclusive basis, that policy, and its application to the grievant's request to attend a science teacher's conference, violated the collective bargaining agreement.

This is not to say that the District must approve all requests to attend otherwise acceptable educational conferences and meetings. Sub-section (b) clearly provides that normal expenses and the cost of a substitute will be paid for attendance at "a conference with the approval of the Board .... " (emphasis added). That means that the Board has discretion in approving or disapproving applications. And, as both parties recognize, only if an application is approved,
is the District then obligated to pay normal expenses and the cost of a substitute.

Also it is not to say that the District may not deny a request on the ground that it does not have sufficient funds to pay "normal expenses" and/or the cost of a substitute. Consistent with its discretionary authority the District should not be foreclosed from denying a request on bona fide economic grounds.

But in the instant case I do not find that the District denied the grievant's request on economic grounds expressly and particularly related to his application. It did not assert or demonstrate that at that particular time it lacked the funds or could not obtain the funds to reimburse the grievant for his expenses as well as pay the cost of a substitute. Rather, irrespective of any demonstrated contemporaneous economic difficulties, it routinely and automatically denied the grievant's application, as it would have with regard to any such request by any other teacher, solely on the grounds of Board policy. It is this distinction, which I believe is a significant difference, which constitutes the District's contract violation with regard to the grievant's case. By relying solely on its "blanket" policy the District effectively took away from the grievant and all other teachers similarly situated the very opportunity which sub-section (a) of Section 30.2 offered - namely the bilaterally negotiated intent:

that teachers are encouraged to take an active interest in professional meetings.

Section 30.2 juxtaposed with the District's policy is a classical example of "giving with one hand and taking away with the other."
But where on a case-by-case basis the District demonstrates a financial inability to pay both expenses and the cost of a substitute, the District cannot then be contractually faulted in exercising its discretionary right to deny a teacher's request to attend a conference. In short, a demonstrable inability to pay on a case-by-case basis does not have the same "chilling effect" on a teacher's interest in professional meetings as does a blanket District policy which virtually nullifies the attendance at any such meetings by any teacher even before an application to attend has been submitted.

With regard to the second issue, both parties have advised that in the new collective bargaining agreement, and under prospective District policy, a budget has been established to pay both normal expenses and the cost of a substitute for the attendance of teachers at professional meetings approved by the District. This is a sensible and reasonable approach to reconciling the spirit and intent of Section 30.2, with the realities of the District's economic condition. Within the allotted budget, I presume the District will approve applications, and for those approved, will pay both normal expenses and the cost of a substitute. In my view that is the way Section 30.2 of the contract should be interpreted, applied and implemented on and after the date of this Award.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:
1. Because the District denied the application of Frank Hess to attend a conference on November 5 and 6, 1979 on the basis of a unilaterally promulgated Board policy, the District violated Section 30.2 of the contract. As Mr. Hess did not attend the conference, the violation cannot be remedied retroactively and therefore no remedy is awarded.

2. From the date of this Award the District shall pay employees whose attendance at conferences have been approved by the District their "normal expenses" as well as assuming the cost of providing a substitute in accordance with Section 30.2 sub-paragraph (b) to the extent that funds are available within a specified budget for that purpose. The parties have advised that such a budget has been established as part of the successor collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: August 6, 1980
STATE OF New York ) ss.
COUNTY OF New York )

On this sixth day of August, 1980, 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.
OPINION AND AWARD
Case #80K00315

In accordance with Article XXIX of the collective bargaining agreement dated January 25, 1978 between the above named Union and Employer, the Undersigned was designated as the Arbitrator to hear and decide a dispute involving the withdrawal of a promotion recommendation for the grievant, Douglas Lee.

Hearings were held at the New York City office of the Employer on March 5, 1980 and June 5, 1980 at which time the grievant and representatives of the Union and Employer appeared. All concerned were afforded full opportunity to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record was taken and the parties filed post-hearing briefs.

The parties did not agree upon a precisely worded issue. Based on the record I deem the questions for determination to be:

1. Is the Union's grievance on behalf of Douglas Lee arbitrable?

2. If so, did the Employer violate the collective bargaining agreement by withdrawing its recommendation? and

   If so, what shall be the remedy?

Issue 1: THE ARBITRABILITY OF THE GRIEVANCE

Substantive arbitrability is not to be confused with a ruling on the merits. A dispute is substantively arbitrable so long as
it involves a claimed misinterpretation or misapplication of a
relevant part of the collective bargaining agreement regardless of
whether such a claim is ultimately sustained on the merits.

Article XXVIII of the Agreement provides in Section 1 that: "This
Article governs grievances over the interpretation or application
of this agreement." To satisfy this requirement and thus to be
substantively arbitrable, a grievance must bear a legitimate
relationship to or have a reasonable connection with a provision
of the collective bargaining agreement.

The Employer's argument with respect to arbitrability relies
primarily on Section 13 of Executive Order 11491 which limits the
scope of the grievance and arbitration procedure in federal em-
ployment. The Employer maintains that the language in Article
XXVIII Section 1 of the Agreement conforms to the provisions of
the Order by preempting the arbitrator from reviewing the type of
dispute involved in this case. Article XXVIII Section 1 provides
in pertinent part that:

Matters outside this Agreement, including matters for which statutory appeals pro-
ducts exist, are not covered by this Article and must be processed in accordance with Civil
Service procedures or other policy. This Article sets forth the exclusive procedures available
to the parties and Unit employees in resolving a grievance involving the interpretation or
application of the Agreement.

The Employer argues that a statutory appeal procedure exists
for promotions—as promotions fall within the purview of the
Civil Service Commission and the limitation mandated by the Order—
thereby removing such an issue from the Agreement and from the
jurisdiction of the arbitrator.

The Employer recognizes that the provisions of the Civil Service Reform Act of 1978 altered the policy of the Federal government by permitting the scope of grievance procedures to be broadened and by allowing collective bargaining agreements to be extended to cover promotions. Nevertheless, the Employer points out that the Federal Labor Relations Authority interpreted Section 7135(a)(1) of the Act to continue in full force and effect the provisions of an existing agreement that conformed to the prior restrictive policy unless a party to such an agreement raises an objection and thereby triggers the newly defined policy of the Act. See 2 FLRA No. 32 (December 19, 1979). The Employer argues that the Union failed to raise an objection to the contents of the existing Agreement and the Union does not challenge this assertion. Under these circumstances it is therefore clear to me that the limited scope of the grievance procedure that the Agreement reflects on its face continues to be applicable.

However, the parties included in their Agreement Article VII entitled "Merit Promotion Program" which states that: "Promotion eligibility is based on Civil Service Commission requirements and the quality of performance at each grade level." (Emphasis added.) In my opinion there are two requirements contained in this provision with respect to the promotion program. The first component is that eligibility is based upon Civil Service requirements. Although the parties did not specify the various requirements, the Agreement incorporates them by reference. Reading
this provision in tandem with Article XXVIII Section 1 ousts the Arbitrator of jurisdiction with respect to the Civil Service procedures because of the exclusive statutory appeal procedure that exists in this regard. But the parties did not end their Agreement concerning promotion eligibility at this point. Instead, they expressly provided that a second factor is to be considered in promotion eligibility, namely, "the quality of performance at each grade level." It is this second factor which makes the instant grievance arbitrable. The Union is alleging that the Employer improperly assessed the quality of the grievant's performance and that this improper assessment, in contravention of the Agreement, was the basis on which the Employer withdrew its recommendation for the grievant's promotion. In short, the Union asserts that the Employer applied Article VIII improperly; that it resulted in the withdrawal of the promotion recommendation and as such violated the Agreement. I conclude that the claim of the Union bears a reasonable relationship to this provision of the Agreement, that the grievance is therefore sounded in contract breach, and on this basis is arbitrable.

THE MERITS OF THE GRIEVANCE

The grievant's classification of Savings and Loan Examiner is covered by the Career Ladder Promotion Policy. Under this plan an employee is promoted periodically when the performance of the employee conforms to certain predetermined standards. In the case of the grievant, the disputed action concerns eligibility for a promotion to a General Schedule Grade Level 12 position
from a Grade Level 11 position. It is undisputed that the appropriate officials of the District Two Office of the Employer had decided in April 1979 to recommend the grievant for a promotion and sent the necessary paperwork in support of this personnel action to the Washington, D.C. office of the Employer. On June 21, 1979 Assistant District Director Clifford C. Hebbeler telephoned the Washington office and requested that the recommendation be withdrawn. The Washington office complied with the request.

I find that the events which occurred during the interval between the recommendation of the promotion and its withdrawal support the Employer's conclusion that the grievant's quality of performance during that time frame triggered a circumstance inconsistent with the recommendation. I further find that the Employer had the right, under these circumstances to cancel the promotion. As for evaluating the quality of performance, I conclude that the assessment of the quality of performance in the exercise of managerial authority, must be reasonable. It also means that the Employer will not be arbitrary, capricious, or discriminatory in evaluating the quality of performance. A failure to comport with this standard would make this language of the Agreement a nullity.

The Employer predicates its action on the events surrounding the grievant's absence from work on June 18, 19, and 20, 1979. The Employer claims that the grievant's failure to obtain advance permission to be absent on June 18, coupled with his additional absences on June 19 and June 20 interfered with the conduct of
an examination at the Highland Falls Federal Savings and Loan Association. Based upon this incident the Employer concluded that the grievant had reverted to his prior pattern of work habits and administrative deficiencies concerning annual leave, administrative leave, and overhead time. The facts of that "pattern" are essentially undisputed and familiar to the parties and need not be recited herein. The Union denies the materiality of the prior conduct and claims that it is in large part stale. With respect to the June 18-20 incident, the Union insists that the grievant had secured advance annual leave and that the ultimate approval of annual leave for the days in question supports the legitimate and bona fide nature of that leave.

The allegation concerning the grievant's failure to obtain advance approval for his absence on June 18 arises from disputed versions of a telephone conversation between the grievant and the Assignment Desk Office, Steven Simone. The Employer credited Simone's version of the telephone conversation on June 14 to the effect that the grievant had merely indicated that he was considering requesting annual leave for June 18. Based on the evidence before me, including the testimony of the grievant and Simone, I do not find the Employer's conclusion about what was said was illogical, unreasonable or incorrect.

It is well settled that an employer has a right to insist upon regular attendance by its employees and that chronic absenteeism, does not have to be indefinitely tolerated by an employer and may furnish the basis for appropriate disciplinary action up to and including discharge. Although this is not a disciplinary case, it is reasonable for the Employer to evaluate the grievant's
attendance to establish his suitability for a promotion. Absences interrupt the normal activities of the Employer in conducting examinations and unpredictable absences accentuate this problem, especially as an employee attains a higher rank and is entrusted with more responsibility. When the June 1979 absences are juxtaposed against the previous record of the grievant, it was not unreasonable for the Employer to conclude that the grievant was reverting to a pattern of conduct that he had assured the Employer would not recur. In my opinion the grievant knew and recognized the relevance of a satisfactory attendance record as a condition to a promotion. Nor do I consider the reference to a prior pattern of conduct to be inappropriate. That prior conduct had not precluded the grievant from the promotion recommendation, since the Employer had relied upon the grievant's expressed assurances that his future conduct would improve. The June events, however, demonstrated to the Employer that the grievant would not or could not live up to his assurances.

That the absences may have been "approved" later does not mean that permission to be absent was requested and granted at the critical time. The later approval may be a defense to a disciplinary action, a matter not involved in this case, but it does not mean that the Employer may not consider those absences, against a backdrop of the grievant's prior record, as an impediment to a promotion.

On that basis the nexus between the June events and the grievant's earlier record is relevant and the Employer's consideration of both jointly, was not unfair or unreasonable, and certainly not arbitrary or capricious.

