In the Matter of the Arbitration between
District 15, IAMAW, Lodge 571
and
Accurate Products Co.

The stipulated issue is:

Under the terms of the labor agreement between Accurate Products Co. and District No. 15 IAMAW, were the grievants improperly paid vacation pay for the years 1979 and 1980? If so what shall be the remedy?

The Company asserts that the grievance as to 1979 is not arbitrable, which the Union denies.

A hearing was held at the Company offices in Hillside, New Jersey on January 20, 1981 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 statements.

The Company's assertion that the grievance as it relates to the year 1979 is not arbitrable, is affirmed. Article XX Section 20.1(b) requires that a grievance be presented by the Union or the employee aggrieved in writing to the Company within three (3) working days after the grievance arose, "or the same is forever barred." The instant grievance was filed in writing with the Company on July 15, 1980, just short of one year after July 26, 1979 when the vacation pay dispute arose. It is clear that the Union and the aggrieved employees knew or should have known of the circumstances which gave rise to the 1979 grievance well before the passage of the almost one year period. Hence, under the absolute time limit set forth in Section 20.1(b) and under well settled principles of laches, the instant grievance as it relates to the year 1979 is time barred and not arbitrable.

With regard to vacation pay for the year 1980, the Union claims that that portion of vacation taken by employees on and after August 1, 1980 should be paid for at the higher contract rates of pay which went into effect on August 1st. The Company paid vacation pay for the entire vacation period, whether prior
to or after August 1, 1980, at the pay rates in effect on June 1, 1980.

I find that Article XIV (Vacations) and particularly Sections 14.1, 14.2 and 14.3 are dispositive of the dispute. Those Sections are related and should be read together. I conclude that the term "vacation benefits" found in the second sentence of Section 14.1 refers to not only longevity eligibility for vacation and to the number of days of vacation entitlement, but also to the rate of pay for each day of vacation.

Determinative in my view is the provision in that second sentence that vacation benefits shall be determined "as of June 1st of each year...." Unless otherwise limited, and I find no such limitation in this contract, the benefits to be determined as of June 1 are the longevity levels, the number of days of vacation entitlement and the rate of pay for those vacation days. It is noted that Section 14.2 refers to the rate of pay. Read together with Section 14.1, I must conclude therefore that the reference to benefits "determined as of June 1" includes a rate of pay for vacation pay as of that date. Reading further, Section 14.3 inter alia determines the vacation for an employee who quit after June 1st as limited to what had been accrued on June 1st, prior to his termination. No vacation benefit attaches to the period of his employment after June 1st.

The foregoing means to me that the benefits of vacation, including eligibility levels, numbers of days of vacation and the rate of pay for those days are all measured and determined each year as of June 1st. Hence the vacation pay which the Company paid the grievants for the 1980 vacation period, a portion of which followed the August 1st contract pay increase, was properly pegged at the earlier June 1st level.

If this result be inequitable (although in part it is consistent with the theory of accrual for vacation entitlement and pay) it is merely a reflection of a portion of the present contract which the parties negotiated (or neglected to change or modify when they agreed on a date for the contractual wage increase and different from what had obtained in predecessor contracts.) A change remains a matter for collective bargaining and not arbitration.
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 as it relates to the year 1979 is not arbitrable.

Under the terms of the labor agreement between Accurate Products Co. and District No. 15 IAM the grievants were properly paid vacation pay for the year 1980.

Eric J. Schmertz
Arbitrator

DATED: March 23, 1981
STATE OF New York )
COUNTY OF New York ) ss.: On this day of March 23, 1981, 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 issue is:

Is the grievance arbitrable? If so, did the Company violate the collective bargaining agreement by not paying lead persons pay to Florence Hull in September-October, 1980? If so, what shall be the remedy?

A hearing was held on July 1, 1981 at which time Ms. Hull, 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 Union and the Company filed post-hearing briefs.

The Company asserts that the grievance is not arbitrable because the Union's complaint that the grievant, a veteran Thermo Machine set-up and operator, was required to "train" another employee in the set-up and operation of that machine was not part of the Union's original grievance, and that in any event what the Company required of the grievant was within the Company's sole managerial authority under the management rights of the contract.

The grievance procedure and the written grievance which initiates it are not "common law pleadings." So long as the
various claims related to the grievance are raised in the course of the grievance meetings. Those claims, which the parties are unable to resolve directly, become arbitrable even if not part of the bare original grievance in its original written form. Here the Company acknowledged that at the third step of the grievance procedure the Union did claim that the grievant was required by supervision to train and reinstruct Joan Walker who was inexperienced on that machine and in that classification, in the set-up and operation of the machine (and not simply to set-up for her). Hence the "training" or "instructional" aspects of the Union's grievance were raised in the grievance meetings, thereby making that contention an arbitrable issue.

The various management rights provisions of the contract cited by the Company do not expressly bar from arbitration the claims by the Union that the grievant was required to perform duties beyond those of her classification; that those duties are properly within the higher job classification of lead person; and that the grievant be paid a differential for performing the higher rated duties.

Whether the management rights provisions of the contract accord the Company the exclusive right to assign the duties in question to the grievant requires an interpretation of those contract sections and therefore is part of the "merits" of the case. As the arbitrator has the jurisdictional authority to interpret the contract, including the management rights provisions thereof, the dispute over whether those provisions
support the Company's action, as argued by the Company, is a matter for the arbitrator. Hence, the grievance is arbitrable.

On the merits, Section 5.12 Definition of Lead Person is pertinent. It reads:

a. A Lead Person is a bargaining unit employee who, because of his/her knowledge and skill, has been designated to provide guidance to other employees in performing a common operation. A Lead Person cannot hire or fire, nor recommend that someone be hired or fired, nor recommend whether or not another employee should be given a merit increase.

b. A Lead Person position is a temporary position for the convenience of the Company for a given period of time. Lead Persons shall be appointed and relieved of Lead Person status based upon workload conditions and management's prerogative. Lead Persons may receive up to forty cents (40¢) an hour more than the top of his/her base rate of pay while on Lead Person status. Upon completion of his/her Lead Person assignment, such employee will revert back to his/her previous base rate of pay. The Company shall have the sole and exclusive right to appoint Lead Persons.

Based on the record, it is clear to me that the grievant's assignment (over her protest) to work with Joan Walker in setting up and operating the Thermo machine meets the contractual test and definition of a Lead Person.

I am satisfied that in this instance, as the Company had done several times previously without objection by the grievant, the Company utilized the grievant's extensive experience on and knowledge of that machine operation to instruct another employee who needed that assistance to become fully qualified. That the grievant did this work on other earlier occasions
without objection does not transform what meets the definition of the work of a Lead Person into the regular duties of the lesser rated Thermo machine operator; nor does it bar her from now complaining and now seeking Lead Person pay for the time involved. Also, just because the Company did not officially designate her as a Lead Person under Section 5.12 of the contract does not mean that it can with impunity assign job duties and responsibilities within the Lead Person definition and not pay the higher wage differential. Indeed, if Lead Person status and pay were determined solely on whether the affected employee was officially designated as a Lead Person, the Company could get higher rated work performed by lower rated employees at lesser wages without objection. I do not believe that the letter or the spirit of Section 5.12 allows that.

Whereas here, there are different job classifications and different pay scales (including the up to 40¢ an hour extra for Lead Person work), there are implicit job duties within each classification. Otherwise wage differences would be meaningless. In my view this is true whether or not the job classifications are particularized with job descriptions. Here, though there are no job descriptions, the contract provision for appointment of Lead Persons and for a higher hourly pay rate for them clearly means that there is a substantive difference between what a Thermo machine set-up and operator may be required to do and what may be required of a Lead Person. In that respect therefore, the jobs have different responsibilities
and if the former is required to take on what falls within the latter's classification, an out of title assignment has occurred, warranting a pay adjustment commensurate with the title in which the work belongs.

The forgoing fact situation which I have found present in this case is a traditional grievance under virtually all contracts and is not barred on the merits by the type of customary and general management rights provisions as are found in this contract. Accordingly, for the reasons stated, I do not find that the Company acted properly under Sections 1.2, 7.1 or 5.1 of the contract. I am satisfied that the instant dispute involves the interpretation and application of the contract, particularly Section 5.12 thereof, and is therefore within the arbitrator's authority under Section 6.2.

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:

1. The grievance of Florence Hull is arbitrable.

2. The Company violated Section 5.12 of the contract by not paying Lead Person's pay to Florence Hull in September-October, 1980. The Company shall pay Ms. Hull an additional 40¢ an hour for the period of time in those months that, in accordance with orders from supervision, she worked with Joan Walker in the set-up and operation of the latter's Thermo machine.

Eric J. Schmertz
Arbitrator
DATED: November 2, 1981
STATE OF New York ) ss.:
COUNTY OF New York )

On this 2nd day of November, 1981, 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 forgoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Has the job of Preventive Maintenance Inspector been substantially and materially changed under Article XVIII, Section 4 of the Contract by the introduction of modern tools for equipment testing? If so, the parties shall attempt to negotiate a rate in accordance with Article XVIII, Section 4 of the Contract. If they are unable to agree on a rate within 30 days, the matter shall be referred back to this arbitrator for the establishment of a rate.

A hearing was held in Wilmington, Delaware on December 17, 1980 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 Company filed a post-hearing brief.

Prior to the circumstances giving rise to the instant grievance, Preventive Maintenance Inspectors checked machine bearings by sight, by feel, by listening, and by the use of a screwdriver. If they discerned what they believed to be a problem with a bearing, they would notify an Engineer who would make a further check with other instruments including a Shock Pulse Meter.

When the Company assigned the use of the Shock Pulse Meter to the Preventive Maintenance Inspectors as a substitute for their observations, listening, feel and use of the screwdriver and also required the inspectors to keep records of their findings from the use of the Pulse Meter, the Inspectors and the Union on their behalf claimed that the Preventive Maintenance Inspector job had
been substantially and materially changed within the meaning of Article XVIII Section 4 of the contract, in that the Inspectors were now required to perform work at the level of the Engineers.

The Union's contentions are not persuasive. As before, the Inspectors continue to check and inspect bearings for defects. I am persuaded that an effective inspection using sight, feel, listening and a screwdriver requires at least as much experience and sophistication as the use of the Shock Pulse Meter. As a more modern testing device, the meter is a scientific replacement for what previously had been the inspector's judgement based on his experience and what he observed or discerned from the old inspectional method. Considering the record, particularly the testimony on how long it takes to learn to use the meter and record its findings as compared to how long it takes to effectively diagnose a defective bearing from sight, feel, listening and the use of a screwdriver, I conclude that the new method is no more complicated, no more demanding, and requires no greater skills than what was expected of the inspectors previously. Therefore a mere modernization and/or mechanization of a particular inspectional duty, which requires no greater skill or effort, does not constitute a substantial or material job change within the meaning of Article XVIII Section 4 of the contract.

Nor does that level of change come about because the inspectors now record meter findings in a log. Again I view this as simply as an updated, more modern and different method of their doing record keeping which has always been attendant to the job. I do not find the new record keeping methods create a substantial or material change in the job.

That the Engineers used the Shock Pulse Meter before that instrument was assigned to the bargaining unit inspectors is not determinative. To my mind that simply means that both Engineers and Inspectors had concurrent jurisdiction over inspecting bearings, although the initial inspectional work was done by the bargaining unit Inspectors. The jurisdiction and sequence has not changed. The Inspectors still perform the routine work and if they find or suspect defects, call it to the Engineer's attention. In the absence of a showing that the Shock Pulse Meter requires greater skill, or is more complex or demanding, or imposes greater responsibility, the mere fact that the
meter was first used by the Engineers does not mean that when it was assigned to the Inspectors that the Inspector classification rose to the Engineer level or underwent a material or substantial change.

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 job of Preventive Maintenance Inspector has not been substantially and materially changed under Article XVII, Section 4 of the contract by the introduction of modern tools for equipment testing.

Eric J. Schmertz
Arbitrator

DATED: February 25, 1981
STATE OF New York ss.
COUNTY OF New York ss.

On this 25th day of February, 1981, 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:

Whether the discharge of Michael J. Haley was for proper cause pursuant to Article III of the Agreement, and if not, what shall be the remedy?

A hearing was held in Williamsport, Pennsylvania on October 1, 1980 at which time Mr. Haley, 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 charge against the grievant, for which he was discharged is that he was "sleeping on the job." His prior disciplinary record includes a five day suspension and a warning for the same offense. Neither of those disciplines were grieved.

The Company's rules provide for a five day suspension for the first offense of sleeping on the job, and discharge for the second offense. The validity of the rules and the measure of penalty for such an offense are not challenged in this proceeding. Rather, the grievant and the Union on his behalf, deny that he was sleeping. Instead, it is asserted that he was working making the repairs to which he was assigned.
Though the grievant was not fully and directly observed in a state of sleep, I find, based on his own equivocal testimony of the manner and maneuvers involved in placing his crane where it was; the absence of noise, light or movement from him or from his location, the unbelievability of his claim that he could and was making repairs in the dark without moving and his inconsistent assertion that he occasionally used a flashlight, the observations for relevant periods of time by managerial representatives of his crane from below without any notice of noise, light or movement, and from two close-in points from another crane at a parallel height from which the grievant's protruding legs were seen, again without any movement, noise or light, the Company had reasonable grounds to conclude that the grievant was asleep. I further determine that those reasonable grounds meet the requisite burden of proof for discipline cases.

As the grievant was previously disciplined for the same offense his instant discharge was proper in accordance both with the plant rules and the traditional principles of progressive discipline.

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 Michael J. Haley was for proper cause.

Eric J. Schmertz
Arbitrator
DATED: January 5, 1981
STATE OF New York )
COUNTY OF New York ) ss.: 

On this fifth day of January, 1981, 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 District 15, International Association of Machinists and Aerospace Workers, Local 571 and AM Varityper, Division of AM International, Inc.

In accordance with Article XX of the collective bargaining agreement dated June 1, 1978 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was there just cause for the discharge of Jeanette Lemma? If not, what shall be the remedy?

A hearing was held in East Orange, New Jersey on March 25, 1981 at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived.

The grievant sustained a foot injury while at work on December 12, 1979 and received emergency treatment at a hospital. Although she was told at the hospital that she could return to work on December 17, on December 14 she complained to Barbara Livorsi of the Company’s Medical Department about her injury. In response Livorsi arranged for the grievant to visit Dr. Floriani, an orthopedic specialist, on December 17. The grievant also visited her personal doctor, Dr. Rispoli, on December 14. Dr. Floriani examined the grievant on December 17 and indicated that she could return to work on December 19. On December 18 the grievant returned to Dr. Rispoli who directed her to rest at home for two weeks and also referred her to an orthopedist, Dr. Lorello. On December 19 the grievant did not report to work. Unable to contact her by telephone, the Company sent her a telegram directing her to report to work as Dr. Floriani had authorized. On December 19 the grievant also complained about some related ailments to Livorsi in the Medical Department.
Livorsi arranged for the grievant to visit a medical doctor, Dr. Silk. On December 20 Dr. Silk examined the grievant and authorized her to return to work on January 2, 1980, apparently as a result of his belief that her job required excessive walking. After Livorsi advised Dr. Silk that the grievant's job did not require excessive walking, Dr. Silk reexamined the grievant on December 22 and changed the January 2, 1980 date to December 26, 1979. On December 26 the grievant did not report to work and notified the Company at 1:45 p.m. that she was ill. That day the grievant also visited Dr. Rispoli who determined that she could report to work on December 31. On December 27 the grievant did not report to work so the Company discharged her. Unknown to the Company at the time, Dr. Floriani examined the grievant on December 27 and authorized her to return to work on December 31.