The Union has raised several additional allegations concerning claimed violations of the Agreement by the Employer in connection with the withdrawal of the promotion recommendation. First,
as I have concluded that the Employer's action was not arbitrary, capricious, or discriminatory, it follows that the Employer did not violate the requirement of Article II Section 6 "to provide for a safe, wholesome, and healthful work environment, both mental and physical" even assuming arguendo that this provision was meant to apply to the impact of a personnel action on an employee's work environment. Second, my finding of substantive arbitrability obviates any further analysis of the claim by the Union regarding Article III Section 2 concerning "the employees' right to express dissatisfaction concerning procedures used by the Employer in the exercise of its rights" even assuming arguendo that this provision was meant to apply to the impact on an employee of a personnel action. Third, the Union asserts that the Employer failed to afford the grievant the presence of a Union representative during a counselling session on June 21, 1979 as required under Article III Section 4A. Based on the evidence in the record the Union failed to meet its burden of proof on this point. I find particularly convincing the grievant's memorandum dated June 25, 1979 (Union Exhibit 9,) which states: "Mr. Nightingale indicated that if I felt the need for a union representative it would not be appropriate to continue the discussion." Fourth, the claim by the Union that the Employer violated Article XX Section 3F by failing to provide advance notice of an assignment requiring overnight lodging is not substantiated. In light of the circumstances surrounding the reassignment of the grievant from the Highland Falls Federal Savings and Loan Association to
the Pioneer Savings and Loan Association in Brooklyn, New York, it is clear that the Employer did not have "sufficient prior knowledge" as specified as the condition precedent to providing five business days advance notice to the grievant. Fifth, the contention of the Union that Article XXII Section 4 requires that "disciplinary actions will be taken only for just and sufficient cause" is inapplicable since the instant case is not a disciplinary action.

Lastly, I am unpersuaded by the argument advanced by the Union that the Employer was as a matter of law precluded from withdrawing the promotion recommendation after having processed it to the Washington office. The parties are well aware of the many levels of review that such recommendations pass through before the recommendation is converted into an approved action. There is no evidence in the record that a recommended promotion may not be retracted before becoming final.

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

The grievance of Douglas Lee is arbitrable.
The Employer did not violate the contract by withdrawing the recommendation for Mr. Lee's promotion.

DATED: September 30, 1980
STATE OF New York ) ss.:
COUNTY OF New York )

On this 30th day of September, 1980 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Does Management have the right to demand and receive copies of sales ticket receipts given to cash paying customers?

Hearings were held on January 1, and 24, 1980 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. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The Company's requirement that its sales route drivers complete and turn in to the Company, copies of cash sales receipts, is a proper exercise of a Company managerial right, unrestricted by the contract. The Company has shown to my satisfaction that it has a legitimate business need for those receipts, both for accounting purposes and for the discovery and correction of errors. The sales receipt forms, of which the cash sales receipt is a part, are official Company documents and records, utilized by the Company and its sales route drivers...
in the regular conduct of the Company's business. As other parts of the sales receipt forms are turned in to the Company by the drivers, so too does the Company have the right to require the drivers to turn in the cash sales receipt part thereof.

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

The Company has the right to demand and receive copies of sales ticket receipts given to cash paying customers.

Eric J. Schmertz
Arbitrator

DATED: May 3, 1980
STATE OF New York )
COUNTY of New York )ss.:

On this third day of May, 1980, 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:

International Brotherhood of Painters and Allied Trades Local 1503, Metal Trades Council of New London County, AFL-CIO:

and:

General Dynamics Corporation, Electric Boat Division:

OPINION AND AWARD
Case #PA9-9

The stipulated issue is:

Was there just cause for the five day suspension of John Preble? If not what shall be the remedy?

A hearing was held in Groton, Connecticut on June 17, 1980 at which time Mr. Preble, hereinafter referred to as the grievant, and representatives of the above named Union and Company appeared. All concerned were offered full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken and the Company filed a post-hearing memorandum.

Pertinent to this case is a portion of an Agreement between the parties dated May 10, 1979. The relevant parts of Section B thereof read:

B. Disciplinary Action - Alcohol

The Employer and the Union agree to the following guidelines for disciplinary action to be administered in cases where employees have violated any of the following Company rules and regulations:

...
3. Being under the influence of alcoholic beverages and unfit for work while on Company premises.

If an employee has committed any of the above violations, the following disciplinary action shall be taken:

1. For a first offense: Five (5) days suspension without pay.

The narrow question in this case is whether the grievant was "under the influence of alcoholic beverages and unfit for work while on Company premises." If so the foregoing Agreement mandates a five day suspension. If not the suspension should be reversed.

Out of the considerable contradictory evidence presented in this case, I conclude that the testimony of the Company's Supervisor of Medical Services, Rosemarie L. Pusateri was credible, accurate and unbiased.

Ms. Pusateri is a registered nurse. I believe she knows an alcoholic breath when she smells it and can distinguish the smell of alcohol from the smell of a cough drop. I believe she knows when both eyes of a person are blood shot and glassy from the effects of alcohol and can distinguish that condition from the mistiness of a single eye that comes from an eye operation. I believe she can detect slurred speech and unsteady gait and can make a determination when those conditions are due to the effect of alcohol. In short, based on her professional medical training I conclude that she accurately determined that the grievant had
been drinking and was under the influence of alcohol when he was examined for a hand injury during the course of his shift.

No doubt the Company's case would have been more unassailable had the other nurse and a medical technician who had observed the grievant also testified, and had the Company used some other testing method to determine whether the grievant was intoxicated or unfit for duty when the breathometer test failed (for whatever reason). But though this additional evidence and testimony, if offered and if supportive of the Company's case, would have added conclusiveness to the charge against the grievant, I find that in this case the nurse's testimony is enough to meet the Company's burden of proving the allegation by evidence that is clear and convincing.

The Union failed to show any bias, prejudice or retaliatory motive on the part of Ms. Pusateri. The various suggestions that in some way she falsified or misreported the grievant's condition out of personal animosity or revenge, was in no way supported by probative evidence. Indeed I find no reason in the record why Ms. Pusateri would falsify or inaccurately report what she observed. I conclude that her observations were accurate, and that her diagnosis that the grievant had been drinking and was unfit for duty was correct.

Those witnesses who testified otherwise were not, in my view, objective about the grievant's condition, nor did they possess the scientific and medical training upon which the nurse's assessment of the grievant's condition was made.
For the foregoing reasons, the Undersigned duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The five day suspension of John Preble was for just cause.

Eric J. Schmertz
Arbitrator

DATED: July 1, 1980
STATE OF New York ) ss.:
COUNTY OF New York)

On this first day of July, 1980, 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
International Association of Machinists and Aerospace Workers, Local Lodge 1871 AFL-CIO
and
General Dynamics Corporation Electric Boat Division

OPINION AND AWARD
Grievances M-7-9 and M-8-9

The stipulated issue is:

On July 27 and August 3, 1979 did non-bargaining unit supervisory employees perform the work of welding machine repair mechanics and thereby violate Article II of the collective bargaining agreement? If so, what shall be the remedy?

A hearing was held in Groton, Connecticut on October 8, 1980 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. A stenographic record was taken and the parties filed post-hearing briefs.

Article II reads:

NON-BARGAINING UNIT EMPLOYEES

Non-Bargaining unit employes, including supervisory employes, shall not perform work on any hourly rated jobs listed in Appendix A except in the instruction or training of employes.

It is also undisputed that bargaining unit repair mechanics have the responsibility "for the issue, return, care and repair" of pre-heat torches.

The issue is simply whether non-bargaining unit supervisory employees "issued" or "cared" for the pre-heat torches within the proscription of Article II, or within the meaning of the
job duties of the bargaining unit repair mechanics. I conclude
they did not.

I find no contractual provision which requires that pre-
heat torches used on a given day or shift be returned to the
tool shed at the end of that day or shift. Nor do I find any
contract bar to a supervisory decision to keep those torches
out overnight after the conclusion of their use one day, for
use the next day.

Here, the torches were properly issued by the repair
mechanics to the welders from the tool shed, on the Fridays,
July 27th and August 3rd, 1979. At the end of those days or the
shifts on those days, the torches were not returned to the tool
shed. Instead, as perceived to be their instructions from
supervision, the welders put the torches in the office of the
welding supervisor, where the torches remained overnight. The
next day (Saturdays, July 28th and August 4th) supervision
distributed the torches to welders called in on those days, for
production use.

In the absence of a requirement that the torches be returned
to the tool shed each day, I cannot find that their retention
out of the tool shed for use on two consecutive days, their
storage overnight in the supervisor’s office, or their distri-
bution for use the next day constituted an issuance or care of
the torches by supervision within the meaning of bargaining unit
work or within the prohibitions of Article II.

As I see it the torches were properly issued by the repair
mechanic on the Fridays, July 27th and August 3rd. Thereafter, they were not issued again on the Saturdays, but rather retained for operational use for the next consecutive day. The Union has not shown that the torches are to be checked mechanically, or for safety, or for repair each day at the end of one day's use, nor is there evidence that any of the torches in question required any specific repair or other attention on the Fridays involved. I construe the duty of "care" to pertain to such work, and distinguish it from "custody." And it is "custody" that supervision maintained over the torches from the end of the day Friday, to the start of the shift on Saturday.

As I have said, I find no contract or operational bar to this, and neither should be constructed from the bare distribution of the torches on the second day by supervision, after storage overnight in the supervisor's office. On the other hand, the result might well be different if there was a contractual safety, mechanical or repair reason why the torches must be returned to the tool shed after each day's use or if the particular torches in question should have been returned for those reasons. But a case on the latter point was not developed as part of this grievance.

Alternatively the evidence indicates that supervision thought the facts to be different than what happened, and were more in accord with the Union's position in this case. It appears that supervision gave instructions that at the end of either or both of the Fridays, new and different torches were to be drawn
from the tool shed (i.e. issued by the repair mechanics), to then be stored overnight in the supervisor's office for distribution to welders the next day. If that had been done the set of torches used on Saturday would indeed have been torches issued by the bargaining unit repair mechanics for the specific and first use on Saturday. (And under that circumstance the torches used on Friday would have been turned in and replaced or reissued by the mechanic for Saturday use.) It would have been a new issue, different from the issuance at the start of the day on Friday for Friday use. As there is nothing I find in the contract or in practice which would bar the issuance of torches at the end of one day for use the next day, those circumstances, which supervision had reasonable grounds to believe were the facts in the instant case, would not be actionable by the Union. Hence I cannot conclude that supervision attempted or intended to by-pass or usurp the duty of the repair mechanic to "issue" the torches. (There is no dispute that after that use on the Saturdays the torches were properly returned to the tool shed.)

It should be obvious that this determination is confined to the facts and equipment involved in this case. It may not be construed as a license for management to circumvent the overtime, provisions of the contract by having supervisory employees perform work within the job duties of a bargaining unit classification. The contract prohibition on such action is clear. Here I have only concluded that what is complained of was an operational procedure, not bargaining unit work within the meaning
of Article II or the repair mechanic job duties.

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

On July 27 and August 3, 1979, non-bargaining unit supervisory employees did not perform the work of welding machine repair mechanics. The Company did not violate Article II of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: December 1, 1980
In the Matter of the Arbitration
between

International Association of Machinists
and Aerospace Workers, Local Lodge 1871
AFL-CIO

and

General Dynamics Corporation
Electric Boat Division

OPINION AND AWARD
Grievances M-7-9
and M-8-9

The stipulated issue is:

On July 27 and August 3, 1979 did non-bargaining unit supervisory employees perform the work of welding machine repair mechanics and thereby violate Article II of the collective bargaining agreement? If so, what shall be the remedy?

A hearing was held in Groton, Connecticut on October 8, 1980 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. A stenographic record was taken and the parties filed post-hearing briefs.

Article II reads:

NON-BARGAINING UNIT EMPLOYEES

Non-Bargaining unit employees, including supervisory employees, shall not perform work on any hourly rated jobs listed in Appendix A except in the instruction or training of employees.

It is also undisputed that bargaining unit repair mechanics have the responsibility "for the issue, return, care and repair" of pre-heat torches.

The issue is simply whether non-bargaining unit supervisory employees "issued" or "cared" for the pre-heat torches within the proscription of Article II, or within the meaning of the
job duties of the bargaining unit repair mechanics. I conclude they did not.

I find no contractual provision which requires that pre-heat torches used on a given day or shift be returned to the tool shed at the end of that day or shift. Nor do I find any contract bar to a supervisory decision to keep those torches out overnight after the conclusion of their use one day, for use the next day.

Here, the torches were properly issued by the repair mechanics to the welders from the tool shed, on the Fridays, July 27th and August 3rd, 1979. At the end of those days or the shifts on those days, the torches were not returned to the tool shed. Instead, as perceived to be their instructions from supervision, the welders put the torches in the office of the welding supervisor, where the torches remained overnight. The next day (Saturdays, July 28th and August 4th) supervision distributed the torches to welders called in on those days, for production use.

In the absence of a requirement that the torches be returned to the tool shed each day, I cannot find that their retention out of the tool shed for use on two consecutive days, their storage overnight in the supervisor's office, or their distribution for use the next day constituted an issuance or care of the torches by supervision within the meaning of bargaining unit work or within the prohibitions of Article II.

As I see it the torches were properly issued by the repair
mechanic on the Fridays, July 27th and August 3rd. Thereafter, they were not issued again on the Saturdays, but rather retained for operational use for the next consecutive day. The Union has not shown that the torches are to be checked mechanically, or for safety, or for repair each day at the end of one day's use, nor is there evidence that any of the torches in question required any specific repair or other attention on the Fridays involved. I construe the duty of "care" to pertain to such work, and distinguish it from "custody." And it is "custody" that supervision maintained over the torches from the end of the day Friday, to the start of the shift on Saturday.

As I have said, I find no contract or operational bar to this, and neither should be constructed from the bare distribution of the torches on the second day by supervision, after storage overnight in the supervisor's office. On the other hand, the result might well be different if there was a contractual safety, mechanical or repair reason why the torches must be returned to the tool shed after each day's use or if the particular torches in question should have been returned for those reasons. But a case on the latter point was not developed as part of this grievance.

Alternatively the evidence indicates that supervision thought the facts to be different than what happened, and were more in accord with the Union's position in this case. It appears that supervision gave instructions that at the end of either or both of the Fridays, new and different torches were to be drawn
from the tool shed (i.e. issued by the repair mechanics), to then be stored overnight in the supervisor's office for distribution to welders the next day. If that had been done the set of torches used on Saturday would indeed have been torches issued by the bargaining unit repair mechanics for the specific and first use on Saturday. (And under that circumstance the torches used on Friday would have been turned in and replaced or reissued by the mechanic for Saturday use.) It would have been a new issue, different from the issuance at the start of the day on Friday for Friday use. As there is nothing I find in the contract or in practice which would bar the issuance of torches at the end of one day for use the next day, those circumstances, which supervision had reasonable grounds to believe were the facts in the instant case, would not be actionable by the Union. Hence I cannot conclude that supervision attempted or intended to by-pass or usurp the duty of the repair mechanic to "issue" the torches. (There is no dispute that after that use on the Saturdays the torches were properly returned to the tool shed.)

It should be obvious that this determination is confined to the facts and equipment involved in this case. It may not be construed as a license for management to circumvent the overtime provisions of the contract by having supervisory employees perform work within the job duties of a bargaining unit classification. The contract prohibition on such action is clear. Here I have only concluded that what is complained of was an operational procedure, not bargaining unit work within the meaning
of Article II or the repair mechanic job duties.

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

On July 27 and August 3, 1979, non-bargaining unit supervisory employees did not perform the work of welding machine repair mechanics. The Company did not violate Article II of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: December 1, 1980
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration
between
IUE, Radio & Machine Workers Local 301, AFL-CIO
and
General Electric Company

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Case #15 30 0591 79

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This is an expedited case pursuant to Article XV Section 8(a) of the 1976-1979 GE - IUE National Agreement.

The stipulated issue is:

Was there just cause for the warning notice and one week disciplinary suspension issued Bruce Davis? If not what shall be the remedy?

A hearing was held in Schenectady, New York on May 14, 1980 at which time Mr. Davis, hereinafter referred to as the grievant and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The grievant is an Anneal Enamel Furnace Operator working on what is known as the "process line." On Wednesday, June 20, 1979 he worked his usual 3 PM to 11 PM second shift. Because of an anticipated absence on the third shift the grievant was instructed by his foreman Gerald O'Brien to shut down the line and secure it. To do so requires about an hour and half of various shutdown activities on the many component parts of the
machinery which make up the process line. It is a procedure which the grievant performs normally every Friday evening. The grievant left work at the conclusion of his shift at 11 PM on June 20th.

At about 2 AM Thursday, June 21, two members of supervision found the rubber-covered applicator rollers of the process line running "dry" in a closed or together position. As a result the rubber rollers were torn apart and ultimately had to be replaced at considerable expense. All other parts of the process line had been shut down.

The Company blames the grievant for failing to shut down the applicator rollers. It asserts that under the particular facts present the logical conclusion, based on circumstantial evidence is that the grievant negligently failed to shutdown that part of the process line and that discipline is warranted. As this was the grievant's third warning within a specified period, it automatically carried with it a one week disciplinary suspension in accordance with the Company's progressive discipline procedures.

The grievant and the Union on his behalf deny that the applicator rollers were not shutdown and secured before the grievant completed his shift on June 20th. They argue that the grievant is familiar with what is required; that he performs the shutdown operation normally each week; that between 11 PM and
2 AM other persons in the plant could have activated the rollers (inadvertently or maliciously); that at the time there was some horseplay going on in the plant and that the reactivation of the rollers between 11 PM and 2 AM could have been another such act; that activation of the rollers could be achieved simply by pressing a button; and that therefore the grievant cannot be held responsible.

If the foregoing was all there was to this case I would have some doubts as to whether the Company had met its burden in a disciplinary case of establishing liability or guilt by clear, persuasive or convincing evidence. I am inclined to accord credit to the Company's assertion that a reactivation of the applicator rollers is not comparable to incidents of horseplay; that it is not simply a matter of pressing a button but rather requires some specialized knowledge of the operation of the process line; and that the few employees who were in the plant from 11 PM to 2 AM did not possess the knowledge or skill to start up the applicator rollers. However, my inclination notwithstanding, I am not persuaded that this is enough to foreclose the possibility of mischief sometime between 11 PM and 2 AM or a non-willful activation of the rollers by someone else unknowingly or negligently, after they had been closed down by the grievant. However I find that I need not resolve the dispute based solely on the foregoing facts, and hence need not deal with the question of whether circumstantial evidence in general or more specifically in this case, points with sufficient
conclusiveness to the grievant's responsibility or falls short of any such logical or inferential conclusion.

There is one additional piece of evidence which I conclude is dispositive of this case despite its controversial aspects. That evidence is the testimony of Foreman O'Brien that in a telephone conversation with the grievant on June 25th in which O'Brien told the grievant of the damage to the applicator rollers, the grievant responded "it was my mistake and I am sorry about that." This testimony is supported by O'Brien's written statement dated June 25th, which O'Brien testified he made immediately after that telephone conversation.

The testimony and the statement (Company Exhibit #7) are controversial because the record discloses that the grievant's alleged "admission" was not made known to the Union in the course of the grievance procedure in this matter nor was Company Exhibit 7 provided the Union during the grievance steps. Indeed, that part of O'Brien's testimony and his statement became known to the Union for the first time at the arbitration hearing. The Union strenuously argues that because such a critical matter was not disclosed prior to the arbitration hearing, it should not be believed, and at least lacks probative value.

It is well settled, good personnel practices and labor relations aside, that evidence bearing on the issue in dispute may be offered by either party for the first time at the
arbitration hearing. Such evidence is admissible. No doubt, good personnel practices and constructive labor relations policies would be furthered if all relevant evidence were made known by each side to the other during the grievance procedure. That way a dispute is given every chance at resolution prior to arbitration, and neither side is surprised by unknown or unfamiliar evidence when and if an arbitration hearing is held. But what may constitute good procedural practices does not bear on the validity or probative value of any such evidence offered for the first time at the arbitration hearing. Here the Company has offered an acceptable explanation as to why this part of O'Brien's testimony was not disclosed to the Union during the grievance step. Apparently the grievance meeting was highly charged, and ended abruptly on an angry note before all the facts or allegations could be disclosed. More important however on the question of the believability of O'Brien's testimony is whether O'Brien would have any reason to fabricate what he states the grievant told him or any reason to bear false witness in the arbitration hearing. Though the Union raised certain suggestions of bias on O'Brien's part towards the grievant, I cannot find that those examples support a charge that O'Brien would lie in such a critical and determinative respect. Therefore, I accept O'Brien's testimony as credible and accurate and conclude that in his telephone conversation with the grievant a few days after the incident, the grievant made a statement acknowledging his responsibility for failing to shut down and secure the applicator
rollers. This critical evidence is sufficiently supportive of the balance of the Company's circumstantial case to meet the requisite standard of proof in disciplinary cases. Accordingly the grievance is denied.

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

There was just cause for the warning notice and one week disciplinary suspension issued Bruce Davis.

Eric J. Schmertz
Arbitrator

DATED: July 22, 1980
STATE OF New York ss:
COUNTY OF New York )

On this twenty second day of July, 1980, 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

International Union of Electrical Radio and Machine Workers, AFL-CIO: Case #3030 0115 79
CLC, Local 191 (Rome, Ga.): OPINION AND AWARD
and

General Electric Company

As amended at the hearing, the stipulated issue is:

1. Did the grievants, Guy Stanley and Paul Dyer, have the minimum qualifications required under the provisions of the second sentence of Section 1 of Article XXVIII to be upgraded to the R-22 Boiler House Assistant Operator job on April 10, 1978?

2. If the Arbitrator determines that either one or more of the grievants did have the minimum qualifications required for such upgrading, did the Company violate Article XXVIII when it upgraded Eugene T. Autry to the position? If so, what shall the remedy be?

After the hearing and the submission of briefs in this matter the original arbitrator Howard W. Kleeb died. By agreement of the parties the entire record, together with supplemental briefs and other material were submitted to me for decision on the aforesaid issue.

As I did not directly hear or observe the witnesses, did not receive or rule on exhibits and other evidence, and did not directly hear the respective arguments, this is not the appropriate case for me to consider reconsidering my prior ruling on the interpretation of Article XXVIII, Section 1 of the contract.
However, within the meaning of my prior decisions I conclude that in the instant case the Company's determination that the grievants Guy Stanley and Paul Dyer were not minimally qualified to be considered for an upgrade to the job R22 Boiler House Assistant Operator, was an abuse of its discretion.

Not having taken steps over the several years since the promulgation of its Minimum Job Requirements for the job of Boiler House Assistant Operator to correct what the Company now claims to be a clerical error (e.g. the Company's assertion that Code 121 set forth therein should have been Code 120 requiring industrial or maritime boiler house operator's experience, 3 years or more, as a minimum requirement) the Company is estopped from attempting to do so in this proceeding. At no time prior to this hearing since the promulgation of the list of Minimum Job Requirements in April, 1973 did the Company by notice to the Union or by the issuance of a new list of Requirements or in any other way claim that the Code 121 reference (which the parties stipulated at the hearing was not applicable to the job in question) was erroneously listed and should have been Code 120. Absent any effort to correct what it now claims was an error, the grievants and the Union on their behalf had no reason to know or believe that "industrial or maritime boiler house operator" experience was a minimum requirement.