The Company contends that the grievant has a record of excessive absenteeism; that she received a leave of absence to recover from her foot injury; and that she overextended the leave of absence without providing the relevant information to or receiving the necessary authorization from the Company. The Union argues that the grievant's attendance record is nothing to be proud of but that the discharge is based solely on overextending the leave of absence. In this regard the Union claims that the injury is undisputed; that the grievant visited a number of doctors; that the injury triggered additional ailments; and that the Company acted prematurely by discharging her on December 27, 1979. The Union insists that the grievant notified the Company that she would be absent on December 26 and, if she could, that she would return to work on December 27. Thus it is the Union's position that the grievant complied with the leave of absence requirements contained in the Agreement.

The record indicates that the Company routinely grants a medical leave of absence when an employee is injured at work. Although the duration of such a leave of absence may be uncertain due to the unpredictability of a patient's response to medical treatment, this is the first time that the parties have disagreed about when an employee should return to work. It is undisputed that at various times either the hospital, the Company's doctors, or the grievant's doctors authorized the grievant to return to
work on December 17, 19, 26, 31, 1979 and January 2, 1980. On reflection it seems that the use of different sets of doctors resulted in a delay between the time each doctor made a finding and when the Company learned of that finding. Consequently, the Company discharged the grievant on December 27 without having learned that as of that date Dr. Rispoli and Dr. Floriani had fixed the date for the grievant to return to work as of December 31.

A principal is bound when its agent possesses actual or apparent authority to act on his behalf. The Company directed the grievant to see Dr. Floriani for a medical examination. As a result, Dr. Floriani became the agent of the Company. When Dr. Floriani authorized the grievant to remain out of work until December 31, the Company became bound. That the Company did not learn of Dr. Floriani’s action until after the Company had discharged the grievant does not negate the authority of the doctor to bind the Company. The evidence indicates that this was the first time that the Company had sent one of its employees to Dr. Floriani. Although this may explain why there was a delay in communicating between the Company and the doctor, the authority of the doctor to bind the Company still obtained. The Company therefore acted improperly and prematurely by discharging the grievant on December 27 since the Company through its agent had extended the grievant’s leave of absence until December 31. For this reason the grievant did not violate Article XVII (c) of the Agreement. She did not overstay a leave of absence without permission. Accordingly, I find that there was not just cause for the discharge of the grievant.

With respect to the remedy, I find that the grievant is not entitled to back pay. First, she was the only person who had complete knowledge about the constantly changing dates that the various doctors had fixed for her to return to work. An employee has an obligation to inform her employer of relevant medical information concerning her availability for work especially when that information is not otherwise available to her employer. The grievant had a right to consult with her own doctors but she had a corresponding duty to inform her employer in a timely manner of the advice that her doctors had given her. For the grievant to have waited until January 16 to inform the Company that Dr. Rispoli
had set December 31, 1979 as the date when she could return to work violated her duty to inform the Company in a timely manner of this information. Similarly, the grievant violated this duty by failing to inform the Company of Dr. Lorello's findings, thereby depriving the Company of this information until it received a letter dated January 14, 1980 from Dr. Lorello on January 22. The information from these doctors was of critical importance for the Company to have had a full understanding of the grievant's medical condition. The grievant must share responsibility for withholding this information.

Second, the grievant testified that from the date of her discharge on December 27, 1979 until the date of the arbitration hearing on March 25, 1981, she had not filed any job applications to seek another position. A grievant has an affirmative duty to seek employment in a related capacity during the period when a discharge or suspension grievance is pending. The simple filing of a grievance does not create a privilege to remain idle. Of course, so long as the employee makes a reasonable, good faith effort to secure employment, back pay will not be deprived even if the grievant is unsuccessful in actually obtaining a job. In the instant case I find that the grievant did not make a reasonable, good faith effort to obtain another position and she thereby violated the duty to mitigate the potential liability.

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

There was not just cause for the discharge of Jeanette Lemma. She shall be reinstated but without back pay.

Eric J. Schmertz
Arbitrator

DATED: May 27, 1981
STATE OF New York )
COUNTY OF New York )

On this 27th day of May, 1981 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with Article XV of the collective bargaining agreement dated May 17, 1980 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the Company's action in discharging Willie Barber in violation of the collective bargaining agreement? If so, what shall be the remedy?

Hearings were held in Greenwich, Connecticut on May 21 and June 1, 1981 at which time Mr. Barber, hereinafter referred to as the "grievant," and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was expressly waived.

The Company discharged the grievant effective October 20, 1980 for striking or punching Srecko Bakija on October 9, 1980. In imposing the penalty of discharge, the Company relied on Article III (3) of the collective bargaining agreement which provides:

Striking another employee is considered a serious infraction of both the Company and Union rules and the penalty shall be discharge for those found guilty of such action. The Company and the Union agree that discharge is the proper penalty for such action.

This bilaterally negotiated provision clearly and un-equivocally sets discharge as the mandated penalty once the
Company has proved the substantive offense of striking another employee. Thus the Arbitrator is contractually required to treat the alleged offense, if proved, as one that justifies summary discharge regardless of the grievant's past record, length of service, or any other mitigating factor. In short, because discharge is the contractual penalty for that kind of offense, this Arbitrator cannot substitute his judgement for that of the Company even if he believes that a long term suspension would be sufficiently protective of the Company's rights and interests.

At the outset, I reject the Union's contention that Bakija, who was the Union President at the time of the incident as well as thereafter, is not an employee within the meaning of Article III (3). Article I of the agreement specifies that an employee "shall mean (a) member of the Union as referred to in this agreement."
The agreement further provides in Article XII that:

The Company shall grant a leave of absence... without loss of seniority to the duly elected President of the Union for the purpose of performing the duties of such office.... The President of the Union upon returning to his regular work, shall retain his seniority and bumping rights to his former classification.

By retaining his seniority and bumping rights under the foregoing circumstances, means that he retained his "employee" status. Also, the Company stated that it considers Bakija to be an active employee. Accordingly, I find that Bakija is an employee within the meaning of Article I of the agreement and is perforce an employee within the meaning of Article III (3).

With respect to the substantive charge, the evidence is clear that the grievant struck or punched Bakija. Bakija
testified that he and the grievant were discussing the allocation of overtime work at which time the grievant voiced certain objections. The conversation occurred in the Shipping Department, during working hours, at or near the grievant's work location. Bakija testified that he started to walk away from the grievant when he considered the conversation to have ended. The grievant thereupon called Bakija's name and, when Bakija responded by turning around, the grievant struck him on the chin. Bakija indicated that he fell to the ground and that the grievant stood over him rather closely. The Personnel Representative, Michael D. Farquhar, testified that he saw Bakija shortly thereafter and that Bakija indicated that the grievant had hit him. Farquhar also testified that he observed that Bakija had a bruise on his left cheek and another one on his chin.

The grievant admits that he "reached and grabbed" Bakija and "pulled" Bakija toward him but denies that he punched Bakija. Instead, the grievant asserts that a fellow employee, Teddy Carroll, interceded immediately after the grievant had grabbed Bakija. The grievant contends that when Carroll sought to separate the two men Bakija stumbled over an empty dolly and thereby sustained the facial injuries. Carroll's testimony affirmed the grievant's version of the incident.

In analyzing the testimony of the various witnesses, I accept Bakija's version of the incident as credible and accurate. I do not find any reason why Bakija would bear false witness against the grievant. There is no evidence of a history of animosity between the two employees. In fact, the behavior of the two employees at the hearing suggested that a cordial relationship existed between them. The reluctance of Bakija to testify--
as evidenced by the need for the Company to subpoena him--
further demonstrates Bakija's concern for the grievant's predica-
ment. Therefore, I find Bakija's testimony to be accurate regarding
what transpired on October 9, 1980. Those witnesses who testified
otherwise were not, in my view, objective about the event.

Although I have found that the grievant struck or punched
Bakija, it is well settled that an innocent victim who merely
protects himself against an unprovoked assault should not be
disciplined for having engaged in fighting. In the instant case,
however, the grievant was the aggressor and not the victim.
Although he may have been upset concerning the allocation of
overtime work, such displeasure does not constitute provocation
to engage in fisticuffs. As the grievant is a long term employee
and a former union official, he knew or should have known that
the proper reaction should have been to grieve if he was dis-
satisfied with the overtime arrangement. There is no contractual
basis for the Arbitrator to excuse the grievant's conduct. I
therefore find, that: the grievant violated Article III (3) by
striking or punching Bakija; and that the discharge did not violate
the agreement.

Mitigation of the decision to discharge the grievant be-
cause of his long years of service is a matter within the exclusive
discretion of the Company. I believe that with its right to dis-
charge for such an offense clearly upheld by this decision, the
Company would not undermine its disciplinary authority if it now
decided without prejudice or precedent to reduce the penalty to a
long term suspension. A suspension of approximately nine months,
would, clearly, unequivocally, and effectively convey to all
concerned the serious and indefensible nature of the offense. At the same time, reinstatement restores the grievant to a livelihood in which he invested 22 years. And, of equal importance, it enables the Company to regain a seemingly well respected employee who, but for a spontaneous, and probably isolated act, would have presumably continued contributing productively to the success of the Company. I therefore strongly recommend that the Company reinstate the grievant to his former position without back pay. However, any such change in the penalty from discharge to suspension, is a matter solely for the Company's consideration.

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's action in discharging Willie Barber did not violate the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: July 2, 1981
STATE OF New York )
COUNTY OF New York )

On this second day of July, 1981 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration

between

Local Union No. 369, Utility Workers Union of America, AFL-CIO

and

Boston Edison Company

OPINION OF CHAIRMAN

The stipulated issue is:

Did the Company violate the collective bargaining agreement by changing the work day for certain Service Department employees from a straight 8-hour day with a paid lunch period to an 8-hour day with an unpaid lunch period or by making resulting schedule changes effective as March 17, 1979? If so, what shall be the remedy, if any?

A hearing was held on June 3, 1980 in Braintree, Massachusetts 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 Oath of the Board of Arbitration was waived. A stenographic record was taken and the parties filed post-hearing briefs. The Board of Arbitration met in executive session on January 27, 1981.

I find contractual support for part but not all of what the Company did.

Article XI Section 6(a) gives the Company the right to change the starting and ending time of a work day by as much as forty-five minutes. In the instant case the Company changed the starting times of both the first and second shifts by scheduling them one-half hour earlier, and changed the ending time of the midnight shift, by making it one-half hour later.

The starting times of the first and second shift had been 1 AM and 4 PM respectively. They were changed to 12:30 AM and 3:30 PM respectively. The midnight shift previously ended at 8 AM. It was changed to an 8:30 AM ending.
Those changes standing alone are in accordance with Article XI Section 6(a) which reads:

6. The following shall not constitute a change in the final posted schedule.
   (a) A change of forty-five (45) minutes or less of the time for starting and ending one or more work days from the times posted in the applicable work schedule.

But that is not all the Company did. It also eliminated what previously had been a paid lunch period within the original shift hours. Instead, under the new schedule, the 20 minute lunch period is now unpaid. As a consequence the employees are on the Company's premises from the start to the end of their new daily work schedule an additional one-half hour. Article XI Section 6(a) makes no mention of changes in the lunch period. Hence that Section neither contemplated nor authorizes the Company to alter the nature of the lunch period when it exercises its right to change the starting or ending hours of the work day.

The Company asserts that an unpaid lunch period is contractually authorized by Article XI Section 2 of the contract, and that the paid lunch period previously accorded the employees in the Transportation Division involved in this grievance was contrary to the contract and hence may be unilaterally changed by the Company. I do not find Article XI Section 2 to be that explicit; indeed I find it ambiguous. Said Section reads:

2. The hours of a work day, as posted, shall be consecutive, except for time out for meals, but in positions where the nature of the work requires continuous operation eight (8) consecutive hours may be worked, during which lunch may be eaten without interruption to service or deduction in pay. Such time out for meals, in those operations where time is usually taken out for meals, shall commence not less than four (4) nor more than five (5) hours after the scheduled starting time.

The phrase

the hours of a work day, as posted, shall be consecutive except for time out for meals,
cannot be construed solely as providing for an unpaid meal period. As work is not performed normally during a meal period, the reference to the consecutive hours of the work day may logically apply to the hours of productive work and not the period for meals. But that does not mean that the phrase 

except for time out for meals

means an unpaid meal period. Rather, as the work day is defined by Article X Section 1 as consisting of eight hours, the above mentioned phrase can logically mean nonetheless that the time out for meals, though paid for, is part of the eight hour work day within the meaning of Article X Section 1, but not part of the consecutive hours during which employees are at work.

The balance of the relevant part of Article XI Section 2 is equally susceptible to different interpretations. The provision:

Where the nature of the work requires continuous operation eight (8) consecutive hours may be worked, during which lunch may be eaten without interruption to service or deduction in pay.

can mean that in situations of continuous operations employees may not stop their productive activity during the lunch period but may be required to work during that period. It follows that except for a continuous operation, when employees involved therein may be required to work through the lunch period, other employees, including those involved in this case not only have the lunch period as off-time but that such lunch period still falls within the same work day, and is paid time. That employees of continuous operations suffer no "deduction in pay" when they work through their lunch period, does not carry with it a clear enough implication that other employees, not involved in continuous operations, must take the meal period on an unpaid basis and outside of the normal work day.

Under the foregoing circumstances though the Company had the contractual right to begin the first and second shifts one-half hour earlier and end the midnight shift one-half hour later, it did not have the right to unilaterally terminate the paid lunch period, which by practice, had become not only a condition of employment, but also by practice, an interpretation of unclear contract language.
In the Matter of the Arbitration
between
Local Union No. 369, Utility Works Union of America, AFL-CIO
and
Boston Edison Company

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

1. The Company had the right to begin the first and second shifts one-half hour early and end the midnight shift one-half an hour later.

2. The Company did not have the right to change the paid lunch period to an unpaid lunch period. The Company is directed to restore the paid lunch period as part of the work day.

3. As the grievants were required to remain on Company premises one-half an hour beyond their previously scheduled eight hour shift, they shall be paid for that additional time for the period involved in accordance with the provisions of the collective bargaining agreement.

Eric J. Schmertz
Chairman

Donald E. Wightman
Concurring In
Dissenting From

John J. Godfrey
Concurring In
Dissenting From
DATED: April 17, 1981
STATE OF New York ) ss:
County of New York )

On this seventeenth day of April, 1981, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: April 1981
STATE OF )
COUNTY OF ) ss:

On this day of April, 1981, before me personally came and appeared Donald E. Wightman to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: April 1981
STATE OF )
COUNTY OF ) ss:

On this day of April, 1981, before me personally came and appeared John J. Godfrey to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration
between
Locals 269, 386 and 387 Utility Workers Union of America, AFL-CIO
and
Boston Edison Company

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

1. The Company did not violate the collective bargaining agreement by passing on to employees increased premium costs for dependents' coverage under the Hospital and Surgical Benefits Plan or the Dental Plan effective as of May 1, 1979.

2. The Company shall give an accounting to the Union within 15 days of the date hereof, concerning the total costs and cost allocations by benefit or group of benefits showing the Company and employee contributions in dollar amounts and percentages for the benefits under the Hospital and Surgical Benefits Plan and the Dental Plan. The Board retains jurisdiction for this purpose and for further actions in that connection as may be needed.

Eric J. Schmertz
Chairman

Donald E. Wightman
Concurring in
Dissenting from

John J. Godfrey
Concurring in
Dissenting from
DATE: APRIL 17, 1981
STATE OF New York )
COUNTY OF New York ) ss.

On this 17th day of April, 1981, 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.

MELANIE S. ADLER
Notary Public, State of New York
No. 30-455932
Qualified in Monroe County
Commission Expires Mar. 30, 1982

DATED: April 1981
STATE OF
COUNTY OF

On this day of April, 1981, before me personally came and appeared Donald E. Wightman to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: April 1981
STATE OF
COUNTY OF

On this day of April, 1981, before me personally came and appeared John J. Godfrey to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between
Locals 269, 386 and 387 Utility Workers Union of America, AFL-CIO and
Boston Edison Company

OPINION OF CHAIRMAN

The stipulated issue is:

Did the Company violate the collective bargaining agreements by passing on to employees increased premium costs for dependents' coverage under the Hospitalization and Surgical Benefits Plan or the Dental Plan effective as of May 1, 1979? If so, what shall the remedy be, if any?

A hearing was held in Braintree, Massachusetts on January 27, 1981 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 Arbitrators' Oath was waived. A stenographic record was taken and post-hearing briefs were filed by both sides. The Board of Arbitration met in executive session on March 17, 1981.

The evidence submitted and the arguments advanced by the parties gave an exhaustive analysis of the history and development of the Hospitalization and Surgical Benefits Plan since its inception in or about 1943. From a plan that covered basic hospitalization and surgical benefits in the 1940's, modifications and improvements made in the Plan since 1950, when the first collective bargaining agreements were concluded between the Company and Locals 369, 386 and 387, have made it a health benefit program that today ranks among the best in the utility industry.

Notwithstanding the developments and achievements, questions have arisen from time to time resolution of which required reference to arbitration.

One such is now before this Board. It arises under the contracts negotiated by the parties in the spring of 1977. The contracts became effective as of May 16, 1977 for Locals 369 and 386, and as of June 12, 1977 for Local 387.

The three Memoranda of Agreement executed by the parties contain the following identical language insofar as the Hospitalization and Surgical Benefits Plan is concerned:
Hospital Expenses:

There will be a daily room and board rate adjustment on October 15, 1977 effective for confinements on or after November 1, 1977 for the purpose of adjusting the average rates then in effect in the said listed 25 hospitals.

There will be a daily room and board rate adjustment on October 15, 1978 effective for confinements on or after November 1, 1978 for the purpose of adjusting the average rates then in effect in the said listed 25 hospitals.

There will be a daily room and board rate adjustment on October 15, 1979 effective for confinements on or after November 1, 1979 for the purpose of adjusting the average rates then in effect in the said listed 25 hospitals.

The maximum reimbursement for special services will be maintained at fifteen (15) times the room and board rate subject to adjustment resulting from the November 1, 1977, November 1, 1978 and November 1, 1979 readjustment.

The above adjustments will be subject to the 10.5% dependent contribution.

The following Hospital and Surgical items effective May 16, 1977 will not be subject to any increased dependent contribution:

**Major Medical:**
- The maximum benefit for each covered person shall be increased from $75,000 to $150,000.
- Reduce deductible from $100 to $75.
- Reduce family deductible from $200 to $150.
- Add a Major Medical stop loss provision at $5,000 of covered benefits.

**Surgical:**
- The unit relative value scale shall be increased from $6 to $7 with a maximum benefit of $1,050.

**In-Hospital Medical:**
- Increase to $10 for first day and $7 each day thereafter for 119 days.

A Coordination of Benefits Clause will be added to the Hospitalization and Surgical Benefits Plan.

All other provisions of the Hospitalization and Surgical Benefits Plan as amended, shall continue in effect.
The Union reads the agreements as a commitment by the Company to absorb all of the increased premium costs for dependents' benefits associated with the improvements negotiated, including the increased premiums effective May 1, 1979, except for the 10.5% dependents' contribution for daily room and board adjustments.

The Company reads the Memoranda differently. In its view it agreed in the negotiations that only certain specified benefit improvements would not be subject to any increase dependent contributions and that that limitation would be applicable to the rates which obtained at that time, but that subsequent increases in the rates for those benefits, as well as rate increases for the other parts of the Plan, would be subject to the 10.5% dependent contribution.

I find the Memoranda sufficiently clear to provide answers to the issue. It does not support the Union's position that "the language in the 1977 Memoranda of Agreement specifically delineates that certain costs under the Plan, i.e. the daily room and board rate adjustment, shall be subject to the 10.5% dependent contribution while the rest of the Hospital and Surgical Benefits Plan is exempt from any increased contribution."

The Memoranda specifically speak of hospital and surgical items listed and not of the Hospitalization and Surgical Benefits Plan. Therefore the only items which were not subject to any increased dependent contribution are the improvements referred to under the headings Major Medical, Surgical, and In-Hospital Medical.

This is neither altered nor negated by the prior arbitration Awards or other exhibits submitted into evidence. In none of these could I find support for the proposition that in the 1977 negotiation the Company waived its rights to a dependents' contribution for increases in rates other than those specified, nor do I find any waiver of its right to require a 10.5% dependent contribution of rate increases for those specified items in subsequent years. Significantly the Memoranda state that there would be no increased dependent contribution for the Hospital and Surgical items effective May 16, 1977. To my mind that means that there was to be no increased dependent contribution for the increased costs attendant to the improved benefits in those items under the rates effective as of May 16, 1977.
To make the limitation effective and applicable to future rate increases would, in my judgement, require explicit obligatory language which would bind the Company into the future to rate increases of an unknown magnitude. The Memoranda contain no such essential provision and therefore the Company is not so bound.

With regard to the Dental Plan, the Union's case is not supported either by the 1977 Memoranda or the Mittenthal Arbitration Award of 1973. The Memoranda make no mention of the Dental Plan nor of the dental benefits. Any increases in premium therefore are to be treated under the final paragraph of the 1977 Memoranda which reads:

"All other provisions of the Hospitalization and Surgical Benefits Plan as amended shall continue in effect."

Accordingly the dental feature is to be treated as continuing in effect, unchanged from the 1975 collective bargaining agreement. The Company's contribution to the premium is determined by the modified Mittenthal formula without regard to future premium increases. Therefore rate increases for dental benefits for employees and dependents may be passed on by the Company to the employees.

At the January 27, 1981 hearing the Union requested that if this Board decided the Company has the right to pass on the increased premium costs for dependent coverage - and we have so decided - that the Board retain jurisdiction for the purpose of determining whether the costs passed on to the employees were accurate. The Company agreed to this retention of jurisdiction.

The Union is entitled to receive from the Company a breakdown of the total cost and cost allocation by benefit, or group of benefits, showing Company and employee contributions in dollar amount and percentages.

Though we retain jurisdiction for this purpose, the holding of a subsequent hearing may not be necessary. An explanatory memorandum from the Company to the Union may resolve this, and the Board directs that such a memorandum be given.

Eric J. Schmertz
Chairman
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Utility Workers Union of America, Local 369

and

Boston Edison Company

AWARD

Case #1130-0262-81

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

The Company violated the collective bargaining agreement by its suspension or discharge of the grievant, Lee E. Huggins. Mr. Huggins shall be reinstated with back pay and benefits.

Eric J. Schmertz
Chairman

Donald E. Wightman
Concurring

John J. Godfrey
Dissenting

DATED: September 10, 1981
STATE OF New York )ss.: COUNTY OF New York )

On this 10th day of September, 1981 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
DATED:
STATE OF )
COUNTY OF ) ss.:

On this day of September, 1981 before me personally came and appeared Donald E. Wightman to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED:
STATE OF )
COUNTY OF ) ss.:

On this day of September, 1981 before me personally came and appeared John J. Godfrey to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company violate the collective bargaining agreement by its suspension or discharge of the grievant, Lee E. Huggins? If so, what shall be the remedy?

Hearings were held on April 21, June 10 and June 15, 1981 at which time Mr. Huggins, 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. With the Undersigned as Chairman, Messrs. Donald E. Wightman and John J. Godfrey served respectively as the Union and Company arbitrators on the Board of Arbitration. The Arbitrators' Oath was waived. A stenographic record was taken; both sides filed post-hearing briefs and the Board met in executive session on August 18, 1981.

Not only is this a discharge case, but the charge against the grievant parallels a criminal offense. Though there is some evidence which suspiciously suggests the grievant's knowledge of, if not responsibility for the improper meter by-pass, the totality of the evidence adduced by the Company falls short of meeting its burden of establishing the grievant's culpability
by the "clear and convincing" standard required in such cases.

For example, in my view, the fact that the illegal electrical by-pass was openly discernible and clearly observable to meter readers and to Company inspectors; remained so for an extended period of time during regular meter readings (and during periods of fluctuations in the grievant's electric bills); and that the grievant took no steps to hide it or to connect it differently at those times or later, when the Company commenced a general investigation of this type of offense by its employees (an investigation which I believe the employees knew of irrespective of whether or not it was publicized) casts sufficient doubt on what the grievant knew or did in connection with the meter by-pass as to render inadequate as probative evidence the other, largely circumstantial aspects of the Company's case.

Eric J. Schmertz
Chairman

DATED: September 10, 1981
In the Matter of the Arbitration between
Local 387, Boston Edison Clerical Workers Union and Boston Edison Company

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

The Company did not violate the collective bargaining agreement by its discharge of Benny Stanley.

DATED: November 12, 1981
STATE OF New York )ss.: Eric J. Schmertz
COUNTY OF New York ) Chairman

On this 12th day of November, 1981 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 forgoing instrument and he acknowledged to me that he executed the same.

DATED: Robert A. Scannell
STATE OF )ss.: Concurring
COUNTY OF )

On this day of November, 1981 before me personally came and appeared Robert A. Scannell to me known and known to me to be the individual described in and who executed the forgoing instrument and he acknowledged to me that he executed the same.

DATED: Joseph C. Faherty
STATE OF )ss.: Dissenting
COUNTY OF )

On this day of November, 1981 before me personally came and appeared Joseph C. Faherty to me known and known to me to be the individual described in and who executed the forgoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the Company violate the collective bargaining agreement by its discharge of the grievant Benny Stanley? If so, what shall be the remedy?

A hearing was held in Boston, Massachusetts on June 15, 1981 at which time 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 Arbitration Board consisted of the Undersigned as Chairman and Messrs. Joseph C. Faherty and Robert A. Scannell as the Union and Company designees respectively. The Arbitrator's Oath was waived. The parties filed post-hearing briefs and the Board of Arbitration met in executive session on November 2, 1981.

As the final step in the application of progressive discipline, the Company discharged the grievant on February 24, 1981 for his use of abusive, disrespectful and threatening language to his supervisor after being suspended for failing to adequately respond to questions concerning his work performance.

Previously, the grievant, with about five years of service, had been formally warned for various infractions and received a
three day suspension in January, 1981 for his refusal to carry out a work order. The warnings were not challenged in arbitration and the suspension was upheld in arbitration.

In the instant case the Union claims that over a period of time the grievant had been harassed by his supervisor; that what the grievant said to his supervisor was an isolated angry response to the supervisor's persistent and provocative questioning and to the suspension imposed on the grievant for not answering to the supervisor's satisfaction; and that the grievant's words were not as abusive or threatening as is the Company's version of what was said.

I reject as unproved the Union's claim that the grievant has been subject to harassment. The Stutz decision, the grievant's prior disciplinary record, and the evidence in this case point in a different direction. I conclude that supervision was properly directing the grievant's work assignments and performance, and that the grievant was unable or unwilling to take direction or to respond to legitimate inquiries regarding his work.

As to the grievant's acknowledged intemperate remarks, I conclude that both versions of what he said, his and that of the Company are not significantly or substantively different. Both, including what he and the Union claims he said are abusive, combative, defiant and threatening. I find no reason to excuse him, even if I accepted his version of his remarks. What he admits he said constitutes classical insubordination for which arbitrators consistently uphold disciplinary penalties including
The stipulated issues are:

1. Was there just cause for the five day suspension of William Dolan in March, 1979? If not what shall be the remedy?

2. Was there just cause for the discharge of William Dolan in June, 1979? If not what shall be the remedy?

Hearings were held on April 15 and 27, 1981 at which time Mr. Dolan, 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. The Employer filed a post-hearing brief; the Union made oral summation argument.

I accept as credible and accurate the testimony of Nurse Fulcher, Supervising Nurse Cyropoliski, and former stockroom assistant supervisor Todd. Their testimony of the events involved in both issues was clear and explicit. I find no reason in the record why they would lie or otherwise so specifically misrepresent what they saw and heard and what happened.
Accordingly I conclude that in March 1979 the grievant was discourteous, disrespectful and uncooperative to nurses Fulcher and Cxypolski. That the nurses were not his direct supervisors does not excuse his rude, insulting and provocative remarks to them. The working relationship between both nurses and the grievant require mutual cooperation, civility and respect. The grievant's breach of those fundamental conditions of that working relationship, irrespective of whether the nurses are "superior" to him justify discipline. I do not find the imposed five day suspension to be excessive; and therefore that suspension is upheld.

The evidence clearly establishes that in June, 1979 the grievant did not perform his work duties in connection with the collection of linens, and when asked about those duties was abusive, insulting and disrespectful to a managerial employee who undisputedly, was his superior. Thereafter, at the grievance meeting scheduled to deal with that misconduct, the grievant further verbally abused, insulted and vilified Todd with obscene language and characterizations.

It is well settled that the latter two foregoing circumstances constitute classical examples of insubordination for which discipline, including summary discharge is justified. Hence the Employer's decision to impose the ultimate discipline - dismissal - cannot be faulted or reversed by the Arbitrator.

DATED: June 22, 1981

[Signature]
Eric J. Schmertz
Arbitrator
AMEERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between:

Local 880 Massachusetts Hospital Workers and Cape Cod Hospital

AWARD
Case #1130 0851 79

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 and the discharge of William Dolan were for just cause.

DATED: June 22, 1981
STATE OF New York ) ss.: COUNTY OF New York )

On this 22nd day of June, 1981, 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 "Hypothetical" Arbitration Under the Collective Bargaining Agreement between

Chicago Pneumatic Tool Company

and

International Associates of Machinists and Aerospace Workers Lodge 645

and

International Molders and Allied Workers AFL-CIO, Local 250

Under the collective bargaining agreement dated June 24, 1979 to June 24, 1982 between the above named parties, and for the private, internal study and consideration of the Company, the Company has submitted to the Undersigned for an impartial advisory Opinion the following issues:

1. Under Article I (b) or (c), and the contract as a whole, is the Company prohibited from subcontracting products whole or in part on a permanent basis to another (stranger) company?

2. Under Article I (b) or (c), and the contract as a whole, is the Company prohibited from transferring products whole or in part to another CP (member) company?

3. Is Article I (b) or (c) limited solely to a proscription of temporary subcontracting to a stranger company by use of the term "farm out" as opposed to contract out or subcontract, for economic reasons?

Article I (b) reads:

The Company agrees that the making, assembling, erection, dismantling and repairing of machinery of all descriptions performed by or on the premises of the Company, either directly or when contracted to a contractor, unless covered by a manufacturers guarantee, or that requiring special skills not available within the bargaining unit, is recognized as coming within the jurisdiction of the International Association of Machinists and Aerospace Workers and/or International Molders and Allied Workers Union - A.F.L. - C.I.O.
Article I (c) reads:

So long as appropriate equipment and qualified employees in this bargaining unit are available, the Company shall not farm out work on products normally produced by the employees in this bargaining unit at a time when any of them are on lay off or not working a normal week in those rosters which would normally do the work farmed out, or when such action would necessitate a lay off or a reduction in the normal (straight time) employment in those rosters which would normally do the work farmed out.