The record before me discloses that the Company made critical use of that previously undisclosed requirement in disqualifying the grievants from consideration for the upgrading and indeed judged
the grievants not to be minimally qualified because they did not have prior experience with boilers. I consider the Company's action in that regard and under that circumstance to be an abuse of discretion.

This is not to say that the Company may not prospectively require Code 120 experience as a minimum requirement. I need not make that determination one way or the other in this proceeding and the rights of the parties on that question are expressly reserved. Rather it is to say that in the absence of fundamental notice of a claimed error and with the passage of years in its original promulgated form (without reference to Code 120) the Company may not ask in this proceeding that that Code reference be read into the Requirements, or that the Requirements now be reformed. And it may not in this case impose that claimed requirement on the grievants in assessing their minimum qualifications.

Also, based on the record I conclude that the interviews of the grievants by Foremen Jones and Ayers were at the same time both superficial and too demanding. The interviews were superficial because the foremen neither referred to nor appeared to know of the existence of the list of Minimum Job Requirements nor did they inquire of the grievants about any of the conditions listed therein. Instead as the evidence shows they were concerned exclusively with whether the grievants had prior experience with boilers. The interviews were too demanding because, again based on their testimony the foremen were looking for an applicant who was qualified to "work alone" on the boilers, who was "fully qualified" on
boilers and who presumably was interchangeable with the Boiler House Operator. By doing this, it appears to me and I conclude that what the Company sought (through the foremen as its agents) was a candidate qualified for the higher rated job of Boiler House Operator, forgetting or ignoring the fact that the job in question was that of Assistant Operator and that the job description for that job specified that the incumbent is to "assist" not replace the Boiler House Operator. By looking for qualifications more related to the senior position in judging whether the grievants were minimally qualified for the junior post, the Company abused its discretion within the meaning of my prior Award interpreting Article XXVIII Section 1.

Based on the record I am satisfied that both grievants met the minimum requirements set forth in the list of Minimum Job Requirements as promulgated by the Company and as in force and effect since April 1973. Therefore both grievants should have been found to be minimally qualified and the Company's failure to do so was for the reasons stated, an abuse of discretion.

With that ruling I set aside the Company's selection of Mr. Eugene Autry for the job in question. I choose not to decide the second part of the stipulated issue at this time but instead I remand the matter to the parties. The Company is directed to make a de novo determination among the two grievants and Mr. Autry as to which should be upgraded to the job of Boiler House Assistant Operator in accordance with the provision of the second sentence of Article XXVIII Section 1. In doing so, as that Section requires, the Company shall "take into consideration as an important factor
the relative length of continuous service" of all three said employees. The de novo selection should be completed within ten (10) days following receipt of this Award. The contractual rights of the parties with regard to this new selection process are expressly reserved.

Unless the parties mutually agree otherwise I shall retain jurisdiction in this matter for the application and implementation of the aforegoing, to decide disputes which may arise therefrom, for determination of remedies if any, and for further proceedings as may be necessary.

Eric J. Schmertz
Arbitrator

DATED: October 20, 1980
STATE OF New York ) ss.:
COUNTY OF New York )

On this 20th day of October, 1980, 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
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In the Matter of the Arbitration
between

International Union of Electrical, Radio and Machine Workers, Local 380 AFL-CIO : OPINION AND AWARD
Case #15 30 0640 79
and

General Electric Company
Silicone Products Division

The stipulated issue is:

Was there just cause for the discipline imposed on 49 identified employees for their conduct on June 7 and 8, 1979, which the Company alleges was in violation of Article XIV, Section 1 of the Agreement? If not what shall the remedy be?

A hearing was held on May 5, 1980 in Latham, New York at which time representatives of the above named Company and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Both sides filed post-hearing briefs.

The Company imposed one day suspensions on the 49 grievants for their failure or refusal on June 7 and 8, 1979 to cross the "wildcat" strike picket line of a sister union, Local 359, in violation of the "no strike" provisions of the collective bargaining agreement.

The issue is a narrow one. There is no dispute that if the grievants failed or refused to come to work out of sympathy for and support of the strike by members of Local 359, they would be
in violation of Article XIV Section 1 of the contract. On the other hand it is equally clear that if any or all the grievants had bona fide grounds to believe that to cross the picket line would subject them to physical harm from the strikers, their failure or refusal to come to work would be excused.

It is the Union's contention that the Company failed to provide the non-striking employees with "safe access" to the plant; that the circumstances were realistically threatening to the physical safety of non-striking employees, including the grievants, and that the disciplinary suspensions were therefore improper.

It is well settled that employees who are bound to report to work as scheduled and foreclosed from engaging in or supporting strikes or walkouts, may not respect a picket line and refuse or fail to report to work simply because they think it might be physically hazardous for them to cross the picket line. Instead, to enjoy immunity from discipline it must be established not just that they were afraid, but that the external circumstances were such as to make their fears realistic and reasonable. In the instant case, with the exception of grievant Patricia Fox, I do not find that those essential circumstances have been established.

Ms. Fox's testimony that she was directly and personally threatened by one or more of the strikers stands unrefuted. Under that circumstance, though I do not conclude that she would have been harmed had she attempted to report for work, I do conclude that she had reasonable grounds to be afraid and hence was justified in not reporting to work.
However, based on the record I cannot find similar conditions applying to the balance of the grievants. None of them were personally or directly threatened. The record is devoid of any evidence that any employee who reported to work or attempted to report was physically harmed or even physically threatened. Indeed, 77 members of the Union in the technician classification (the same bargaining unit as the grievants) reported to work and went in and out of the plant without incident. Additionally, it has been shown that the picketing was limited to certain sections of the plant and that there were a number of accessible entrances and exits at which there were no strikers and through which the grievants could have entered and left the plant without undue burden. In fact some of those unpicketed entrances were the same entrances which some of the grievants customarily used.

I agree with the Union that the Company acted unwisely and imprudently in failing to remove the strikers from within the Company's yard and by permitting them to remain and even drink beer on the premises. I agree that the Company's failure to promptly remove the strikers could be an intimidating factor to non-striking employees. But on balance I am persuaded that any such potential intimidation was at least neutralized by the total lack of difficulty 77 employees had in coming to work; by the absence, except for the case of Ms. Fox, of any direct or personal threats to any of the other grievants; by the absence of any incidence of personal physical violence; and by the apparent availability of law enforcement authorities to insure safe entrance and
exit had the grievants wished to work as scheduled.

That there was property damage, including damage to cars of some employees is a serious and disturbing matter. However, property damage is not the same as or evidence of a threat of personal harm or potential personal danger.

A one day disciplinary suspension is a moderate if not light penalty for a violation of the relevant contract provision. Therefore I cannot find that it is either too harsh or inappropriate simply because the strikers, engaged in an illegal strike, received the same penalty. That the latter group might have been properly disciplined more severely does not mean that the one day suspensions imposed on the 48 grievants was unjustified.

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

There was not just cause for the discipline imposed on Patricia A. Fox. Her one day suspension is reversed and she shall be made whole for the time lost.

There was just cause for the discipline imposed on the remaining 48 identified employees for their conduct on June 7 and 8, 1979 which was in violation of Article XIV Section 1 of the Agreement.

DATED: September 12, 1980
STATE OF New York )
COUNTY OF New York )

On this twelfth day of September, 1980, 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 Union of Electrical, Radio and Machine Workers, Local 731:

and

General Electric Company

Memphis, Tennessee

The stipulated issue is:

Was the removal of Luke White from the H-152 Mount Maintenance R-21 "A" classification on October 12, 1979 for inability appropriate under the circumstances? If not, what shall the remedy be?

A hearing was held in Memphis, Tennessee on July 10, 1980 at which time Mr. White, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record was taken and the parties filed post-hearing briefs.

The Union does not contest the Company's right to remove an employee from a job because of "inability." Rather, in the instant case it contends that the grievant was able to perform his job duties; that his automatic progression to the top of the rate range of his job classification is irrebuttable evidence of satisfactory performance; that problems or difficulties with his work performance, if any, were due to machine defects and/or lack of adequate training; and that this removal was discriminatory in that he was not placed in another job or afforded the opportunity
to bump into another job in accordance with his seniority under a local layoff agreement or practice as applied to other employees removed under similar circumstances.

The evidence adduced by the Company abundantly established that the grievant's productivity and material efficiency on the H-152 Mechanic's job was significantly below the group average for an extended period of time, and his mount loss was significantly higher. Indeed, this statistical evidence and unfavorable comparison with other employees in the group are not seriously disputed or refuted by the Union.

I am not persuaded that these deficiencies were due to machine defects or a lack of training. The former is a bare allegation, not supported by adequate probative evidence and there is no showing that any other employee of the group or others on those machines on the grievant's shift or other shifts were similarly affected. The grievant received the same "buddy" training as other employees in the same classification; the contract does not require a formal training program; and indeed, when both the grievant and his supervisor recognized his operational difficulties, he was assisted by and received additional job training for some 10-12 weeks from a mechanic of acknowledged skill and excellence.

Despite that latter help, the grievant's work performance remained chronically inadequate, leading to his removal. On that basis I do not find the Company's determination that the grievant was unable to perform his job duties, to be arbitrary or unreasonable.
I do not accept the Union's argument that the grievant's automatic progression to the top of the rate range is conclusive evidence of satisfactory performance. To accept that argument would mean that upon reaching the top of the range, an employee could never be removed, or even progressively disciplined for unsatisfactory work performance. To reach the top of the wage range would constructively license inadequate work performance, whether willful or otherwise. I find no such contract restriction on the Company nor is the Company estopped from removing an employee from his job for "inability" after he has reached the top of the rate range anymore than it is restricted from removing him for the same reason in the course of his progression upward. In short, I do not interpret Article VI to authorize removal only at stages in the progression before reaching the top, or to grant immunity from removal or discipline after the top of the rate range has been reached. Indeed, the obvious rhetorical question is what is to be done with an employee who becomes unable or for the first time shows his inability after reaching the top?

I do not find that the grievant had a contract right to be placed in another job after his removal, nor do I find that he was entitled to bump. The contract contains no explicit provision on the removal rights of the Company (but as stated, that general right is conceded by the Union). Perforce the contract contains no express provision regarding what is to be done with an employee removed for "inability." Hence there is no discernible contract right to be placed in another job or to be allowed to exercise bumping rights.
Moreover, the "local agreement" regarding bumping is not applicable here. First, if binding on the parties, it covers layoffs due to lack of work. The instant situation is not a layoff for that reason. Rather it was a removal from available and existing work because of inability. So it was not a diminution in the work force because of declining work. Second, there is some serious question as to whether the "local agreement" was mutually accepted by the parties. It has not been jointly executed, and the Company denies its effectiveness and enforceability.

The evidence on "practice" is inconclusive. In some cases, employees removed because of inability were placed in other jobs. But the Company explains that those jobs were "open" and that in this case there was no "open" job available for the grievant. The Union has not shown otherwise. In other cases, primarily removals for medical reasons, the employees involved were not placed in other positions. There is no persuasive evidence of any prior practice of according bumping rights to employees removed for inability. In short, I find no practice supportive of the Union's claim that the grievant's removal was discriminatory or "disparate" because he was not placed in another job or given bumping rights.

For the foregoing reasons the grievance is denied.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:
The removal of Luke White from the H-152 Mount Maintenance R-21 "A" classification on October 12, 1979 for inability, was appropriate under the circumstances.