Subsumed within the above issues and related thereto, are the following additional questions posed by the Company:

A. Does the use of the words "contracted" in Article I (b) and "farm out" in I (c) have different meanings? For example does either apply to the transfer of work to an outside or stranger company while the other applies to the transfer of work to another Chicago Pneumatic facility? Does one term apply to the temporary transfer of work while the other applies to a permanent assignment or transfer?

B. In any event, under Article XXXIV (Management Rights) and Article XXXVI (Severance Allowance) may the Company contract or farm out work irrespective of the provisions of Article I (b) and I (c) so long as it pays a severance allowance to the employees terminated as a result?

Obviously the threshold question is whether the words "contracted" and "farm out" found respectively in Articles I (b) and I (c) have different meanings or are synonymous. In the absence of any evidence, either in the contract or otherwise, providing different definitions or interpretations of those two words they should be given their customary and traditional meanings. In my experience, and I am satisfied that the cases support this view, both words are customarily used interchangeably and have the same meaning. Both mean the assignment or transfer of work normally performed by the bargaining unit or which the bargaining unit has the skills, equipment and manpower to perform, to non-bargaining
unit employees whether the latter be stranger companies, outside vendors or other facilities of the employer not covered by the collective bargaining agreement involved.

I find nothing in the instant collective bargaining agreement nor has there been any other evidence submitted in the record which would provide a substantive distinction between or any differing interpretations for these two words. There are only two evidentiary explanations in the record for the use of both words and both explanations fail to alter the customary meaning. First the two foregoing contract Articles were negotiated at different times, Article I (b) in 1950 and Article I (c) in 1952. The different periods of time that each clause came into the contract may explain why two words which otherwise are customarily interchangeable were used. If so, and without any other reason, the traditional synonymousness of both is not altered and both should be interpreted the same way, although under Articles I (b) and I (c), the type of work contracted out or farmed out may be different.

The other evidence is that the Unions, as a matter of practice, have taken the position that Article I (b) is applicable to maintenance work in connection with the machinery referred to therein and that Article I (c) is applicable to other types of work covered by the contract. Obviously that distinction relates only to the type of work sent to an outsider, but it does not provide any differentiation or distinction in meaning between the two words themselves.

Therefore, with only these positions in the record, neither of which alters the customary meaning of contracting out or farming out, I must conclude that both words mean the same and should be treated synonymously under this contract.
Under the foregoing interpretation it is immaterial in my view whether the farm out or contracting out is of short term, long term, temporary or permanent duration. As the act of contracting or farming out occurs when the work is assigned or transferred to non-bargaining unit employees, the propriety of that act, at the time it takes place, turns on whether it is in compliance with Articles I (b) and I (c) of the contract and does not turn on such a subsequent factor as how long term or ad hoc the transfer or assignment may be. The fact is that the removal of work normally performed by the bargaining unit or which the unit is capable of performing, is potentially damaging and prejudicial to the job security of the unit members, albeit in different degrees, whether the farm out or contracting out is of small or large quantity, of short or long term, or even if permanent. It is to that potential prejudice that Articles I (b) and I (c) are directed. Hence they are applicable when the contracting or farm out first occurs irrespective of the quantity of the work or the duration involved.

Again, under the traditional synonymousness of the terms contracting and farming out, I consider it immaterial whether the work is sent to a stranger company, or to another facility of Chicago Pneumatic not covered by the instant collective bargaining agreement. In both instances the work has been removed from the bargaining unit and is or will be performed by non-bargaining unit persons. In my experience, and again I am satisfied that the relevant cases so hold, the phrases contracting out and farming out are applied equally and with the same meaning to the transfer of work to other facilities and non-bargaining unit personnel of the same employer located elsewhere and to stranger companies.
The foregoing answers primary issue #3 and subsidiary question A.

With regard to subsidiary question B it is my view that the Company may not be excused from violations of Articles I (b) and I (c) merely by payment of severance pay under Article XXXVI of the contract. I am not persuaded that Article XXXVI was intended to apply to the permanent closedown of a plant or a portion thereof because the work of that facility was contracted or farmed out. In my view the closing of a plant or a substantial portion thereof, within the meaning of Article XXXVI, would come about as a result of a discontinuance or sharp reduction in the availability of work performed by that facility. I am not persuaded that it was intended to cover the circumstance where the work remained available but had been or was to be transferred to non-bargaining unit personnel. However assuming arguendo that Article XXXVI is applicable to the termination of employees due to the permanent contracting or farming out of work they previously performed, I am convinced that the terminations involved must still conform to the requirements of Articles I (b) and I (c) in order for the Company's liability to be limited only to payment of the severance allowance. If the contracting or farming out which resulted in the close of a department or plant or a substantial portion thereof caused terminations in violation of Articles I (b) and I (c), the Company would be liable for damages arising from the Article I (b) and I (c) violations and would not be immune from that liability by the mere payment of the severance allowance. In other words, terminations due to the closing of a plant or department due to contracting out or farming out would require the payment

1. The resulting inconsistency supports my earlier view that Article XXXVI is inapposite.
of severance allowances and also must comply with Articles I (b) and I (c) to be contractually proper. Otherwise, in a substantial manner, Articles I (b) and I (c) would be unnecessary, if not meaningless.

Nor is this changed by Article XXXIV (Management Rights). The Company's right "to relieve employees from duty because of lack of work, or other legitimate reasons...." is expressly "subject to the provisions of this Agreement." As Articles I (b) and I (c) are provisions of the Agreement, the Company's right to relieve employees from duty because the work they normally perform or are capable of performing has been contracted or farmed out, is subject to the conditions and restrictions of Articles I (b) and I (c) of the contract. In short, termination of employment under Article XXXVI presupposes valid contractual terminations. It, and the payment of severance pay thereunder are not substitutes or cures for employment terminations that violate other contract provisions.

The foregoing answers subsidiary question B.

We then turn to Articles I (b) and I (c) themselves, and to the primary stipulated issues nos. 1 and 2. Based on all the foregoing, I am satisfied that Articles I (b) and I (c) are sufficiently clear and unambiguous. I (b) is essentially a statement setting forth the Union's general jurisdiction over "the making, assembling, erection, dismantling and repairing of machinery of all descriptions...." It contemplates that the work will be performed by the Company or by an outside contractor, or by the manufacturer under guarantee. If the work is performed by bargaining unit employees there is of course no problem. By the
terms of I (b) the latter, work performed under the manufacturer's guarantee, is not within the Union's jurisdiction and thus not bargaining unit work. Hence work in that category is not "contracted" within the meaning of Article I (b). Also, work contracted to a contractor is not bargaining unit work or within the Union's jurisdiction if the work requires "special skills not available within the bargaining unit." But, work of the covered type which the bargaining unit has the skills to perform falls within the Union's jurisdiction and must be deemed bargaining unit work.

It should be noted that Article I (b) does not set forth circumstances and conditions under which the Company may contract out work which falls within the Union's jurisdiction under that Article. I do not interpret silence on that question to mean that the Company may not, under any circumstance, contract out that work, even where the bargaining unit possesses the skills to perform it.

Rather the Company's rights and restrictions in that regard and with regard to all other types of bargaining unit work, is set forth in Article I (c). (Indeed the negotiation of I (c) two years subsequent to the agreement on I (b) may very well have been for that purpose - namely to set forth specifically the terms and circumstances under which contracting and farming out would be allowed or disallowed.) In short, to answer primary issues 1 and 2 and for logical contract interpretation, Articles I (b) and I (c) must be read together.

Article I (c) is clear enough. It is stipulated in the record that the word "roster" means a "group of jobs or classifications
related by skill and pay" and that "any experience in a job or jobs within a roster would meet the definition of employment in (the) rosters" within the meaning of Article I (c). My interpretation of Article I (c) is that the Company may not farm out any bargaining unit work if:

1. appropriate equipment and qualified employees in the bargaining unit are available; or

2. it would cause a layoff or a reduction in the normal, regular, straight-time employment of employees in any job classification within a roster which would normally perform that work; or

3. when there are employees with experience in any of the job classifications within a roster which would normally do that work who are either on layoff or not working, a normal, regular, straight-time work week.

Put conversely, and applied to Articles I (b) and I (c) the Company may farm out or contract out any bargaining unit work:

1. so long as there is not appropriate equipment and/or qualified bargaining unit employees available; and

2. so long as it does not cause a layoff or a reduction in the normal straight-time employment of bargaining unit employees in classifications within rosters which would normally do that work; and

3. so long as there are not on layoff or not working a normal work week, employees in job classifications within the roster which would normally do that work.

If none of the foregoing circumstances are present or result, the Company may farm out or contract bargaining unit work covered by both Articles I (c) and I (b) of the contract. And as previously indicated it is immaterial in my view whether the contracting
out or farm out is to a stranger company or to another facility of Chicago Pneumatic not covered by this collective bargaining agreement.

This answers primary issues 1 and 2.

As I have viewed Articles I (b) and I (c) as sufficiently clear and unambiguous, any past practice consistent therewith is relevant. Any past practice that is inconsistent would have no prospective effect on the rights of either the Company or the Unions to henceforth enforce these clear contract terms.

December 1, 1981

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Was there just cause for the discharge of Robin Cook? If not what shall be the remedy?

Hearings were held on September 17, 1979, March 4, and April 9, 1980 at which time Ms. Cook, hereinafter referred to as the "grievant" and representatives of the above named parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing briefs.

Based on the record before me I am persuaded that on several occasions the grievant claimed she was sick, used the sick leave benefits of the contract and absented herself from her primary employment at the Philadelphia Nursing Home, but was able to work and did work shifts at a different place of employment (the Stephen Smith Nursing Home) immediately before or immediately after her scheduled tour of duty from which she absented herself at the Philadelphia Nursing Home.

I conclude that on those occasions the grievant was not sick or unable because of illness to work her regular schedule at the Philadelphia Nursing Home, but rather took the time off
to be able more conveniently to work at her second job at the Stephen Smith Nursing Home, and to receive pay from both places of employment.

I deem this to be a false and improper use of sick leave, in violation of the contract and civil service law. Together with the grievant's prior disciplinary record of warnings and suspensions for other offenses, which were contested by the Union in this proceeding, but which because they were not grieved at the time imposed are no longer challengeable herein, the misuse of such time, constitutes grounds for 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:

The discharge of Robin Cook was for just cause.

Eric J. Schmertz
Arbitrator

DATED: October 28, 1981
In the Matter of the Arbitration between
Council 13, American Federation of State, County and Municipal Employees, AFL-CIO and Commonwealth of Pennsylvania

The above named Union represents the bargaining unit of Correction Officers and Psychiatric Security Aides employed by the Commonwealth of Pennsylvania at state correctional and mental institutions. In collective bargaining between the Union and the Commonwealth for a successor contract to the one due to expire on June 30, 1981 an impasse was reached on certain issues. In accordance with applicable statutes those unresolved issues have been submitted to the Undersigned Panel for resolution by arbitration.

Hearings were held on April 4, 5, 26, May 1 and 2, 1981, at which time representatives of both sides appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Also, at the request of the parties and accompanied by their representatives, the Chairman of the Arbitration Panel visited certain correctional and mental institutions and observed the duties and conditions of employment of the Correction Officers and Psychiatric Security Aides employed at those locations.

The Arbitration Panel met in executive session on June 7th, 1981.

Upon full consideration of the entire record, the Undersigned, duly designated as the Arbitration Panel, makes the following AWARD:

1. By direct collective bargaining the parties reached agreement on a number of issues. Those resolved issues and the agreements thereon are incorporated by reference herein and shall be included by the parties in the successor collective bargaining agreement.
2. **Contract Term**

   The contract shall be for two (2) years commencing July 1, 1981 and ending June 30th, 1983.

3. **Wages**

   The Correction Officers and the Psychiatric Security Aides shall receive an 8 per cent across-the-board wage increase effective July 1, 1981 and an additional 8 per cent across-the-board wage increase effective July 1, 1982.

   Also the employees shall receive a $200 cash bonus shortly after the commencement of the successor contract. There shall be a moratorium on payment by the Commonwealth of health and welfare plan contributions for the first six months of the successor contract.

4. **Longevity**

   Effective July 1, 1981 the first and second paragraphs of Section 7 of Article 19 of the expiring contract shall be replaced in the successor contract by

   a. a provision that during the period July 1, 1981 through June 30, 1983 a wage increase to Step F of the next higher pay range shall be granted to an employee who has served ten years or more as a Correction Officer or Psychiatric Security Aides; and

   b. a provision that during the period July 1, 1981 through June 30, 1983 a second longevity increment shall be granted to an employee who has served nineteen or more years as a Correction Officer or Psychiatric Security Aide. However this latter longevity increment each year shall be equivalent to one-half of the next higher
pay range of Step F. Also it shall be a lump sum cash bonus and shall not constitute an increase in salary or wage rate. It shall not be included in calculations for any benefits for which a salary or wage rate is utilized.

5. **Shift Differential**
   Effective July 1, 1981 the shift differential shall be 35 cents per hour. Other demands of both parties as regarding the shift differential are denied.

6. **Meal Periods**
   The meal allowance presently referred to in Article 8 Section 2 of the expiring contract shall be increased to $6.00 in the successor contract.
   In the successor contract, Article 8 Section 4 shall read:
   The Employer agrees to reimburse all employees in accordance with the appropriate expense regulation for all meals missed as a result of community assignments.

7. **Clothing Allowance**
   Correction Officers and Psychiatric Security Aides shall receive a clothing allowance of $100 a year effective July 1, 1982.

8. **Grievance Procedure and Arbitration**
   At the hearing the Commonwealth withdrew that part of its demand on this issue relating to an extension of time limits.
   The balance of the Commonwealth's demand is granted and shall be included in the successor contract.

9. **Sanitary Facilities**
   The issue is limited to the matter of shower
facilities for Psychiatric Security Aides at Norristown. The Commonwealth shall make a shower facility available which the Psychiatric Security Aides may use in private, at which their personal belongs are secure, which is adequately heated and which is not used by residents of the institution.

It is the judgement of the Panel that such a shower facility, among possibly others, is available in that portion of the institution which had been planned for female residents (but which is not presently so occupied) and which is now used periodically for group therapy sessions.


a. The issue concerning "passing and/or pouring of medicines at Huntingdon, Muncy and Philadelphia State involves only the matter of "passing" medicines, as there is no evidence that employees of this bargaining unit are "pouring" medicines. As we believe there is no legal liability of or to an employee who merely passes medicine to a resident, the Union's demand that employees be relieved of this responsibility is denied. However the parties shall include in the contract, or in an exchange of letters, a statement regarding the non-liability of an employee who passes medicine. It is noted that under the law and procedures of the Commonwealth, employees sued under such circumstances are defended by the Commonwealth.

b. Upward Mobility for Psychiatric Security Aides at Mayview
The parties shall undertake a joint study of the job duties and work methods of the Psychiatric Security Aides at Mayview to determine if those duties and/or the particular circumstances under which they work warrant the establishment of higher job classifications and/or promotional opportunities. If the Union and the Commonwealth disagree, the disagreements may be submitted for arbitration to the Classification Panel referred to in Article 28 Section 2 of the current (and successor) contract, and the decision of that Panel shall be binding.

c. The Union's demand for 10 per cent hazardous duty pay when a shift works short is denied.

d. The Union's demand for a mandatory one-time a year shutdown at Muncy is denied.

11. The Union's demand for a "buy-out" of rest periods for Psychiatric Security Aides, is denied.

The Panel believes that this is more appropriately a matter for future collective bargaining.

12. The Commonwealth's demands with regard to holidays are denied without prejudice.

13. The Union's demands with regard to personal leave days are denied.

14. The Union's demand with regard to expediting overtime payments is denied. However the Panel strongly recommends that in the interest of sound personnel practices the Commonwealth
inquire into the circumstances surrounding delays in paying for overtime work, and take steps to expedite payment.

15. The Union's demand for "call time and lay over" is denied.

16. The Union's demand regarding survivor's insurance is denied.

17. The Commonwealth's demand concerning work related injuries is denied.

18. The Union's demand for payment at the higher rate for work in a higher classification immediately upon assuming the higher duties, is denied.

19. a. The demands of the Commonwealth with regard to Discharge, Demotion,Suspension and Discipline are denied.

b. The demands of the Union with regard to Discharge, Demotion and Suspension are denied.

20. The Commonwealth's demand regarding extension of the promotion probationary period is denied.

21. The Commonwealth's demand regarding Peace and Stability is denied without prejudice to the respective legal and/or judicial rights of the parties.

22. The demand of the Commonwealth regarding its claimed right to determine when uniforms are to be worn is denied without prejudice.

23. The Undersigned Panel retains jurisdiction of this matter for interpretation and implementation of the foregoing decisions and/or
to assist the parties, if necessary, in the preparation of appropriate contract language covering these decisions and for the incorporation of these decisions into the collective bargaining agreement effective July 1, 1981 through June 30, 1983.

DATED: June 18, 1981

Eric J. Schmertz
Chairman

DATED: June 1981

Gerald W. McEntee

Concurring in Nos. ____________________________

Dissenting from Nos. ____________________________

DATED: June 1981

Miles J. Gibbons, Jr.

Concurring in Nos. ____________________________

Dissenting from Nos. ____________________________
In the Matter of the Arbitration
Between
Hotel and Restaurant Employees and
Bartenders International Union, AFL-CIO, Local 76
and
Concord Hotel

This case involves the grievances of Carole Higgins, Lloyd Freeman and George Wilde. Each claim that the Employer improperly deducted allowances for lodging and/or meals on certain days.

A hearing was held at the Concord Hotel on December 22, 1980 at which time the grievants 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.

Specifically, Higgins and Freeman who live off premises claim that on seven and six days respectively in 1980 when they were sick and not at work the Employer deducted $3.90 on each of those days for "meals" because of their illnesses they took no meals at work. Wilde who lives on premises claims that on three days in 1979 and four days in 1980 on what otherwise would have been personal leave days and his birthday and on which he actually worked, both his pay for the personal leave days and birthday (which by contract are days off) and his pay for the time worked those days had deductions for lodging and meals. His position is that on those days when he received double pay (i.e. pay for the contractual day off and for working) the deductions for meals and lodging should have been made only from one of those payments, namely from the payment for time worked, but not from pay for his birthday or personal leave. During the hearing Freeman also made a similar claim in connection with his birthday in 1980.

It is undisputed that under the law the Employer may deduct from wages for worked performed, a daily amount for meals and lodging for employees who live on premises, and for meals for those who live off premises. These are among the recognized statutory or "legal allowances."

The question in this arbitration is whether on days that an employee is sick and not at work there should be a deduction for "meals" from his sick pay benefit for that day, and whether if an employee works on his birthday or
personal leave day his leave and birthday pay should be diminished by a meal and lodging allowance when his pay for the actual day worked is decreased by those deductions as well.

The Union’s case is essentially equitable. It argues that it is unfair to deduct for meals when an employee who lives off premises does not work because of illness and took no meals on the Employer’s premises. And that it is equally unfair and illogical to deduct twice on the same day for meals and lodging when an employee works on his birthday or personal leave day.

The Arbitrator is bound to the terms of the contract. If contract provisions cover the instant circumstances, those provisions prevail, equitable considerations to the contrary notwithstanding. Even assuming a persuasiveness to the Union’s equitable arguments, I find specific contract language that is dispositive of the issue and which supports the Employer’s position herein.

Article XI Sections A and B Employee’s Birthday and Employee’s Personal Day read:

Section A. Employee’s Birthday. Provided he qualifies for a one week vacation, an employee shall receive a day off at straight pay on his birthday. At the Employer’s option, the affected employee may be required to work on his birthday at his regular rate of pay for that day and be given another day off at straight time pay in lieu of his birthday.

Section B. Employee’s Personal Day. Provided he qualifies for a one week vacation, an employee shall receive a personal day off at straight time pay on such date as may be mutually agreed upon between the employee and his supervisor.

The question narrows to what is “straight pay?” Does it mean the hourly rate times the hours worked with deductions or without deductions? And if the latter, which deductions.

The answer is found in Schedule A of the contract together with how, under the contract, the parties handle "straight pay" for purposes of vacation. I am persuaded that the contractual definition of "straight pay" calls for certain deductions and/or the deduction of allowances, and that "straight pay" for the personal leave days and birthdays involved in this case is a days pay at the hourly rate less legal allowances which include the disputed lodging and/or meal deductions.

If those deductions were not part of "straight pay" what the parties
negotiated differently for vacation pay would have been unnecessary. Article XII (Vacations) expressly limits deductions from vacation pay to federal and state taxes. I conclude that that limitation was negotiated for vacation pay, whereas no such limit is placed on "straight pay" for birthday and personal leave days, to insure that meal and lodging allowances would not be deducted from vacation pay. As federal and state taxes are routinely deducted from all pay it follows that an explicit contract provision limiting deductions to those items must have been included to bar other deductions and to distinguish "straight pay" for vacations from "straight pay" for other purposes. For if all "straight pay" was without deductions or only with a deduction of federal and state taxes, any such language would be superfluous and meaningless. I do not think the parties negotiated a meaningless sentence.

Clearly the distinction, so far as this case is concerned, is between "straight pay" for vacations and "straight pay" for personal leave days and birthdays. The latter two, by the contract terms, are to be paid for at "straight pay" without any mention of or limitation on deductions or allowances. Therefore if "straight pay" for vacations is subject only to federal and state taxes, which are routinely deducted anyway, it follows that "straight pay" for personal leave days and birthdays must involve other deductions or allowances as well, and those other allowances must be "legal allowances" including meals and lodging.

In short, the limited pay deductions from vacation pay are explicit exceptions to what otherwise is "straight pay" for other benefit days.

This is supported by Schedule A. For the various relevant classifications Schedule A provides for a specified hourly pay rate less all legal allowances. Consequently, "straight pay" for personal leave days and holidays must be the specified hourly rate times the relevant hours, less state and federal taxes and the legal allowances for meals and/or lodging.

As for sick pay, Article XVII Section A reads in pertinent part:

An employee...shall be entitled to six (6) days of sick leave without loss of pay in his employment or fiscal year. (emphasis added)

To my mind the underscored language means that an employee shall receive the same amount of pay when he is sick as he would receive if he worked. Here, had the grievants not been sick they would have been paid for the day with deductions for meals. Their sick pay for the days in question
was in the same amounts. Hence I can find no "loss of pay" in what they received and therefore I find no contract violation.

Based on the foregoing, the pay an employee is entitled to receive as sick pay, for a birthday and for a personal leave day is what the Employer accorded each of the grievants in the circumstances presented. That Wilde worked on his birthday and on personal leave days and Freeman worked on one birthday, is immaterial. A benefit day and a day worked are two separate circumstances. It is undisputed that the Employer had the right to deduct for meals and/or lodging for the time worked. And since the benefit for the birthday and personal leave day is confined to "straight time" as defined, I cannot find contractual fault with the deductions the Employer made from the payment for those benefits even though two sets of deductions were made on the same day. In my view the contract provides for the deduction, whether it be a benefit day or a work day and those deductions obtain to both independent circumstances even if, by coincidence, both occur in the same calendar day. And it is to the contract that I must adhere. If these results, which are reflections of the contract negotiated by the parties are inequitable, a change is for collective bargaining not arbitration.

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 grievances of Carole Higgins, Lloyd Freeman and George Wilde are denied.

DATED: January 20, 1981
STATE OF New York )
COUNTY OF New York )

On this 20th day of January, 1981, 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  
Locals Number 420 and 457 of the  
International Brotherhood of  
Electrical Workers  
and  
The Connecticut Light and Power  
Company  

In accordance with Article IV of the collective bargaining agreement effective June 1, 1979 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide a dispute involving the use of gas contractors by the Company.

Hearings were held in Meriden, Connecticut on January 21 and April 22, 1981 at which time representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken. The Arbitrator's Oath was taken and the parties filed post-hearing briefs.

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

1. Are the grievances filed by Local 457 arbitrable in the instant proceeding?

2. Did the Company violate the collective bargaining agreement by utilizing contractors to perform work regularly performed by bargaining unit employees while members of the bargaining unit were eligible for recall and/or had been displaced from
their regular jobs through the exercise of bumping rights?

If so, what shall be the remedy?

The Company decided in 1977 to reduce its permanent work force due to changes in the demand for gas services. The Company implemented the layoff procedures of the collective bargaining agreement for certain gas department employees represented by Locals 420 and 457 in late 1977; however, the notice provisions and bumping rights contained in that agreement delayed the effectuation of the layoffs, and the accompanying displacement of employees who opted to exercise their contractual bumping rights, to the period commencing on February 12, 1978.

Later, in July 1979, the Company experienced an increase in the demand for gas services and began to utilize outside contractors to perform certain work that the additional demand generated. The Company did not recall any of the employees whose recall rights had not lapsed. Local 420 filed grievances concerning the Company's use of outside contractors as follows: October 4, 1979 for the Norwalk District; October 29, 1979 for the Shelton District; January 2, 1980 for the Danbury District; January 2, 1980 for the Torrington District; and January, 1980 for the Waterbury District. Local 457 filed grievances as follows: October 1, 1979 for the Enfield District; November 30, 1979 for the Bristol District; November 30, 1979 for the Danielson District; and October 15, 1979 for the Meriden District. Representatives of Local 420 and the Company arranged a grievance meeting for January 3, 1980; Local 457 was represented at the meeting. The
grievances were not settled and, as a result, the instant arbitration was commenced.

Issue 1: The Arbitrability of the Local 457 Grievances

The Company asserts that Local 457 is not a party to this arbitration. In support of this claim of non-arbitrability, the Company relies on the failure of Local 457 to arrange its own meeting pursuant to Step Three of the grievance procedure and the failure of Local 457 to communicate its intent to arbitrate either orally or in writing as did Local 420. (Company Exhibit 2(a)-2(d).) The Company also insists that the Local 457 never made a demand for arbitration and did not participate in the selection or designation of the arbitrator as did Local 420.

The Company maintains that Local 457 should have demanded arbitration and then participated in selecting the arbitrator as it did in a parallel arbitration case involving the use of outside contractors for the electrical portion of the Company's operation.

The Union claims that Local 457 advised the Company at the Step Three grievance meeting on January 3, 1980 that it intended to act jointly with Local 420 and that the Company accepted this arrangement. Although the demand for arbitration only referred to Local 420, the Union argues that Local 420 had intended to encompass the grievances of Local 457.

In my judgment the parties jointly processed the grievances of Local 420 and Local 457 to arbitration. It is undisputed that the parties to the collective bargaining agreement are the Company and the two Locals. Local 420 and Local 457 jointly negotiated
referred to as the UNION . . . . " The agreement repeatedly utilizes the additional terms "Local concerned" and "Local Union concerned." The parties, therefore, knew how to differentiate between a single Local and both Locals. But Article IV refers throughout to the "Union" (i.e., both Locals) but omits any reference to "Local concerned" or Local Union concerned" (i.e., a single Local). There is, consequently, a strong presumption that both Locals may participate in the same arbitration.

Under the factual circumstances surrounding the processing of the gas contractor grievances as reflected in the record and cited above, I find that the Company failed to rebut this presumption. The joint processing of the grievances at Step Three coupled with the Company’s failure to schedule a Step Three meeting for Local 457 are probative evidence that the Company understood that the two Locals would process the grievances on a joint basis. The procedure utilized by Local 420 and Local 457 in jointly processing to arbitration the grievances concerning the use of electrical contractors explicitly indicated the involvement of both Locals (Company Exhibit 3(a)-3(c)).

Furthermore, the introduction by the Company of only one example of how grievances are processed by the two Locals is insufficient evidence to prove a past practice that supersedes the thrust of Article IV, which the parties bilaterally negotiated, and the conduct of the parties throughout the processing of the instant grievances. In light of all of these circumstances, it is my finding, that the grievances filed by Local 457 are
arbitrable in the instant arbitration proceeding.

Issue 2: The Merits of the Grievance

The Union claims that Article XVI, entitled Contract Work, prohibits the Company from using outside contractors to perform bargaining unit work when members of the bargaining unit have been laid off and/or have been displaced through the exercise of bumping rights. As a result, the Union contends that the Company denied certain employees a continuity of employment in their job classifications—and, incidentally, permanent promotions—by using contractors instead of recalling members of the bargaining unit. Although the Union recognizes that the Company is not obligated to recall employees under Article V, Section 4 when there is a job involving insignificant time, the Union interprets the agreement to require that the Company recall employees when, as it alleges is the case herein, there is a significant amount of work to be performed.

The Company asserts that the work that outside contractors performed was "sporadic as to location, short-term in duration and subject to the vicissitudes of weather." The Company, therefore, argues that the use of contractors is not violative of Article XVI because bargaining unit employees were not deprived of a "continuity of employment" or "permanent promotional opportunities." In addition, the Company maintains through Company Exhibit 7 that in 1963 the Union failed in attempting to secure a modification of Article XVI that would have further limited the Company's right to use contractors and that the parties have
incorporated the 1963 contractual language into the current agreement. The Company also argues that the Union's interpretation of the agreement would cause chaos by leading to instability in the work force due to constant recalls and layoffs. Finally, the Company insists that Article II, entitled the Functions of Management, permits the Company to determine the number of employees that are necessary for performing its daily operations and that the Company exercised this contractual right by setting its base load requirement and, thereafter, by utilizing contractors.

Article XVI provides:

Work regularly performed by employees covered by this Agreement will not be contracted out if it would result in loss of continuity of employment or opportunities for permanent promotions to job classifications covered by this Agreement.

Article XVI is quite specific. The Company's right to use contractors is proscribed only if the use of contractors causes a "loss of continuity of employment or opportunities for permanent promotions ... " (emphasis added.) The critical contractual language does not refer to employees on layoff or even those who bumped downward as a result of an earlier layoff. Had the parties intended to prevent the use of contractors while qualified employees were on layoff, the prohibition, which was well within their contemplation, could have and should have been explicit. It is not under this language, and the same is true for employees, albeit still working, who had to bump downward to avoid an earlier layoff.
Therefore, under the instant facts and particularly in view of the less than permanent nature of the work involved (as referred to later), the phrase "continuity of employment" must apply to those employees actively at work at the time contractors were used. In other words, contractors may not be used if it causes a layoff or downgrade of employees then at work. Manifestly, employees then on layoff as a result of an earlier diminution of work not related to the use of contractors have no "continuity of employment" because they are not actively at work and their layoffs are not caused by use of the contractors. Hence the use of contractors did not affect them within the meaning of the controlling contract language.

Also the record is clear that, to the extent that the Company retained outside contractors to perform bargaining unit work, such work which was sporadic in scheduling could only be performed during above-freezing weather which, as a rule, was the late March to November time period. The seasonal and irregular nature of such work meant that continuity of employment and promotions would not be reduced for members of the bargaining unit by using outside contractors because there would be no demand for such employees or "continuity of employment" between the months of December to March. And no "permanent" employment was involved. A planned, significant, interruption in employment is contrary to the clear meaning of "continuous" and "permanent."