Eric J. Schmertz
Arbitrator

DATED: November 11, 1980
STATE OF New York )
COUNTY OF New York )ss.:  

On this eleventh day of November, 1980 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:  
American Federation of Government  
Employees Local 1760, AFL-CIO:  
and:  
Department of Health, Education  
and Welfare; Office of Program  
Centers of the Social Security  
Administration:  

The stipulated issue is:  
Was the suspension of Vera Grayson for  
ten working days for just and sufficient  
cause and to promote the efficiency of  
the Service? If not what shall be the  
remedy?  

A hearing was held on July 22, 1980 at which time Ms.  
Grayson, hereinafter referred to as the "grievant", and repre-  
sentatives of the above named Union and Employer appeared. All  
concerned were afforded full opportunity to offer evidence and  
argument and to examine and cross-examine witnesses. The  
Arbitrator's Oath was waived. The Union filed a post-hearing  
brief; the Employer made an oral summation at the conclusion of  
the hearing.  

In a prior decision I held the grievance to be arbitrable.  
On the merits I find this to be a classic example of the  
proper application of "progressive discipline."  

The Employer claims that the grievant was absent without  
leave for the period of June 6th through July 27th, 1979, and  
more specifically so far as the ten day disciplinary suspension
and the instant arbitration are concerned, that contrary to instructions and a work rule the grievant failed to call in each day she was absent before 10 AM to notify her department that she would be absent, the reasons therefor, and to seek a leave.

The grievant claims she was not informed of any such rule or requirement; that at times she did call in or had a member of her family do so for her; or that she was so ill with "swollen glands" that she was unable to speak on the telephone. I reject these contentions. The record clearly shows that prior to her suspension she was repeatedly told orally, and then in writing, of the requirement that she call in before 10 AM on each day that she is absent. There is no doubt that she was told a sufficient number of times and in sufficient form of that requirement. I am also satisfied that the Employer's record keeping methods would have recorded calls which she made or which were made on her behalf. Supervision was under instructions to carefully note when she called and what was stated. A record of calls she made at other times and at later hours persuades me that the record keeping of the grievant's telephone calls to her department is complete and accurate, and I therefore must conclude that calls she says she made or which she says were made on her behalf but which are nowhere recorded, cannot be credited to her. In the absence of explicit supporting medical testimony, I cannot accept her testimony that her "swollen gland condition" made speaking on the telephone impossible.

I do not find the Employer's rule to be unreasonable. Therefore it is enforceable. The Employer has shown the work
disruptions that result from unexpected absence. In the case of employees like the grievant, who have had extended periods of absences due to illness, I do not find it illogical or unreasonable for the Employer to require a daily callin before 10 AM so that the work for that day may be planned and carried out in the employee's absence.

In short, the Employer's rule is reasonable; the grievant absented herself for an extended period without complying with the rule; she had been previously warned both verbally and in writing to comply with the rule; and her failure to do so thereafter warranted the imposition of the next step in the traditional progressive discipline process, namely that of a suspension. Though a lesser period of suspension may have been adequate in carrying out the purpose of progressive discipline, I do not find a ten working day suspension to be excessive.

The Union's contention that the Employer failed to comply with the 15 workday time limit of Article 27 Section c of the contract is also rejected. The pertinent part of that contract provision reads:

If the Program Service Center feels that disciplinary or adverse action is necessary, such action shall be initiated promptly, normally within 15 workdays after the offense has been committed or has been made known to the Program Service Center.

The grievant's period of absence ended July 27, 1979. She was formally suspended by notice dated August 27. However the foregoing time limit is the period in which the disciplinary action is to be initiated. The specific pertinent contract language is:
such action shall be **initiated** promptly, normally within fifteen workdays ... (emphasis added)

The Employer has met that time limit. Though not completed and formally imposed until August 27 the disciplinary action was **initiated** by no later than July 31, 1979 (four calendar days after the period of absence) by a letter of that date to the grievant from the Chief, Data Preparation Section informing her of the two charges against her and of the sixteen specifications within Charge I and the twelve specifications within Charge II. It further informed her that "it is proposed to suspend you from duty and pay for a period of ten work days ..." I consider that letter with its explicit particularization of the charges and specifications and the proposed penalty, as constituting the initiation of the disciplinary action within the meaning of the foregoing contract language.

For the foregoing reasons the disciplinary suspension is upheld.

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

The suspension of Vera Grayson for ten working days was for just and sufficient cause and was to promote the efficiency of the Service.

DATED: August 20, 1980
Eric J. Schmertz
Arbitrator

STATE OF New York )
COUNTY OF New York )

On this twentieth day of August, 1980 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

Local 348 Bakery, Confectionary and Tobacco Workers' International Union

and

ITT Continental Baking Company, Inc.

OPINION AND AWARD
Case #1130 1086 80

The stipulated issue is:

Was there just cause for the discharge of Richard Catarius? If not what shall be the remedy?

A hearing was held at the Boston, Massachusetts office of the American Arbitration Association on December 8, 1980 at which time Mr. Catarius, hereinafter referred to as the "grievant", and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

I accept as credible and accurate the testimony of Supervisor Shanks regarding when and how often the grievant was in the "break room." On that basis the grievant was not properly in that room from at least 11 AM to 11:20 AM on May 12th; and therefore overstay his authorized break time by that amount of time during that unauthorized period.

Standing alone of course, that offense is not grounds for the ultimate penalty of discharge. However the grievant had been previously warned about over extending break periods; had been
previously reprimanded for placing his jacket in a location
violative of company rules; and had received a 2½ days suspension
(as affirmed by an Arbitration Award) for using foul language
to a manager. The Company's letter to the grievant which accom-
panied notice of the suspension warned him that his involvement
in other incidents of misconduct or violations of Company policy
would result in his termination.

There are two instant questions. One is whether the May
12th extension of breaktime should trigger the grievant's dis-
charge. The other, which must be dealt with first, is whether
the last offense and any consequences therefrom were settled by
a verbal warning which on May 12th Supervisor Shanks imposed on
the grievant in the presence of the Union's Steward, and which,
according to the Union, was accepted by both the grievant and
the Union as the full extent of any disciplinary penalty.

I do not accept the Union's assertion that the penalty
which the Company may impose for the grievant's overall record
is limited to that verbal warning. I conclude that Shanks
penalized the grievant only for the May 12th incident, and in-
tended that the penalty be applicable only to that incident. He
did not consider (though he had the authority to do so) the
grievant's full disciplinary record, nor am I persuaded did he
intend to discipline the grievant for that total record. Under
that circumstance, I do not find that higher officials of the
Company were barred from increasing the penalty as they promptly
did, after learning of the events of May 12th. Indeed in my
experience it is not uncommon for a final incident ultimately
triggering a severe penalty to be first dealt with as a warning and thereafter further perfected when the affected employee's entire record is reviewed. The discussions between Shanks, the Steward and the grievant, were short, inconclusive and ambiguous. A statement following the imposition of the verbal warning that "that's it" can mean that that was the penalty for over-extending or taking an unauthorized break, but not the full or final disposition of the grievant's overall disciplinary record, just as much as contended by the Union, that it was dispositive of any and all action the Company might maintain against the grievant.

Hence, though I think Supervisor Shanks should have delayed imposing a penalty until he had conferred with personnel, or should have expressly conditioned the verbal warning on the possibility of further and more severe discipline, I am not prepared to hold that the verbal warning on May 12th, estopped the Company from increasing the penalty two days later.

The foregoing notwithstanding, I conclude that the penalty of discharge was too severe. Though the grievant was warned when he was suspended for 2½ days in November, 1979 that further offenses would result in his discharge, the arbitrator in reviewing and upholding that suspension did not find the grievant guilty of all the charges, and did not incorporate the final warning in his decision. Additionally, the grievant was employed by the Company for sixteen years. With the exception of the "foul-language" offense which led to the 2½ days suspension, his other relevant disciplinary penalties were for offenses that cannot be deemed very serious. Under those circumstances I
consider it proper and appropriate that he suffer an extended suspension to impress upon him the unsatisfactory nature of his conduct and cumulative record and to give him one final chance to achieve and maintain a satisfactory work record. I am not persuaded that the short 2½ days suspension served that warning and rehabilitative purpose within the meaning of the traditional "progressive discipline" process. Therefore, as a final chance, I shall reduce the grievant's penalty of discharge to a disciplinary suspension.

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

The discharge of Richard Catarius is reduced to a suspension. He shall be reinstated without back pay and the period of time between his discharge and reinstatement shall be deemed a disciplinary suspension for his overall relevant record. He is warned that this is his last chance and that further misconduct or violations of Company rules or policies would, in the opinion of this Arbitrator, be the grounds for his discharge.

Eric J. Schmertz
Arbitrator

DATED: December 11, 1980
STATE OF New York )
COUNTY OF New York )

On this 11th day of December, 1980, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with Article VII of the collective bargaining agreement dated July 20, 1976 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Is the Company's action in having a Waldbaums supermarket at Co-Op City, the Bronx, served by Route 533 prior to March 1978, and thereafter served by Route 512, improper? If so, what shall be the remedy?

Hearings were held at the New York City office of the American Arbitration Association on January 8, May 23, May 31, October 8, and October 11, 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 taken. A stenographic record of the hearing was taken.

BACKGROUND

The Company is engaged in the sale and delivery of bread and cake products through a route delivery system. The instant case concerns the bread portion of the Company's operation which is operated as a distinct entity. The bread division encompasses
the geographical area of Long Island (Suffolk, Nassau, Queens and Brooklyn), Manhattan, the Bronx and Westchester Counties and is serviced from nine (9) depots that are divided into approximately 257 routes that contain between 10,000 and 15,000 stops. The Union represents the sales-drivers who pick up the products at the depots, transport the products in step vans to the various stops on a particular route, deliver the products to the stops, and set up the products on shelves or displays for sale to the public. Each driver is assigned to a particular route and receives a base salary that was $150 per week at the time of the grievance as well as a commission of 8½% of the sales. Routes are assigned to a particular driver on the basis of a bidding system in which a route opening is posted for 72 hours and the senior employee who bids receives the route. At the time of bidding, the Company posts the route number, the location, the number of stops, the departure time, and the amount of business on the route.

For many years the Company belonged to the New York City Bakery Employers Labor Council that represented the Company, the American Bakeries Company, and Drake Bakeries, Division of Borden Foods for the purpose, inter alia, of negotiating a collective bargaining agreement with the Union. The Council disbanded on October 7, 1978. The parties stipulated that the bargaining unit employees are covered by 1) a basic collective bargaining agreement entered into by the now defunct Employer Council and the Union dated July 20, 1976 and received in
evidence as Joint Exhibit 1(a); and 2) a Memorandum of Agreement entered into by the Company and the Union dated November 2, 1978 and received in evidence as Joint Exhibit 1(b).

The present grievance arose out of the Elmsford Depot which is the point of origin for 23 routes. Prior to March 1978 Route 533 serviced a stop in Co-Op City, the Bronx, which had been a Key Food Supermarket and subsequently became a Waldbaums Supermarket, hereinafter referred to as the Key Food-Waldbaums. Route 533 had been the highest volume route in the geographical area serviced by the Elmsford Depot. The route went up for bidding in March 1978 due to the retirement of the incumbent driver. However, prior to the bidding the Company deleted the Key Food-Waldbaums stop from Route 533. The grievance complains of the assignment of that stop to Route 512 rather than to Route 529, (which is geographically contiguous). The right of the Company to sever the Key Food-Waldbaums stop from Route 533 is not disputed.

PERTINENT CONTRACT CLAUSES

The following clauses in the collective bargaining agreement are applicable to this case:

Article XXIV-Miscellaneous

(c) No route shall be eliminated by the Employer without 30 days prior written notice to the Union of its intention to do so.

Schedule "A" Section 2-Wage Rates

(a) 7. (B)... Each salesman shall receive full commission on all goods delivered on his route...

(D) A salesman whose route is split shall be guaranteed the full amount of the difference
in commission caused by the cut for a period of eleven (11) weeks thereafter; and for the succeeding period of the next nine (9) weeks, the amount of this special compensation paid to him shall be reduced ten percent (10%) each week.

CONTENTIONS OF THE UNION

The Union contends that the present grievance involves the integrity of the route system. Thus the Union argues that each driver services all stores on the route and this aspect of the employment relationship is synonymous with servicing all stores within an area or boundary that is coterminous with the route.

The Union admits that not every single contingency is provided for in the collective bargaining agreement in effect between the parties; however, the Union maintains that relations, dealings, understandings, and practices develop over a period of years and rise to the level of practices that have become part of the contract. The Union asserts that when the Company intends to split off or dissect a portion of a route that is assigned to a particular driver, the integrity of the route system requires that resultant route boundaries may not be breached. To do this, in the Union's view, the Company has two options: 1) the territory can be reassigned to the next adjoining route; or 2) the territory can be reassigned to a newly established route. If the first alternative is selected, the route that is immediately adjacent to the original route must receive the severed portion of the original route. In that manner the resulting route boundaries will be secure and will not be breached by an intrusion from a
third route.

The Union's position is rooted to the system of compensation that has developed in the industry. Since a significant part of each driver's income is derived from commissions, a crucial fact is that the Company is obligated to pay each salesman full commission on all goods delivered on his route in accordance with Schedule "A" Section 2-(A) 7. (B) of the collective bargaining agreement. The Union, therefore, claims that not only is each stop that a driver services part of his route but the territory itself that conforms to the route is also part of the route. In support of this contention, the Union points to the practice of assigning the driver whose route encompasses a Thrift Store the commissions for the sale of fresh bread in that store. Similarly, the Union stresses that if a customer goes directly to a depot in order to purchase bread, the driver encompassing the location of the customer will receive the commission. In the Union's view, this practice conforms to the tramp route policy whereby seasonal deliveries to camps or restaurants or picnics result in commissions being paid to the driver whose permanent route encompasses the tramp route delivery.

In light of these various practices, the Union argues that the Company's action that give rise to this grievance will destroy the integrity of the route system. The Union argues that the Company's action requires the driver of Route 512 to cut through the territory of Route 529 in order to service the Key Food-Waldbaums. This action violates a basic premise of the Union's
conception of the route system, namely, that no driver is to cut through or into another driver's territory to service a stop, or put another way, no stop is to be assigned when to service it requires that or those encroachments. The Union asserts that such intermingling of routes will play havoc with the compensation system that is used in the industry and threaten the job security of the drivers. As an example, the Union states that for punitive or discriminatory reasons the Company could assign a stop to a driver that is twenty (20) miles away from the heart of that driver's route thereby causing him operational and financial difficulties. Also, the Company could transfer a lucrative stop from within a particular driver's territory thereby depriving him of a normal source of income. In contrast, secure, clear, and undisputed boundaries enable a drive to build up an area, obtain new accounts, and increase the volume of sales within the route so that the Company will receive larger receipts and the driver will receive more commissions. Furthermore, unclear boundaries will result in many disputes among the drivers concerning who is entitled to service newly acquired stops.

The Union presented a number of witnesses in support of its position. The first witness, Jack Scherer, served as President of the Union until he retired. Scherer testified that management consulted with the Union prior to splitting routes and that the parties worked out mutually acceptable arrangements. As an example, Scherer mentioned a route elimination in the Bay Ridge-
Fort Hamilton section of Brooklyn that involved a redistribution that affected 5 or 6 different routes. However, he stated, though many routes are affected causing a "chain reaction" the boundary concept for routes is preserved. He explained that to accomplish this preservation of boundaries, all reassignments are limited to perimeter stops rather than interior or center stops within a route and that reassignment of perimeter stops were to other routes contiguous thereto. Scherer also indicated that the Company recognized this approach and in fact possessed maps in the various depots that visually identified the stops on a route. He also mentioned that there were not any geographic areas within the Company's jurisdiction that were not assigned to a particular route. The witness testified that from time to time the parties agreed to make adjustments so that the earnings of the drivers would be equitable.

The current President of the Union, Richard Volpe, then testified. He stressed the fact that the New England Thruway forms a natural boundary near the Co-Op City area and that this limited the access to the Key Food-Waldbaums and had to be considered in drawing the route boundaries. Volpe stated that the Company could have realigned the routes by shifting the perimeter stops but not by assigning the Key Food-Waldbaums to Route 512 since Route 529 was closer from a geographical standpoint. The witness recalled that the integration of fourteen (14) former Silvercup employees into the Company's operation at
first involved paying the permanent employees commissions for all sales within their route. Lastly, Volpe raised the possibility that in the future interior stops could be plucked by the Company for time purposes if the present grievance is denied.

Eric Nitschke, a shop steward from Suffolk County, testified next. His testimony included references to Union Exhibit 3 which was a map of Nassau and Suffolk Counties that contained a description of the various routes in that area as prepared by the Union on the basis of information provided by the affected employees. Nitschke related that the men understood that the boundaries are to be respected and when the Company starts interfering with them in terms of readjustments then this will interfere with the rights that the employees have and will lead to chaos. The witness cited the one exception to the sacredness of the route boundaries as being the dislocated stop or persona non grata situation in which there is a personality conflict or some other problem between a particular driver and a store manager. In this situation the Union and the Company permit another driver to enter the original driver's territory in order to service the stop.

Walter Busching, a shop steward in Jamaica, then testified. He acknowledged that splits are frequent but that dislocations do not occur and that there had not been a situation similar to the Key Food-Waldbaums reassignment in the 27 years that he had worked for the Company. He mentioned that in addition to the
persona non grata situation, one driver might cross the boundary of another driver if there was a fire or if a supermarket stop was lost and as a result a driver was experiencing a financial hardship. In such a case if an adjacent route had an overload, the Union and the Company would arrange to help out the driver. With respect to the persona non grata exception, the driver who made the actual delivery received the commission.

The Union then called Alfonso Santos, Jr., who had filed the grievance over the assignment of the Key Food-Waldbaums to Route 512 rather than Route 529 which he had worked at the time. After presenting some written exhibits, Santos described the events surrounding the split. Santos related that his supervisor, Jerry Kaiser, at first had indicated that Santos would get the stop. Thereafter, Santos learned that Route 512 had received the stop. Santos subsequently found out that the Company believed he could not service the stop at the proper time. Santos, however, indicated he could properly service the Key Food-Waldbaums in addition to his four other supermarkets and that he finishes the four stops before the driver of Route 512 even reaches the Key Food-Waldbaums.

With respect to the time schedule of deliveries for the key stops, Santos testified on cross-examination that he adhered to the following schedule:

<table>
<thead>
<tr>
<th>stop number</th>
<th>place</th>
<th>arrive</th>
<th>depart</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Imperial</td>
<td>5:30 or 5:40</td>
<td>6:00 or 6:10</td>
</tr>
<tr>
<td></td>
<td>(three small stops)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Daitch #10</td>
<td>7:00 or 7:30*</td>
<td>7:30 or 8:00</td>
</tr>
<tr>
<td>3</td>
<td>Hills (now Daitch)</td>
<td>7:30 or 8:00</td>
<td>8:00 or 8:30</td>
</tr>
<tr>
<td>4</td>
<td>Grand Union</td>
<td>8:30 or 9:00</td>
<td>8:45 or 9:15**</td>
</tr>
</tbody>
</table>
Santos indicated that he services two additional Daitch stores but that they were not large accounts on his route and the time requirement was very flexible. The witness reiterated that the Company did not provide him with an opportunity to demonstrate that he could in fact properly service the stop by granting him a trial period. He further testified that after Route 512 received the Key Food-Waldbaums stop he did receive five (5) of the stops previously assigned to Route 512 which he covered at the end of his delivery day.

The Union then called Anthony Catenaro, a business agent from Local 194 in New Jersey. The witness testified that his Local negotiates jointly with Local 550. Catenaro stated that there has been no comparable situation in New Jersey. He discussed the tramp routes in New Jersey and concluded with the fact that the geographical boundary is the key.

The Union called Jerome Gibbs as its final witness. Gibbs had belonged to the Union for 40 years and served as a Union officer for 20 years as well as a member of the Executive Board for 35 years. He stated that he had never encountered a similar case. He acknowledged the fact that the Key Food-Waldbaums was a key stop and that all the supermarkets prefer early service. He stressed that the Company and the Union had always sat down in the past, discussed the situation, and if a realignment had to be made the closest route received the stop and the contractual compensation was paid to the original route. Gibbs also confirmed
the persona non grata situation and testified that the parties always worked things out on the occasions when such a situation arose. At no time would the Union have accepted one driver crossing over the route of another driver according to Gibbs.

CONTENIONS OF THE COMPANY

The Company claims that it has always considered three factors when it assigns stops to routes: 1) the geographical location of the stop; 2) the time and service requirements of the stop; and 3) the volume of sales of the driver. Since there are between 10,000 and 15,000 different stops, it is impossible for the Company to discuss each assignment with the Union. Accordingly, the Company asserts that it has a long history of unilaterally determining and assigning stops. In particular, the Company emphasizes its expertise in running this aspect of the business enterprise while at the same time highlighting the fact that the Union is not in the boundary-drawing business. In reaching the final decision of where to assign a particular stop, the Company initially is guided by the location of the stop. The Company then analyzes any special service requirements that may exist. Of special importance to the Company is the high priority that it attaches to high volume accounts which are chiefly the supermarkets and supermarket chains. In this regard the Company strives to furnish early deliveries to the key accounts in order to maintain a strong relationship with each key account and also to maximize the market exposure of the Company's product. In contrast, the Company is less insistent upon assign-
ing the smaller stops and therefore will normally follow the wishes of the drivers. Finally, the Company is mindful of the distribution of sales to the various routes and thus in certain circumstances will consider whether a route is particularly high or low in terms of its total sales.

The Company's case is also based upon its reasoning that since the parties agree that the Company possesses the right to split a route, the concomitant right to assign stops must also be possessed by the Company. The Company views the evidence presented by the Union as failing to satisfy the Union's burden to establish a specific practice concerning the integrity of the boundaries, which the Company does not concede exist. The Company argues that its preeminent interest in controlling and directing how routes are structured could be defeated only if the Union established discrimination by the Company in making an assignment. In the absence of such a situation, the Company relies upon its right to run the business as the authority for its position since there is no contractual provision that qualifies this inherent managerial right.

The Company presented several witnesses in support of its position. Charles Moscati, one of the two Sales Managers for bread in the Metropolitan area, stated that of utmost importance to the Company is the goal of maximizing the volume at each stop. Moscati denied that the Union officials are involved in assignment decisions but did acknowledge that representatives of the Company listen to complaints and suggestions from the drivers
and brief the stop steward about changes that would be happening. Notwithstanding this degree of involvement, Moscati underscored the fact that the actual decision is made exclusively by the Company. During two appearances before the Arbitrator, the witness discussed a number of stops that were assigned for reasons other than location:

<table>
<thead>
<tr>
<th>stop</th>
<th>nearest rte</th>
<th>assigned rte</th>
<th>reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hartsdale Pathmark</td>
<td>14</td>
<td>26</td>
<td>service</td>
</tr>
<tr>
<td>Westchester Avenue</td>
<td>47 (57)</td>
<td>46</td>
<td>service</td>
</tr>
<tr>
<td>Royal Farms</td>
<td>51</td>
<td>61</td>
<td>service</td>
</tr>
<tr>
<td>Durso Key Food</td>
<td>51</td>
<td>53</td>
<td>service</td>
</tr>
<tr>
<td>E &amp; B Supermarket</td>
<td>41</td>
<td>21</td>
<td>persona</td>
</tr>
<tr>
<td>Third Avenue</td>
<td>51</td>
<td>53</td>
<td>service</td>
</tr>
<tr>
<td>E.L. Grant Highway (two stops)</td>
<td>41</td>
<td>21</td>
<td>non grata</td>
</tr>
<tr>
<td>Broadway, Manhattan</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waldbaums &amp; First</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>National Store</td>
<td>58</td>
<td>55</td>
<td>unknown</td>
</tr>
<tr>
<td>125th Street, Manhattan</td>
<td>33(34)</td>
<td>?</td>
<td>unknown</td>
</tr>
<tr>
<td>Harlem Coop</td>
<td>13</td>
<td>11</td>
<td>service</td>
</tr>
<tr>
<td>Bruckner Boulevard</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pathmark</td>
<td>62</td>
<td>69</td>
<td>unknown</td>
</tr>
</tbody>
</table>

During the course of this testimony, Moscati stressed that certain stops require service during a specified time period which in some cases may involve service before the store opens to the public. In addition, the Company tries to service the key stops before the public is allowed to enter so that maximum sales may be obtained. The witness conceded, however, that he did not know of any stop located right in the middle of another route except in the persona non grata situation.