As the parties have negotiated successive collective bargaining agreements since 1963 that include this identical language, the Company is not contractually required in my judgment to
absorb the financial burden of recalling members of the bargaining unit who would be unable to perform their jobs and therefore again subject to layoff during an extended period of time such as the winter months. I recognize the possible inequities to employees on layoff, but a modification of this contract provision remains a matter for collective bargaining rather than for arbitration. I therefore find, that, under the particular circumstances of this case, the Company did not violate the collective bargaining agreement by utilizing contractors to perform work regularly performed by bargaining unit employees while members of the bargaining unit were eligible for recall and/or had been displaced from their regular jobs through the exercise of bumping rights.

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

1. The grievances filed by Local 457 are arbitrable in the instant proceeding.

2. The Company did not violate the collective bargaining agreement by utilizing contractors to perform work regularly performed by bargaining unit employees while members of the bargaining unit were eligible for recall and/or had been displaced from their regular jobs through the exercise of bumping rights.

Eric J. Schmertz
Arbitrator
DATED: October 5, 1981
STATE OF New York )ss.:
COUNTY OF New York )

On this fifth day of October, 1981 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

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

C. W. Post Collegial Federation

and

C. W. Post Center, Long Island University

CASE NUMBER: 1730-0045-79

AWARD OF ARBITRATOR

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated September 1, 1977 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The Union's grievance dated October 25, 1978 is denied. The Memorandum of Understanding dated November 16, 1978 did not substantively change the terms and meaning of Article XIX of the contract. The University did not err in its work load assignments or released time credits to those faculty members who grieved and/or testified at the hearing. The grievances of said employees are denied.

STATE or New York
COUNTY of New York

On this first day of June, 1981, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Arbitrator's signature (dated)
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

C.W. Post Collegial Federation

and

C.W. Post Center, Long Island University

CASE NUMBER: 1730-0045-79

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated September 1, 1972, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The Union's grievance dated October 25, 1975, is denied. The Memorandum of Understanding dated November 16, 1975, did not substantively change the terms and meaning of Article XVII of the Contract. The University did not err in its work load assignments or released time credits. Those faculty members who grieved and/or testified at the hearing are denied grievances. Arribator's signature (dated)

STATE OF
COUNTY OF ss.

On this day of , 19 , before me personally

came and appeared
to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

Did the District violate Article V Section 1 of the collective bargaining agreement when it inserted certain memoranda from the Building Principal into the files of J. Gamble, P. Osborne, J. Cynar, P. Donaldson and J. Mancini? If so what shall be the remedy?

A hearing was held at the offices of the District on October 22, 1981 at which time representatives of the above 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.

At the hearing the Arbitrator ruled the grievance to be arbitrable.

The pertinent part of Article V Section 1 reads:

ARTICLE V
PROFESSIONAL RESPONSIBILITIES

Section 1 - Official Professional File

Upon the request of the teacher, on reasonable notice, he shall be permitted after school hours to examine his own Deer Park School System Official Professional File maintained in the Division of Personnel. Such examination shall be limited to ratings, observations, and evaluations made by supervisory personnel concerning the teacher's service in the Deer Park
School System. No such materials shall be placed in his file unless the teacher has an opportunity to read it. The teacher shall acknowledge that he has read such materials by signing the copy to be filed, but such signature shall not be deemed to constitute agreement by the teacher with its content. Refusal of the teacher to sign will be noted by the appropriate representative of the District. The teacher shall have the right to answer in writing any material filed and his answer shall be inserted in his file. The official school Evaluation Form must be used for all professional file insertions. Observations may be made for the period between sign-in and sign-out time. The annual evaluation shall be related to individual evaluations made during the school year. All official observations must be written and offered to the teacher for signing within seven (7) working days. The teacher when signing the observation will also write in the date on which he signed the observation.

The Association contends that the memoranda placed in the files of the employees named in the stipulated issue (hereinafter referred to as the "grievants") contained factual inaccuracies, were substantively unjustified and violated that portion of the forgoing contract clause requiring that the teachers be afforded an opportunity to read any such memoranda and to sign the copy to be filed before the memoranda is placed in the personnel files.

The District asserts that Article V Section 1 is inapplicable because the disputed memoranda were not evaluations or observations within the meaning of Article V Section 1 and hence the procedural requirements of that Section do not obtain. It is the District's position that the disputed documents, though written on Teacher Observation forms were recordings of routine personnel action taken by the Building Principal and, pursuant to the
arbitration decision of Arbitrator Stanley L. Aiges, may be recorded on Teacher Observation forms without being "observations or evaluations" within the meaning of Article V Section 1 of the contract and may be placed in an employee's personnel file. Additionally the District claims that the documents are substantively accurate and justified.

I need not determine whether the documents are observations or evaluations within the meaning of Article V Section 1 of the contract or simply memoranda. Nor need I determine whether they are substantively accurate or otherwise justified. Instead this issue is determined on the procedural requirements of Article V Section 1.

By its own action the District has acknowledged that whether the documents are official observations and evaluations or only memoranda, the requirements of Article V Section 1 that a teacher be given an opportunity to read it and to sign a copy before it is filed in his or her personnel file, must be followed. The Building Principal testified that with regard to these disputed documents, he was instructed by the Assistant Superintendent of the District, after a single copy of the document was transmitted to each grievant respectively (in all or most cases by placing it in his or her school mailbox) and after seven days had elapsed from the date of the memoranda, and after a copy was placed in each grievant's personnel file, to afford each grievant an opportunity to sign a copy thereof. This action by the Assistant Superintendent refutes the District's claim in this
arbitration that the procedures of Article V Section 1 do not apply to these documents, whether they be memoranda, observations or evaluations. And the Aiges decision does not deal with that question. The instructions of the Assistant Superintendent to the Building Principal demonstrates that the District believed that the grievants were entitled to see and sign the documents before they were placed in their respective personnel files. I construe the instructions of the Assistant Superintendent to mean that he was advising the Building Principal to "cure" the latter's procedural defect by giving the grievants a chance to sign the documents, which Article V Section 1 requires be done before any such documents are placed in the personnel files and within the prescribed seven days. However this effort to cure the procedural defect came too late. The documents had already been placed in the grievants' personnel files, and more than seven days had elapsed from the dates of the memoranda.

In short, by its own action the District considered the disputed memoranda to be subject to the procedural requirements of Article V Section 1 of the contract; those procedural requirements were not followed; and hence the disputed documents were not properly placed in the grievants' personnel files.

The Association's requested remedy that the documents be expunged from the grievants' personnel files and destroyed, is granted.

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 District violated Article V Section 1 of the collective bargaining agreement when it inserted certain memoranda from the Building Principal into the files of J. Gamble, P. Osborne, J. Cynar, P. Donaldson and J. Mancini. The memoranda shall be expunged from the files and destroyed.

Dated: November 11, 1981
State of New York )ss.
County of New York

On this 11th day of November, 1981 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Is there a violation of Article III B.1.b Section 3.41 of the contract by the President naming himself to, and serving on the Long Range Planning and Development Committee? If so what shall be the remedy?

A hearing was held at the College on August 26, 1981 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 claims that the contract section set forth in the stipulated issue bars the President of the College from naming himself to and from serving on the Committee in question. That section reads in pertinent part:

The President of the College...may sit in all meetings of the Faculty-Administrative Senate with all rights and privileges of the members save that of vote and committee membership....

The Union argues that the Long Range Planning and Development Committee is a committee from which the President is barred as to membership and vote because that Committee regularly reports to the Faculty-Administrative Senate.
The College asserts that the forgoing contract provision is not applicable to the Long Range Planning and Development Committee because that Committee is not a committee of the Faculty-Administrative Senate but rather a Standing Committee referred to under that heading, and found elsewhere in an entirely different and separate section of the contract, namely Section 3.73. Therefore, the College argues, the prohibition of Section 3.41 applies to ad hoc committees established by the Faculty-Administrative Senate, but, because the prohibition is not found in or under the contract section entitled The Standing Committees, it does not apply to the Long Range Planning and Development Committee which is specifically listed as one of the Standing Committees.

It is generally well settled, and not challenged by the Union herein, that absent a specific restriction or limitation, an official with the power to appoint may exercise that power by appointing himself. The Union's case is simply that the contract does contain an explicit restriction and limitation on the President's right to appoint himself and to exercise the right to vote, and that that restriction applies to the Committee in question.

I find the critical contract language and provisions to be ambiguous. Either argument advanced respectively by the Union and the College makes sense. It is acknowledged that the Long Range Planning and Development Committee regularly reports to the Faculty-Administrative Senate. As such, though that Committee
is contractually defined as a "Standing Committee," it could also qualify as a "committee" within the meaning of Section 3.41 and subject thereby to the proscription on the President's membership and right to vote. Also Section 3.41 might well be an expression of general intent. That is to say that by specifically excluding the President from committee membership and the right to vote, the parties intended to express a reservation about such service by the President and such right to vote on any committee referred to in the contract; that it was unnecessary to express the prohibition at each and every location in the contract relating to committees.

On the other hand the prohibition is found only under the contract section dealing with the Faculty-Administrative Senate. It is acknowledged that the Senate has the power and does, from time to time, establish various ad hoc committees. The specific prohibition of Section 3.41 is not found in paragraph C of Article III under the various regulations dealing with Standing Committees, of which the Long Range Planning and Development Committee is one. As a matter of traditional contract interpretation it is therefore logical to conclude that the prohibition is limited to the Section where it is found, i.e. to committees established under the Faculty-Administrative Senate but not to Standing Committees referred to elsewhere in the contract, even if those standing committees make reports to the Senate.

Where the contract is unclear or ambiguous the traditional approach to resolve the ambiguity is to look to past practice if
evidence of practice is available and probative. In the instant case it is not. The College pointed to one instance in which the Vice President for Academic Affairs and Dean of Faculty appointed himself to serve on the Long Range Planning and Development Committee in accordance with his contractual right to "appoint an administrator," and a memorandum from the Chairperson of the Long Range Planning and Development Committee (Dr. Joan Boyle) stating that she was "pleased" by the President's appointment of himself to that Committee. These instances do not constitute a controlling past practice. The first did not involve the President and the second was not an authoritative approval by the Union or by a Union representative. Therefore the ambiguity is neither clarified nor resolved one way or the other by any past practice.

The state of the record remains one of ambiguity. As such the Union has not met its burden of proving that a limitation found in Paragraph B of Article III is applicable to Paragraph C of that Article.

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

There is no violation of Article III B.1.b. Section 3.41 of the contract by the President naming himself to and serving on the Long Range Planning and Development Committee.

Eric J. Schmertz
Arbitrator
DATED: October 20, 1981
STATE OF New York )ss.: 
COUNTY OF New York )

On this 20th day of October, 1981, 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
Capitol City Lodge No. 354, Affiliated with District 91, International Association of Machinists and Aerospace Workers, AFL-CIO

and
Dunham-Bush, Inc.

In accordance with Article 15 of the collective bargaining agreement dated October 29, 1979 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the collective bargaining agreement by refusing to upgrade Oscar Downer and Joe Welch from Refrigerator Mechanic, Labor Grade 9, to Refrigerator Mechanic A, Labor Grade 10? If so, what shall be the remedy?

A hearing was held in Hartford, Connecticut on March 2, 1981 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. The parties filed post-hearing briefs.

On April 23, 1980 the Union filed grievances 80-36 through 80-42 on behalf of a number of employees in Department 32 who claimed that the Company had misclassified them as Refrigerator Mechanics, Class B, Labor Grade 9, rather than as Refrigerator Mechanics, Class A, Labor Grade 10. The parties agreed that Grievance 80-40, filed on behalf of Oscar H. Downer, and Grievance 80-41, filed on behalf of Joe Welch, would be resolved by following the option recommended by Assistant General Manager William N. Munro and recited as follows in the minutes of the Dunham-Bush Union and Management Meeting on June 4, 1980 (Company Exhibit 3, page 3):

Since it is Management's opinion that these employees do not possess the skills to become Grade 10, it was recommended that the Foremen would assign each Grade 9 employee to work with a Grade 10 employee over the next three months to help improve their skills. At the end of the three month cycle each of the Grade 9 employees would again be reviewed to see if they were promotable to Grade 10.
On September 23, 1980 the parties held a Third Step Grievance Meeting at which time the Company indicated that the grievants would not be promoted. The minutes of that meeting (Company Exhibit 4) reflect that: "Management has completed a review of these two employees and still feels that they should not be promoted to Grade 10." On October 9, 1980 Downer and Welch filed Grievance 80-71 that is the subject of the instant arbitration.

The grievance claims that the grievants are currently misclassified. The Union contends that the duties of Refrigerator Mechanic B and Refrigerator Mechanic A are, in essence, indistinguishable or, in the alternative, that the grievants are performing the duties of Refrigerator Mechanic A; are qualified to do so; and therefore should be upgraded. The Company asserts that the job duties are different; that the grievants are unable to perform the job of Refrigerator Mechanic A; that Management is under no duty to promote the grievants even if they were qualified to perform the Refrigerator Mechanic A job; and that the grievants, therefore, should not be promoted.

Although this case originated as a misclassification dispute, the grievance evolved into a promotion dispute. The stipulated issue is framed in terms of a refusal to upgrade the grievants. I find that the June 4, 1980 option--bilaterally agreed to by the parties--shifted the grievance to that of a promotion dispute. The use of the word "promotable" in Option 3 when coupled with the language contained in Option 1 that the individuals "would immediately be brought up to Grade 10" and in Option 2 that the Grade 9's "would be raised to Grade 10" is determinative. Thus, I conclude that the parties had agreed that the grievants would be promoted if they were found to "possess the skills to become Grade 10."

It is well settled that an employer's judgement concerning the abilities and qualifications of employees for a promotion should not be disturbed unless found to be arbitrary, capricious, or discriminatory. In the instant case there is persuasive evidence in the record that supports a finding of arbitrariness. Foreman, Gary Henderson, who was responsible for determining whether to promote the grievants after the three month review period had ended, testified that he did not contact employee Thompson even though the Company had assigned Downer to work with him during the three month period. If the purpose of the three month period was to afford the grievants an opportunity to
demonstrate their ability to perform as Refrigerator Mechanics A, there can be no reasonable explanation for the foreman to have neglected consulting with Thompson. As a result, Henderson judged the worthiness of the grievant for promotion without any input from the key person involved in the review process. I consider this arbitrary.

Second, Henderson testified at length about the need for five years of experience in Department 32 as a Refrigerator Mechanic B before an employee could be promoted to a Refrigerator Mechanic A. Although the parties ultimately stipulated at the hearing that five years of such experience was not an absolute requirement, it is clear that the Company relied on that requirement. This predisposition, evidenced by the Company's initial explanation at the hearing that it deemed five years experience to be a threshold qualification, foreclosed either grievant from receiving an objective appraisal because it was a chronological impossibility for either to have achieved five years of experience in Department 32 by September 1980. Accordingly, the outcome of the three month period of review was predetermined from the outset by the Company, and that was arbitrary, if not willfully misleading.

Third, the bilaterally agreed to three month period of review contemplated a three month period of time for the employees to "improve their skills." The evidence indicates that the grievants were on vacation during the time frame that the Company considered to be three months. This reduced what should have been approximately 12 weeks to only 10 weeks of actual time. Furthermore, Union Exhibit 1, which the Company did not rebut, indicates that by assignment, the grievants worked together for three days during the week of August 18, for five days during the week of August 25, for five days during the week of September 2, and for three days during the week of September 8. This necessitates subtracting 16 additional days from the 10 weeks that remained of the 3 month period of review. Thus the bilaterally agreed to 12 week period of review ended up as only a 7 week period. Under these circumstances I must conclude that the Company acted arbitrarily by failing to accord the grievants a reasonable and agreed to period of time, namely 12 weeks to improve their skills, if necessary, to the level the Company asserted was required.