The Company then called as a witness Jack Nemchin, the Ozone Park Branch Manager. Nemchin indicated that stops are reassigned to create routes, build routes, eliminate routes, and to promote
business. The standards for assignments involve geography, time, and volume. The witness then mentioned a number of stops that were assigned for reasons other than location:

<table>
<thead>
<tr>
<th>stop</th>
<th>nearest rte</th>
<th>assigned rte</th>
<th>reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sloan's FDR Drive</td>
<td>422</td>
<td>425</td>
<td>service</td>
</tr>
<tr>
<td>Grandview Dairy</td>
<td>162?</td>
<td>4</td>
<td>persona non grata</td>
</tr>
<tr>
<td>Waldbaums</td>
<td>162</td>
<td>20</td>
<td>service</td>
</tr>
<tr>
<td>Waldbaums Starrett City</td>
<td>99</td>
<td>88</td>
<td>volume</td>
</tr>
</tbody>
</table>

With respect to this testimony, the witness indicated that many stops that originate from the Ozone Park Depot are placed on routes that result in drivers crisscrossing each other on a somewhat regular basis. The witness discussed this contention in conjunction with Company Exhibits 3a, 3b, 3c, 3d, and 3e which the Company argues provide visual evidence of the intermingling of routes.

Jerry Kaiser, the Lead Sales Supervisor at the Elmsford Depot, testified next. After receiving Company Exhibits 4(a) and 4(b), Kaiser discussed the Key Food-Waldbaums stop at Co-Op City. He indicated that Route 533, the route that had previously serviced the stop, was the highest volume route in the depot prior to the split and had some key stops that were not being serviced until the late morning; whereas, Route 512 only had two key stops. The earlier stop on Route 512 could not be serviced until approximately 8:00 a.m. thereby enabling Route 512 to service the Key Food-Waldbaums at 7:30 a.m. In contrast, Kaiser pointed out that Route 529 had six key stops that Santos covered in the following manner:
<table>
<thead>
<tr>
<th>stop number</th>
<th>place</th>
<th>arrive</th>
<th>depart</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Imperial</td>
<td>6:30</td>
<td>blank</td>
</tr>
<tr>
<td>2</td>
<td>Daitch #10</td>
<td>7:30</td>
<td>8:15</td>
</tr>
<tr>
<td>3</td>
<td>Hills</td>
<td>8:30</td>
<td>9:15</td>
</tr>
<tr>
<td>4</td>
<td>Grand Union</td>
<td>9:30</td>
<td>10:00</td>
</tr>
<tr>
<td>5</td>
<td>Daitch</td>
<td>10:00</td>
<td>10:20</td>
</tr>
<tr>
<td>6</td>
<td>Daitch #2</td>
<td>11:00</td>
<td>11:30</td>
</tr>
</tbody>
</table>

Based upon this schedule, Kaiser concluded that adding the Key Food-Waldbaums stop to Route 529 would not be consistent with the Company's interests. Kaiser admitted that Santos sometimes gained access to the Imperial stop earlier than 6:30 a.m., however, Kaiser could not rely upon that kind of situation to set up a route structure. Kaiser also testified that Route 529 and Route 512 transacted weekly sales within $50 of each other. The witness elaborated on the time problem by explaining that Route 529 would not service the last key account-stop 6, Daitch #2—until the early afternoon if the Key Food-Waldbaums stop were added to the route. He further stated that it takes approximately one (1) hour to service the Co-Op City stop.

Kaiser also testified that he knew that Route 512 would cross over Route 529 on the way to servicing Co-Op City.

**Opinion**

Initially, it is well settled that an employer is entitled to flexibility in designing its business operation. Whether this discretion is characterized as the entrepreneurial control of the business, business considerations or managerial prerogatives, it constitutes the basic authority of the employer limited only by the express provisions of the collective bargaining agreement or by an established practice, or other arrangement.
In the instant case there is no express contract restriction on the Company's right to determine stop assignments. The question therefore narrows to whether a practice or any other determinative arrangement obtains, that makes the Company's unilateral action improper.

The Union presented several witnesses who served in the Union for many years. Messrs. Scherer and Gibbs indicated that the Company and the Union had frequently discussed assignments. I cannot conclude by following a sensible and mature policy of consulting with the Union or by considering the views, suggestions, or complaints of the Union and the drivers that the Company had compromised or waived its ultimate right to make the final decision.

A significant portion of the testimony focused upon previous instances in which route assignments involved considerations other than geography. The dislocated stops (persona non grata stops) establish that the parties permitted a driver who a store manager would not allow to service the store to be replaced by another driver who would not otherwise service that area. The provision for the commissions to be paid to the permanent drivers during the phasing in of the former Silvercup drivers illustrated the balance that was achieved between the commission system and the business goals of the Company. The information provided by Charles Moscati established that the Company assigned certain stops for reasons other than geography. The service requirement factor became the primary consideration in making those assign-
ments. Although the witness conceded on cross-examination that some of the stops could be considered as perimeter stops, this fact does not in and of itself vitiate the existence of and reliance on the time and service variable as a consideration in determining assignments.

The testimony provided by Jack Nemchin confirmed the Company practice of retaining the discretion to place stops within routes based upon time and service requirements. Although some of the specific stops mentioned could be viewed as solely perimeter stops, the significant testimony concerned the Ozone Park Depot stops which involved an intermingling of routes. I am satisfied that the information contained in Company Exhibits 3a, 3b, 3c, 3d, and 3e establishes a practice of assigning stops for reasons other than geography. It, together with other persuasive evidence rebuts the Union's claim that route boundaries are inviolately maintained and respected as an unvaried practice.

Nevertheless, the Union has a legitimate economic concern with respect to stop assignments. Schedule "A" Section 2(A) 7. (B) states in pertinent part that: "Each salesman shall receive full commission on all goods delivered on his route." To my mind this means that a driver's compensation and the stops to which he is assigned are interdependent, and that as the location from which a driver's commission is derived a route is more than a series of stops, but of necessity has territorial aspects. But this does not mean that a route has firm, permanent and immutable boundaries.
The trouble with the Union's case in this proceeding is that it argues for the maintenance of defined route boundaries, yet admits that the Company has a managerial right to change stop assignments and to alter the scope of a driver's territory. It recognizes that there is no applicable contract restriction, but contends that because the vast percentage of stop assignments have been determined by geography, a practice of geographic pre-eminence has been cast. Yet, the latter assertion cuts both ways. That the Company has only infrequently assigned stops for reasons other than geography can mean that in most situations two factors which the Company says it considers in making assignments, coincided with the geography. And that only at times, perhaps infrequently, as in the instant case, when other factors, such as time, service, etc. are more compelling and run counter to geography, does it exercise its managerial right differently. In short, that most assignments appear to have been based on geography does not mean as the Union appears to argue, that geography is the principal, preeminent or exclusive determining factor. On that basis, and I so find, the quantity of assignments apparently consistent with the Union's geographic theory does not constitute a practice barring the Company from using other legitimate factors to make a different decision.

What remains therefore is whether, in the instant case, the Company considered these other legitimate factors and whether they were properly applicable to the decision to assign the Co-Op City stop to Route 512.
Santos testified that he believed he could have serviced the disputed stop properly whereas Kaiser concluded that timely service could not be effectuated by Santos. Although Santos was of the view that he only had four (4) key stops, I accept the Company's assertion that two (2) Daitch stops are properly classified as key stops because the stores are part of a large supermarket chain with which the Company transacts a large volume of business. An appraisal of Route 259's ability to absorb the additional assignment of the Key Food-Waldbaums stop must be viewed in conjunction with its six (6) original stops. Although Santos credibly testified that he is able to gain access to his first stop, Imperial, at either 5:30 or 5:40 a.m., this early opening appears to be tied directly to an Imperial store employee who happens to arrive at that early hour. I find the Company's reluctance to base an entire, permanent route alignment on this one uncertain and potentially impermanent circumstance, to be reasonable. Therefore, as I see it, the Company reasonably forecasted the time schedule of Santos on Route 529 and had a legitimate basis for concluding that the six (6) original key stops coupled with a seventh (7) Key Food-Waldbaums key stop could not be serviced with the desired efficiency. I conclude therefore, that the Company had a reasonable basis for assigning the Key Food-Waldbaums stop to the next adjacent route (#512). This finding is reinforced by the fact that to compensate for that decision, the Company reassigned five (5) small stops from Route 512 to Route 529 that could be serviced at the end of
Route 529's route. It did so, I am persuaded to insure the adequacy of Route 529 and thereby to protect the letter and spirit of the commission arrangement mandated by the collective bargaining agreement.

I do not find the cases cited by the parties to be controlling. First, the instant case is not a commission case as some of the cited cases were. Second, my authority is limited to the interpretation and application of the current contract to this Company and not the contract of another company. Finally, the other cases cited are factually different from what is before me, and hence are of indeterminative value.

The Union has not sustained its burden to demonstrate that a practice existed that barred the Company from assigning the Co-Op City stop to Route 512. The grievance is, therefore, denied.

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's action in having a Waldbaums supermarket at Co-Op City, The Bronx, served by Route 533 prior to March 1978, and thereafter served by Route 512, was not improper.

DATED: February 29, 1980
STATE OF New York  )s.s.: Eric J. Schmertz
COUNTY OF New York )  Arbitrator

On this twenty-ninth day of February, 1980 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 Amalgamated Local Union 355 and Island Transportation Corporation:

The stipulated issue is:

Whether the Employer has violated the collective bargaining agreement by discharging Maurizio Lopiccolo without proper cause. In any event what shall the remedy be?

Hearings were held on July 15 and 17, 1980 in Jericho, New York at which time Mr. Lopiccolo, hereinafter referred to as the "grievant" and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Cumulatively, the grievant's disciplinary record, including the accident with his truck on June 19, 1980, would warrant his discharge provided he had been progressively disciplined adequately and effectively.

I find that the grievant's accident on June 19, 1980 was "chargeable"; that he drove at too rapid a speed in a construction zone and probably was too close to the truck ahead of him to stop when that vehicle stopped abruptly. I do not accept his claim that the brakes on his truck were "long" or delayed in taking hold. The other violations for which the grievant was warned or discipline over his approximately two and one-half years of service are not challengeable in this proceeding, inasmuch as they were not grieved when originally imposed.
As the Employer has recognized in citing the grievant's entire record as grounds for his dismissal, none of his offenses, standing alone, is grounds for summary dismissal. Hence, in order to uphold the Employer in this case, the grievant's cumulative record must have been subjected to the well established principle of "progressive discipline", culminating finally in discharge only after the imposition of lesser penalties of warnings and suspension. In this regard the Employer's case fails. The grievant was disciplined for prior accidents, for administrative negligence and for excessive tardiness. In November of 1979 and in April, 1980 his letters of discipline included notices of suspensions of three days and one day respectively. It is undisputed and stipulated however that those two periods of suspensions were never implemented and the grievant did not serve the time off. Additionally, the Employer is unable to show that a suspension scheduled for the grievant in April of 1979 was ever implemented, and I therefore conclude that like the aforementioned "suspensions" this latter referred to suspension was not carried out either. I do not consider another circumstance when the grievant reported late to work and was not permitted to work that day, to meet the test of a disciplinary suspension within the meaning of a "progressive discipline" formula. Hence, though the grievant's disciplinary record includes verbal and written warnings, he was not suspended, and therefore the step generally viewed as the condition precedent to discharge was never taken.