Having found that the Company acted arbitrary in its failure to carry out and comply with the stipulated arrangement between
it and the Union, the appropriate remedy in my judgement is to upgrade the grievants to the job classification Refrigerator Mechanic A, effective September 23, 1980, the date of the Company's improper decision, and make them whole for lost wages.

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 violated the collective bargaining agreement by refusing to upgrade Oscar Downer and Joe Welch from Refrigerator Mechanic B, Labor Grade 9, to Refrigerator Mechanic A, Labor Grade 10. The Company shall upgrade them retroactively to September 23, 1980 and shall make them whole for lost wages.

Eric J. Schmertz
Arbitrator

DATED: May 19, 1981
STATE OF New York )
COUNTY OF New York) ss.: On this 19th day of May, 1981 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:

Has the Employer violated the collective bargaining agreement (1978-1980) by reducing Joan Powell's hourly rate of pay to $6.92 per hour in connection with her transfer to PPT 2 classification? Is there to be a declaration of rights for those employees similarly situated in the grievance? If so, what shall the remedy be?

A hearing was held in Tenafly, New Jersey on June 29, 1981 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 Arbitrator's Oath was waived.

The Employer makes a distinction in wages between two groups of permanent part-time (PPT) employees. In doing so it relies on Section 4.03 of the contract which defines two types of permanent part-time employees, respectively PPT #1 and PPT #2. For those classified as PPT #1 the Employer pays the PPT hourly rate set forth in Schedule A page 42 of the collective bargaining agreement. For those classified as PPT #2 the Employer pays the lesser per diem wage rate of that same Schedule A. In the instant case the grievant upon her transfer from a full-time classification to that of the PPT #2 classification was paid the per diem rate of $6.92 an hour. It is the Union's contention that she should have been
paid the PPT rate of $7.97 an hour under the schedule effective September 1, 1979.

I find the Union's case meritorious. Schedule A provides for a rate of pay for PPT employees and makes no distinction between those classified as PPT #1 and those classified as PPT #2. Though Section 4.03 divides the PPT classification into two types, I conclude that that Section merely defines each job and does not set up nor is it designed to determine the wage rate for either or both types of PPT employees. Rather, the wage question is determined by Schedule A. Had the parties intended that PPT #1 and PPT #2 employees be paid differently, they would and should have delineated that distinction in the wage scale by providing for different hourly rates for each of the two PPT classified employees. Alternatively the parties would and should have included the PPT #2 employee within the per diem compensation column. That neither was done, particularly in view of the fact that the parties contractually were aware of the two types of PPT employees, as provided in Section 4.03, leads me to conclude that though two types of PPT employees are defined and employed, the parties did not intend that they be paid differently.

The "practice" cited and relied upon by the Employer is not persuasive. Either the cases are factually different from the instant dispute, or the examples cited post-dated the instant grievance and hence lack precedential value.

Accordingly the Employer erred when it paid the grievant in the PPT #2 classification an hourly rate less than the PPT rate set forth in Schedule A for the period of time involved. The grievant's rate shall be increased with an appropriate retroactive adjustment.
The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above parties makes the following AWARD:

The Employer violated the collective bargaining agreement (1978-1980) by reducing Joan Powell's hourly rate of pay to $6.92 per hour in connection with her transfer to PPT #2 classification. Her pay shall be increased to the PPT hourly rate set forth in Schedule A with a retroactive adjustment for the period involved.

This decision is limited to the grievance of Joan Powell. Its applicability to other employees similarly situated is a matter for the parties to jointly determine and/or for other arbitral proceedings and determinations in which the question of other employees similarly situated is at issue.

Dated: August 5, 1981
STATE OF New York ) ss.: 
COUNTY OF New York )

On this fifth day of August, 1981, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration:

Frito-Lay, Inc.

and

Local 802, IBT

The Employer, Frito-Lay, Inc., and the Union, Local 802, IBT, are parties to a collective bargaining agreement covering the period which is the subject of these two proceedings. The grievants are John T. Crawford and Ronald Indelicato, employees of Frito-Lay who were discharged in February and April, 1980, respectively. Each grieved his discharge. Hearings were held on August 20, 1980, with respect to Mr. Crawford and on September 18 and October 13, 1980, with respect to Mr. Indelicato. Witnesses were heard, documents were received in evidence and the Employer submitted briefs in each case. The Union chose to rely on oral presentations at the end of each proceeding. Upon receipt of the stenographic record and the briefs, the hearings were declared closed on December 15, 1980. Because of the common questions involved, it was agreed that the arbitrator would consider the disposition of the two grievances contemporaneously. Of course, each of the grievances was considered separately on its own merits. This decision and opinion covers both grievances, each presenting the stipulated issue of whether there was just cause for the discharge of the grievants.

In each case, Frito-Lay claims there was just cause for discharge because the grievants did not perform competently his duties related to maintaining proper records and rendering accurate accounts to Frito-Lay. The Employer does not assert that discharge was based on claims of dishonest conduct on the part of the discharged employees.

The evidence on behalf of the Employer was substantially the same in each case. In fact, substantial parts of the minutes of the Crawford hearing were stipulated in evidence in the Indelicato hearing.

The employee's position in each case was also substantially the same. However, Mr. Indelicato presented one major question not presented in the Crawford hearing. Mr. Crawford had a pending claim against Frito-Lay which, in substance, asserted that his discharge was the product of racial
discrimination on the part of Frito-Lay. This claim is not before me in
this proceeding. Mr. Indelicate, who is white, alleged that his discharge
was in whole or in part motivated by Frito-Lay’s desire to provide credi-

tility to its claim that Mr. Crawford’s discharge was not racially motivated.
Mr. Indelicate’s contention is before me in this proceeding. But by virtue
of my disposition of the other issues presented, it is unnecessary to deal
with Mr. Indelicate’s claim in this regard.

The Employer has the burden of establishing by evidence that each of
the discharges was for just cause. I turn now to the evidence presented in
support of the claim that discharge was justified because of the failure of
Mr. Crawford and Mr. Indelicate to perform their duties of record-keeping
and accounting competently. In substance, the evidence consists of a
description of the duties of each employee, the production of periodic state-
ments by the Employer showing the state of accounts between Frito-Lay and
the employee and conclusions drawn from the periodic statement of accounts.

Mr. Crawford and Mr. Indelicate were route salesmen employed in
Frito-Lay’s Bronx depot. Route salesmen deliver goods to retail customers
and collect payments in the form of cash, checks and authorized credit
receipts. Each day a route salesman is required to render a daily account
of the transactions for the day. The records of the transactions include:
(1) order invoices which reflected inventory transactions between the sales-
man and Frito-Lay; (2) sales tickets which reflected transactions with the
customers on the route; and (3) a daily report which is a summary of the
day’s transactions. A usual route out of the Bronx depot would involve 8 to
10 customers. At the end of each day, a route salesman turns in his daily
report together with the receipts for the day. If receipts were in cash, he
obtained a money order for the amount and gave that to the Company with his
daily report and checks and authorized credit receipts, if any.

Based on these reports, as well as information not available to or
supplied by the salesmen (e.g., checks uncollected for insufficient funds),
the Company’s central accounting system located in Dallas would cause to be
issued computer printouts (route settlement reports) reflecting, inter alia,
each salesman’s account.) These reports were issued at the end of each four
week period, i.e., 13 per year. The computer-produced statements would reflect
shortages or overages in the salesman’s account or that it was in balance.
In the event of a shortage which the salesman did not explain satisfactorily,
he is required to pay the Company the amount of the shortage within the first
five days of the next accounting period. Overages are credited or paid to the employee.

Computer reported imbalances in a salesman's account are not uncommon. Indeed, zero balances at the end of a four week period are more unusual than overages or shortages and shortages more usual than overages. There are many explanations for shortages that are benign rather than attributable to dishonesty. A shortage does not mean that Frito-Lay is out-of-pocket the amount in question, because Company policy has been that unless the employee can explain the shortage reflected in the periodic statement so as to reduce or eliminate it he must and does pay the balance shown to be due.

In or about April, 1979, the Company determined that the frequent appearances of shortages and overages in the accounts presented a serious problem. In addition to reflecting the difficulties in the efficacy of its accounting system, the shortage problem meant that the Company was losing the value of the cost of money for the period, however short, during which money remained due from its employees. Frito-Lay received much of its payments in cash. Sixty percent of the 5 million dollar annual sales in the northeast region represented cash sales. Nationally, 1/3 of its 1.5 billion dollars in annual sales was in cash. Unrepaid shortages amounted to $277,000 in 1979, nationally. However, this figure includes amounts written off due to thefts from driver's trucks; the reasons for the remaining amount of shortages are not known.* In the Bronx depot, the amount of shortages written off in 1979 for all reasons was $7,700.

The dimensions of these figures caused the Company to institute a new policy in or about April, 1979. At that time, the Company announced a policy applicable throughout the nation. In substance, the Company declared that frequent overages or shortages in excess of $50 per four week accounting period would result in discipline and ultimately discharge. Even with respect to an amount of $50 or less, the employee would be responsible for reimbursing the Company for shortages. The Company also believed it had a special problem with respect to the Bronx depot where Crawford and Indelicato were

*It is common for employees who have been discharged to fail to pay the shortages.
employed. In the Bronx depot, the Company applied the $50 standard.*

It is undisputed that the Company's computer printout statement reflected shortages by the grievants in excess of $50 for most of the periods between April, 1979 and the moment when each was discharged. It is also undisputed that each grievant reimbursed the Company for the net amount of the asserted shortages (i.e., after deductions for break-ins, etc.).** Thus, the only question is whether the Company has sustained its burden of proving it had just cause to discharge them because of a failure to accurately account to Frito-Lay under the terms of the collective bargaining agreement.

The Company's position and the nature of the proof upon which it relies is best exemplified by the testimony of Mr. Alan R. Spachman who was responsible for Frito-Lay's employment relations and labor relations activities in the Northeast region where the Bronx facility is located. He described the Company's problems and concerns with the shortages reflected in the computer generated four week route settlement reports by the Company's Dallas central account facility. He also described the prescribed procedures to be followed by route salesmen, a typical day for a salesman in the Bronx facility and the special concerns with the Bronx facility. Company policy concerning the establishment of the $50 rule and disciplinary policy were addressed by his testimony.

He conceded that the Company could not explain the reason for any particular shortages and, indeed, during the hearings the Company did not attempt to do so. The following testimony of Spachman at the Crawford hearing is a fair summary of the Company's position:

Q. In fact, may of the explanations for shortages have to do with causes located with the Company facility, the paper processing, the not giving credit or proper credit for sales or that kind of thing?

A. (Spachman) Not reconciled shortages, no, that is not correct.

*The Elmsford facility, subject to the same collective bargaining agreement as the Bronx facility, was subject to a $100 rule. The Company presented testimony that Elmsford and the Bronx were managed independently of one another and that Elmsford had had a $100 rule for a considerable period before the Company announced its $50 rule. Further, the problems at Elmsford were not as acute as at the Bronx facility.

**The Company and Indelicato are in dispute about the amount due, if any, attributable to Indelicato's last period. The dispute relates to whether or not Indelicato was credited with the turnover of some inventory to another driver. In any event, the Company does not rely on this period as a basis for just cause.
Q. I don't know what you mean by that.
A. Well, at the end of the period, the salesman gets the route settlement report.
Q. Yes.
A. It is in an unreconciled form. Only he has all the paper work available to insure that it is correct. He checks that against his own records and we do set up a procedure and have given instructions on how that check should be made on a period basis to be sure that he has gotten all the credits that he has coming, that he has been charged with all the charges that he should have been charged for; no more, no less. That is what we call a reconciled period.

At the end of that period, if there is a missing piece of paper that is brought to the Company's attention, the balance is adjusted.

After that reconciliation, if a shortage occurs, then it is not an error of Frito-Lay or a paper work problem or a system problem.

Q. So far as the reconciliation process reveals, but I am sure you will concede that you have not ironed out every dam bug in that system to be able to trace every piece of paper, so there are times when, reconciliation efforts aside, you don't know the reason for the shortage; is that correct?
A. The Company may not know, but the salesman has all the paper and assistance available to him.
Q. You can only speak for the Company. That is why I ask you the questions. The Company doesn't know the reason for the shortage at times even after the reconciliation; is that correct?
A. Yes.
Q. That is why you say to the driver, to the salesman, "You want us to make you whole"?
A. Yes.
Q. You figure he must know, if you don't know?
A. Yes.
Q. You make him responsible?
A. Yes.
Q. His job depends on it?
A. Yes.
Q. You ask him at the end of the period and at the end of the reconciliation to pay back the Company for whatever shortage still exists without explanation?

A. That is correct.

Q. Whether the explanation -- in fact, even if no one knows it has to do with the Company errors or salesman errors, the salesman pays it; is that right?

A. The salesman has the only complete record of every transaction.

Q. We have been through that.

A. That there could be no Company error that he could not determine through the reconciliation process. There should be no reason for a Company error to create a shortage that he has to pay.

Q. So your testimony is that with a Company that generated $1.5 billion in 1979, your reconciliation process is such that every Company error ever made is caught at the end of every period so that whatever is left must be the driver error?

A. No, that is not what I said.

Q. Okay. Let me see if we can get at it this way.

Even if after the reconciliation process a shortage occurs that no one is able to explain, the driver is responsible, the salesman must pay the Company; is that correct?

A. That is correct.

Q. Even if he doesn't know the reason and even if the Company doesn't know the reason, he is the one that has to pay; is that correct?

A. That is correct, but I can't agree there would be a situation that existed that he would not be able to know the reason for it.

THE ARBITRATOR: I just want to be clear on something at this point.

You said settlement reports, the vast majority of them show some slight shortage?

THE WITNESS: Yes.

THE ARBITRATOR: What remains after the reconciliation process?

THE WITNESS: The balances in most cases are nearly zeroed out.
THE ARBITRATOR: So in most cases there is reconciliation?

THE WITNESS: Oh, yes.

THE ARBITRATOR: The vast majority of route settlement reports would show a shortage?

THE WITNESS: Would show some deviation and more than half are shortages.

THE ARBITRATOR: That most of those or virtually all of those are reconciled?

THE WITNESS: In one form or another. By "reconciled," I mean the salesman knows where the shortage is, if he is responsible for it.

THE ARBITRATOR: I don't mean reconciliation where the salesman just comes up with the money. I don't consider that reconciliation. By "reconciliation," I mean that the shortages are accounted for, paperwork, mistakes, something like that.

THE WITNESS: No, I wouldn't say that is the case then. I would say that even after reconciliation, and there aren't that many that require further action after the computerized reports are generated.

THE ARBITRATOR: They reconcile themselves?

THE WITNESS: That is right. They are reasonably accurate.

THE ARBITRATOR: I am looking for a percentage which those on the raw basis shows a shortage. After reconciliation what percentage of the total number of reports that you are responsible for still show an unreconciled and unexplained shortage after reconciliation, but before payment by the driver of the balance due?

THE WITNESS: I would have to give you a guess on that. I couldn't give you an answer.

THE ARBITRATOR: Is it a lot or a little?

THE WITNESS: More than half. For example, when I pulled the route for the month, my seven dollar balance was unreconcilable. I know where it went. I had an explanation in my mind for that shortage, but it was not reconcilable.

THE ARBITRATOR: You could not officially reconcile it?

THE WITNESS: That is right. That is the usual situation.

THE ARBITRATOR: Thank you.

BY MR. HARTZ:

Q. The only point that I want to get on the record, and I
think you will agree with me, is that at that point, regardless of whether the driver knows about it or not, and you think he does, but regardless or whether he does, regardless whether it is a Company error or undiscovered, the salesman pays the Company?