The purpose of progressive discipline is well established.
It is to demonstrate to an offending employee that his violations are serious and will not be tolerated by the employer if continued; to give him an opportunity to correct his errors; and to impress upon him the need to improve his record by not only warning him of his violations but by depriving him of pay by at least one suspension. The absence of a suspension, with attendant loss of pay, substantially reduces the desired impact on the employee. By failing to carry out the suspensions here the Employer neglected to take the step especially designed to impart to the grievant, the seriousness with which his work violations were viewed. A necessary and requisite step in the progressive discipline sequence was omitted, and with that omission the Employer has waived its right to rely upon "suspensions" in support of the penalty of discharge in this case.

Under the foregoing circumstances, the discipline which should be imposed on the grievant is the suspension which should have been but was not previously implemented. Until that is done his disciplinary record is not ripe for dismissal. I shall direct his reinstatement without back pay, with the period of time between his discharge and reinstatement deemed a disciplinary suspension for his overall record. The grievant should recognize that in the opinion of this Arbitrator, a failure to maintain a satisfactory work record in the future would, together with his prior disciplinary record, constitute just cause for his discharge.
The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

For failure to adequately and effectively apply "progressive discipline" the discharge of Maurizio Lopiccolo was without proper cause. His discharge is reduced to disciplinary suspension. He shall be reinstated without back pay except for the one month suspension.

Eric J. Schmertz
Arbitrator

DATED: July 21, 1980
STATE OF New York )ss.: COUNTY OF New York )

On this twenty first day of July, 1980, 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
International Ladies' Garment
Workers' Union
and
Jonathan Logan, Inc.
Butte Knitting Mills
Transportation Division

The stipulated issue is:

Did the Employer violate Article 14 of Transportation Supplemental Agreement by refusing to pay to Gary Dycus and Arnold Hughes for eight hours on March 3, 1979 and James Brown and Fate Calvert for seven and one-half hours on February 7, 1979?

Hearings were held in Spartanburg, South Carolina and New York City on May 13 and June 16, 1980 respectively, at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

Article 14 of the Transportation Supplemental Agreement reads:

14. Breakdown - Overloads

Drivers shall be paid at their hourly rates for the first eight (8) hours and any additional time required to stay with the unit for time lost due to breakdown, impassable highways, overloads, certificate violations, or other delays beyond the control of the driver.

Also pertinent is Article 16 of that Agreement which reads:

16. Layover.

(a) If relieved of duty, both drivers shall be paid at the hourly rate after the
fifteenth (15th) hour of layover or evident delay. It is intended thereby to insure at least eight (8) hours of pay in any twenty-four (24) hour period for a driver who is on the road or away from home.

(b) The Employer shall provide adequate motel or hotel sleeping quarters to a driver who is relieved of duty for more than eight (8) hours. This provision shall not be applied arbitrarily or consistently used to the discomfort or deliberate delay of drivers or inconsistently with the above provisions. Any such arbitrary or inconsistent application or use shall be a proper subject for the grievance procedure.

Grievance of Dycus and Hughes

The grievants are truck drivers. On route driving south to Spartanburg in the regular performance of their duties, they ran into snow and ice which they judged made the highway impassable. They stopped at a truck stop in Bracey, Virginia at about 1:30 AM on March 3, 1978 and stayed there until about 9:30 AM when they resumed their trip to Spartanburg. The Company denied them pay for that eight hour period because they failed to call-in to the Spartanburg office or to a responsible Company official, in violation of a rule requiring drivers stuck on the road for more than a couple of hours to call-in to the Company's office, whether it be day or night.

It is conceded that the initial decision to stop or to continue driving in circumstances of severe inclement weather, rests with the drivers. In the instant case, though the Company suggests that the highway may not have been "impassable" inasmuch as the grievants were driving south and other driving teams heading north were able to continue moving over the same stretch of road, there
is no probative evidence to dispute both the contention and the evidence regarding the heavy snow storm in the area at that time. Accordingly I accept as factual the Union's contention and the decision of the grievants' that the highway was unsafe and "impassable" within the meaning of Article 14 of the Agreement.

The Company has the right to promulgate reasonable rules requiring drivers to call in when they are stuck or delayed en route. The rule which the Company refers to herein is clearly reasonable. When drivers are delayed due to weather, breakdowns or otherwise for an extended period of time, the Company is entitled to know where they are and the conditions which have interrupted their traveling so that it can consider the available options and give instructions. However, in the instant case I am not at all persuaded that the Company effectively promulgated, disseminated or implemented any such rule. It is undisputed that if the drivers were told of that rule, it was done verbally. Though it is obviously an important rule it is not in writing. Moreover and significantly, the evidence persuades me that whether the drivers knew of it or not, some followed it and some did not as a matter of practice, and that either way the Company did not withhold pay.

Therefore, under the particular circumstances of this case, and because I find that the Company did not effectively legislate and uniformly enforce the rule and because there is no real contest over the "impassable" conditions of the highway during the relevant time the grievance is granted and the Company shall pay Dycus and
Hughes for the eight hours involved.

**Grievance of Brown and Calvert**

The grievants in this matter while en route south from North Bergen, New Jersey to Spartanburg ran into a snow storm at about 2 AM on February 7, 1979. They pulled into a Holiday Inn in Henderson, North Carolina and called the Company's dispatcher at about 2:30 AM. When the dispatcher was told that the grievants did not believe that they could continue driving, he instructed them to check into a motel and to callback between 9 and 10 AM for further instructions. The grievants parked their truck and checked into the Holiday Inn and went to sleep. After calling-in as instructed later that morning they resumed driving south at about 10 AM.

The Company has denied the grievants pay for the seven and one-half hours between 2:30 AM and 10 AM. It asserts that in accordance with Article 16 of the Agreement they were on "layover" status, having been "relieved of duty." The Union contends that based on the history of negotiations and the language of paragraph (b) of Article 16 namely that

"This provision shall not be applied arbitrarily ... or inconsistently with the above provisions ...",

it was intended to apply only to layovers at the terminal points of a trip (i.e. at terminal depots, Company headquarters, etc.) and not to unexpected delays encountered en route. It argues that Article 14 is applicable to the facts in this grievance, that for the Company to be permitted to utilize Article 16 would
be an application of that Article "inconsistent" with an "above provisions", namely the provisions of Article 14; and that any such use of Article 16 would nullify the rights of the employees under Article 14.

It is my conclusion that under the facts of this grievance Article 16 is applicable and that the grievants were placed on "layover" status and "relieved of duty" in accordance therewith. Article 16 is not ambiguous. Hence, traditionally its "legislative" history and past practice are not relevant. It sets forth how drivers will be paid "if relieved of duty." There are no conditions on when a driver will be relieved of duty. Had it been intended to apply solely to the terminal points of routes it could and should have said so. It is significantly distinguished from Article 14 by the fact, inter alia that drivers "relieved of duty" for more than eight hours are entitled to motel or hotel sleeping quarters. The grievants in this case were instructed to check into the Holiday Inn and did so. I consider that arrangement markedly different from where drivers, under Article 14, are "required to stay with the unit for the time lost ..." Clearly a driver is much more discomforted by the requirement that he stay with his truck (presumably either in the truck or at a truck stop) then when he is asleep in a motel. Moreover, I think the grievants recognized they had been relieved of duty when on their trip report they originally wrote that they "went off duty at Henderson, North Carolina, at 2 AM; went back on duty at 10:30 AM due to icy roads."
Finally, resorting to practice, though as I have stated an un-
ambiguous contract clause stands as written, there are a suffi-
cient examples offered by the Company showing the application and
utilization of Article 16 to interruptions en route, to place in
doubt the Union's assertion that Article 16 was intended by the
parties to be applicable only to layovers at terminal points of
routes.

I am mindful of and do not disagree with the Union's asser-
tion that under certain speculative circumstances the Company
might be able to try to use Article 16 to nullify the benefits
of Article 14. The hypothetical examples given by the Union in
its brief would in many respects be an application of Article 16
which would be inconsistent with Article 14 or which would
effectively nullify Article 14. I do not find the instant
grievance to be comparable to those examples. Rather I think
that the grievants, faced with an impassable highway and unsafe
driving conditions, were placed on layover status and accepted
that status when, after calling in, they parked and left their
truck and went to sleep for about seven and one-half hours in the
Holiday Inn. Under different circumstances and where as Impartial
Chairman I am persuaded that the Company is attempting to use
Article 16 to diminish or nullify the benefits of Article 14, I
will not hesitate to enjoin the Company from doing so.

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 Employer violated Article 14 of the Transportation Supplemental Agreement by refusing to pay Gary Dycus and Arnold Hughes for eight hours on March 3, 1979. The Company shall pay them for that time.

The Employer did not violate Article 14 of the Transportation Supplemental Agreement by refusing to pay James Brown and Fate Calvert for seven and one-half hours on February 7, 1979.

DATED: August 22, 1980
STATE OF New York )
COUNTY OF New York )

On this twenty-second day of August, 1980, 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

International Ladies' Garment
Workers Union

and

Jonathan Logan, Inc.
(Tracy Fashions)

The stipulated issue is:

Whether the Company's change of the regular schedule of working hours violated the contract? If so what shall be the remedy?

A hearing was held in Baltimore, Maryland on March 19, 1980 at which time representatives of the Company and 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.

In September 1979 the Company changed the regular shift hours from 7:30 AM to 3 PM, to 8 AM to 3:30 PM. I find that it did so in compliance with the contract.

Article VI paragraph 7 of the contract provides in pertinent part:

Notice of change in a regular schedule of working hours....shall be given at least two (2) weeks in advance.

It is undisputed that the Company gave the requisite two weeks notice of the change in the working hours.

In view of this specific contract clause which places that single restriction on the Company's right to change the schedule
of working hours, I must reject the Union's reliance on Article XXVI of the contract. It is well settled that an express contract provision, dealing specifically with the subject in dispute preempts a provision that is general in nature. Hence, the Company's change in the work schedule with the requisite two weeks notice, has neither contractually nor substantively "lower(ed) standards or working conditions" within the meaning of Article XXVI.

Nor do I find that the Company exercised its right arbitrarily. It offered acceptable testimony and explanation of the business and production reasons for the schedule change.

I accept the Union's assertion, as evidenced by the petition of many employees, that the changed work schedule has disturbed some private life arrangements of some of the employees. Car pools to work and arrangements to get children to school and to safely pick them up at school bus stops at the end of the school day apparently have been disrupted.

However, the Arbitrator's authority is confined to the contract. In the face of the Article VI rights of the Company and its business reasons for making the work schedule change, the Arbitrator is without power to reverse that action because of difficulties employees may encounter. Rather, as the Company stated it would be willing to do, the personal difficulties of individual employees are matters which may be discussed directly by the Union with the Company, in an effort to work out adjustments on a situation by situation basis.
The Undersigned, Impartial Chairman under the Collective Bargaining Agreement between the above named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The Company's change of the regular schedule of working hours did not violate the contract.

Eric J. Schmertz
Impartial Chairman

DATED: May 12, 1980
STATE OF New York)
COUNTY OF New York)ss.:

On this twelfth day of May, 1980, 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.