A. Yes.

Q. The salesman must pay?

A. Yes.

Q. The Company is made whole ultimately?

A. Ultimately, not on a daily basis.

Q. On a period basis? On an accounting period basis, 13 times a year?

A. Yes.

Q. Now, the Company is very concerned about reducing shortages, is it not?

A. Yes.

The foregoing is descriptive of how the Employer sought to sustain its burden of proving that imbalances were due to the grievant's fault. I find the burden has not been met.

The Employer's position in effect is that because the original paperwork was performed by the employee and he retained copies, the employee is in the better position to mount a factual challenge to the accuracy of the records generated by the Dallas office. This creates a presumption of computer accuracy and employee fault, which the employee is required to rebut, without any showing by the Employer where and how and in what particular respects the employee erred. The Employer's conclusions in this case are a series of inferences drawn from that presumption. To my mind the presumption and the inferences of employee fault drawn therefrom wrongly shift the burden of proof from the Employer to the employee.

In short, the trouble with the Employer's case herein is that there is no specific evidence to explain the source, reasons or even nature of the imbalances, except that a "bottom-line" shortage was shown by the computer printout. Not only do we not know what the mistakes were, but it remains undetermined, as a matter of proof, whether mistakes were actually made,
That errors could arise and were expected to occur in the ordinary course of dealings and even on a regular basis is evidenced by the $50 rule itself and the admissions of Company witnesses. That the errors could be difficult to explain is forcefully revealed by the experience of Mr. Spachman himself. He described how he drove a truck and ran a route and kept records for one of the four week periods. He followed the prescribed routine for making and maintaining records. The route settlement report showed a shortage of $7. He was unable to "officially reconcile" the shortage. He also conceded the possibility that shortages might appear as a result of insufficient fund checks and carried for several periods.*

In order for the Employer to sustain its burden it must show the source or reason for the shortage and that it was due to employee error. This may require assigning an employer representative to closely supervise and analyze records for specified periods. It might require the Company to assign someone to accompany a salesman on his route for a period of time or to retrace the employee's route and sales transactions. In the instant case all that can be said is that the computer showed shortages which neither the Employer nor the grievants can account for or reconcile. That leaves the matter of fault undetermined and inconclusive. In any event, the Company cannot shift the burden to the employee to prove the source of an error in the accounts by asserting it has confidence in its own computer system and claiming the employee has the records to prove his innocence.

There is no question that the Company has the authority to establish a system to assure that it will receive its due and to assure efficiency. It may change and adjust this system to meet changing conditions and needs. But it may not shift to the employee the burden of proving he was free of fault. 

*In addition a shortage of about $1600, with which Indelicato started the April 1979 period was reduced to $800. The $1600 represented "shortages" over a period of time. Records beyond the period which resulted in the $800 shortage were not available. He reimbursed the Company. It cannot be said that if the Company had relied on these facts, the mere fact of shortage plus inability to explain by Indelicato would have sustained its burden of proving the shortages were attributable to Indelicato's incompetence. I also need not determine whether a $50 or $100 standard is reasonable.
The burden of proving the specifics of an employee’s alleged fault remains with the Employer and an accounting or computer system is not a per se substitute for that obligation.

What the Employer has done is to make the employee an absolute guarantor of the validity of his transactions and to hold him liable for discipline if the computer shows shortages. This despite the absence of proof that the shortages recorded are themselves correct, where and how they occurred and that they were due to the employee’s carelessness, incompetence or misconduct. In this case the Employer has not shown on an account by account basis, the elements or particulars of fault attributable to the grievants which the burden of proof in discharge cases requires.

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 discharges of John T. Crawford and Ronald Indelicato were not for just cause. They shall be reinstated with seniority and back pay, less earnings from gainful employment elsewhere, if any, during the period of their discharge.

DATED: February 16, 1981
STATE OF New York
COUNTY OF New York

On this 16th day of February, 1981, 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
Laborers’ International Union
of North America, Local 364
and
General Dynamics Corporation
Electric Boat Division

OPINION AND AWARD
Grievance No. L140-80

The stipulated issue is:

Was the three day suspension of Arthur Mackie for just cause? If not, what shall be the remedy?

A hearing was held in Groton, Connecticut on January 12, 1981 at which time Mr. Mackie, 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 parties filed post-hearing memoranda.

I find no reason why Superintendant Sebastian, who had not previously known or dealt with the grievant, would falsify or mistate where he saw the grievant and what the grievant was doing on October 22, 1980. Nor do I think his testimony was in error. Rather I accept his testimony as credible and accurate.

Specifically therefore, I find that the grievant was sitting on the enclosed fire stairway at building 16-J; that he was not at work at that location; and that he was either reading or observing what appeared to be a newspaper or magazine. The grievant’s assertion to the contrary, namely that he was working in a stooped position scooping debris into a plastic bag, is discounted and rejected.

As I do not accept the grievant’s version of what he was doing when Sebastian came upon him, I also reject his claim that cleaning that stairway was among his prescribed duties at that time and that he was authorized to be at that location. The evidence discloses that his specific work assignment, set forth in writing, were in and at other buildings and locations and that the fire stairway at building 16-J was not part of those enumerated duties. That he may have cleaned that area at other prior times did not give him the right to go there this time without a specific work authorization for that area.

I conclude therefore, as the Company contends, that while he was on the fire stairway at building 16-J on October 22, 1980 he was away from his regular work area and work assignments during working time, without authority.
As the grievant was previously twice disciplined by written warnings, in July and August 1980, for being out of his work area without permission, this instant and third offense of the same type of misconduct warrants a more severe penalty in accordance with the principle of progressive discipline. Therefore I cannot fault the imposition of the three day suspension.

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

The three day suspension of Arthur Mackie was for just cause.

Eric J. Schmertz
Arbitrator

DATED: January 26, 1981
STATE OF New York )
COUNTY OF New York ) ss.

On this 26th day of January, 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 Metal Trades Council of New London County, Laborer's Local 364 and General Dynamics Corporation, Electric Boat Division

OPINION AND AWARD

The stipulated issue is:

What shall be the disposition of grievance L-84-80?

A hearing was held on May 13, 1981 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 briefs were filed.

In and limited to the instant case, I am not prepared to conclude that the evidence adduced by the Company regarding available or "adequate manpower", and its work schedule and assignments for the bargaining unit employees covered by the grievance together with the fact that no bargaining unit employees were on lay-off, did not meet the test of enumerated exceptions to the Article XXX contractual restrictions on the subcontracting of the demolition work involved.

However, the Arbitrator notes that in his view, Article XXX creates a presumption against the subcontracting of work which the bargaining unit normally performs and is capable of performing.

The instant Award, although upholding the Company, should not be construed as a license allowing the Company to circumvent the general restrictions on subcontracting, by regular, casual or unnecessary reliance on the enumerated exceptions. The proper
implementation of this section requires a good faith effort by the Company to restrict its use of subcontractors on production work and work normally performed by the bargaining unit. Again, based on the record before me, I am not prepared to find an absence of good faith in this case.

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

Grievance L-84-80 is denied.

DATED: July 2, 1981
STATE OF New York )ss.: COUNTU OF New York )

On this second day of July, 1981 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 Workers and Machine Workers, Local 761, AFL-CIO and General Electric Company. A FLA Case No. 52 30 000 60 50

...Arbitrators:...

"The Arbitrator cannot read a mind; The record is not here or there; To speculate on discernment. The finding sought would be unfair! The grievants seek the jury, because, "The claim is denied, they have the burden.""

My reply: "And God from the very start, the case has the same way, it's becoming more apparent that I can't decide a flump." 1/6/81

P.S.
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 782

and

General Electric Company

CASE NUMBER: 7130026280 N.D. 62,493

AWARD OF ARBITRATOR

The undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties and dated 1976-1979 as extended and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

The discharge of Brenda Silcott is reduced to a suspension. She shall be reinstated without back pay and the period of time between her discharge and reinstatement shall be the period of her suspension. For purpose of subsequent discipline if any, the instant fourth warning notice shall be deemed a reinforcement of the prior third notice and treated as a third warning notice under the Company’s four warning notice procedure. The period of time between the date of the fourth warning notice and the date of this Award shall be tolled and not counted in calculating any consecutive twelve month period.

Arbitrator’s signature (dated)

Eric J. Schmertz

STATE OF New York
COUNTY OF New York

On this 5th day of January, 1981, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

JOYCE M. FRIED
Notary Public
County of New York
Commission Expires March 99, 1981
The stipulated issue is:

Was there just cause for the four-week suspension of Herbert Fox imposed April 10, 1979? If not what shall be the remedy?

A hearing was held in Boston, Massachusetts on October 6, 1980 at which time Mr. Fox, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Union and Company filed post-hearing briefs.

The question is whether Foreman Hammond is telling the truth when he states that at the relevant time and after the grievant had himself punched in, he saw the grievant punch another time card and place it next to another card at a particular location in the time card rack, and that his examination of both cards at that location showed neither to be the grievant's, but that one of them, the card of employee Robinson had been punched a second time at the critical time involved.

For Hammond to testify falsely means not only that he lied
about what he says he saw, but also that he must have arranged to have had Robinson's card punched, or punched it himself, so as to support an untrue accusation. Such would constitute nothing less than a "frame-up." For reasons to be indicated I do not conclude that Hammond was so motivated or malevolent. Rather I accept his testimony as truthful and accurate.

The inescapable fact is that Robinson's card was punched twice. Somebody did it. Robinson did not testify that he did it both times. Hammond's testimony is the only explanation in the record for how it happened. Significantly the Union witnesses who testified that they were at or around the time clock at the critical time and that they did not see Hammond in that vicinity did not testify how the time card got punched or who punched it. If indeed they were at that location at that time they were in a position to offer some testimony on this highly critical point. The absence of any such testimony when otherwise they were able to testify with certainty as to what they did and that they did not see Hammond, suggests only one logical conclusion, and that is that there is no other explanation to refute what Hammond said he saw. Also it is not surprising that those witnesses did not see Hammond. Two of them admittedly, were racing from a faster time clock at another location to the slower clock at this location to get punched in before being recorded late. With that single purpose in mind it is not surprising that they did not see Hammond (who, significantly, testified that those two employees, one whom he identified, raced past him going from one clock to the other). The other witnesses who placed themselves at the clock at the
critical time testified that they engaged in some horseplay with
the two who had raced to that clock. Under that circumstance
their attention was not on who else might have been in the vicinity
with a view of the time clock.

The Union's position on why Hammond would lie and willfully
construct a false case against the grievant is based solely on
hearsay testimony, which, on such an essential matter cannot be
credited as probative.

It is well settled that the willful punching of another
employee's time card, for whatever reason and for whatever time
is involved, is a serious offense warranting discipline. The
Company's Code of Plant Conduct so provides. The validity of
the Code and the propriety of a disciplinary suspension for that
violation has been established by prior arbitration decisions
between the parties under this or applicable predecessor contracts.
Under the Code, punching another employee's time card is a per se
offense. It is not conditioned upon how much misrepresentation of
time is involved, nor, irrespective of the type of the prior
cases that have arisen, does it limit the disciplinary suspension
to where collusion between two or more employees is found to be
the basis of the improper punch. The Code rule, as is tradition-
ally the case, is designed to deter any punching of another's
time card under any circumstances and for any amount of time, and
that is why the bare act, otherwise unexplained, is a disciplinary
offense. Therefore here, in the absence of any showing that the
card was punched in error or otherwise without intent, or other
explanation or circumstance which might be considered in mitigation,
I cannot reverse or reduce the penalty just because only a few minutes of time were involved, or because there was no discernible logic or rational reason for the grievant to have done it, or even because of the grievant's good prior record. Rather, considering the provisions of the Code and the unconditional prohibition on the willful punching of another's time card, I cannot find that the four-week disciplinary suspension imposed on the grievant was improper or excessive.

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 four-week suspension for Herbert Fox.

Eric J. Schmertz
Arbitrator

DATED: December 26, 1980
STATE OF New York )
COUNTY OF New York )

On this 26th day of December, 1980, before me personally came and appeared Eric J. Schmertz to be known and know 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, AFL-CIO :
Local 734 :

and :

General Electric Company :
---------------------------------------------

OPINION AND AWARD

Case #5230 0328 79
ND 55627

The stipulated issue is:

Was the termination of Beverly Hamilton on November 21, 1977 appropriate under the circumstances? If not, what shall the remedy be?

A hearing was held in Youngstown, Ohio on August 14, 1980, at which time Ms. Hamilton hereinafter referred to as the "grievant" and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived, a stenographic record was taken, and the parties filed post-hearing briefs.

Whether treated disciplinarily or a matter of managerial authority, it is well settled generally as well as under the collective bargaining relationship between this Union and Company that employees with records of chronic absenteeism regardless of reason or fault, and with no reasonable prospect for improvement to a satisfactory level of attendance may be terminated or discharged. Universally accepted is the principle that an employer, to maintain production or services, is entitled to and may require a reliability of attendance from his employees. However, in my
view, under either theory, the employer must demonstrate just cause for the termination or discharge.

In the instant case I conclude that the grievant had compiled a record of excessive absences that was largely beyond her fault or control, that the Company did not over-estimate or statistically exaggerate the quantity, and that it was not unreasonable for the Company to determine that requisite improvement to a level of acceptable attendance would not occur if her employment continued.

Though the Union raises allegations of "disparate treatment" I do not find in the record probative evidence showing that other employees with similar attendance problems were not dealt with similarly or that the grievant was singled out for termination or otherwise discriminated against.

In my view the issue narrows to whether the grievant's termination should have followed the traditional process and principle of "progressive discipline" by warning and suspension before discharge and have been subject to the disciplinary standard of "just cause", or whether it could be achieved, under the Company's theory, as a "non-disciplinary" or administrative termination by its "Two Letter Approach" (i.e. one warning letter followed by a second letter and termination, if not improvement.)

The record before me includes several prior arbitration decisions between these parties under the same management rights and other contract clauses upholding the Company's right to terminate "administratively" or "non-disciplinarily" for chronic
and unimproveable absenteeism.

Despite any different approach I might consider had this issue come to me as a matter of "first impression," and despite the general view elsewhere that absenteeism regardless of reason or fault is a disciplinary offense calling for progressive steps of warning and suspension before discharge, I do not disagree with the Company's assertion that a disciplinary suspension in such as the instant case would not be rehabilitative. Nor do I find those prior Awards to be wrong. Hence I choose not to consider disturbing or reversing them or applying a different rule to this grievance. Rather I find that the Company's Two Letter Approach in this case is nothing more than the implementation of its right, as sustained in similar forms by prior arbitration decisions, to remove from the payroll an employee who unfortunately is unable to maintain adequate attendance. No matter what the theory, I conclude that the grievant's poor attendance record, and its continuation following the first letter meets the substantive test of "just cause." Therefore under those prior decisions, the Company is not barred from so acting procedurally.

Accordingly I deem it unnecessary and immaterial to precisely

1. See cited decisions of panel arbitrators Larkin, Brown, Gregory, St. Antoine, and Wildebush.
determine whether the grievant's termination was "administrative" or "disciplinary."

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 termination of Beverly Hamilton on November 21, 1977 was appropriate under the circumstances.

Eric J. Schmertz
Arbitrator

DATED: December 31, 1980
The stipulated issue is:

Did the Company violate Article XXV of the 1976-1979 GE - IUE National Agreement when it denied payment to certain identified employees for absences during the period April 26th and May 8th, 1978? If so what shall the remedy be?

A hearing was held in Louisville, Kentucky on July 16, 1980 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.

On April 26th, 1978 the Machinists Union Lodge 2409 commenced a strike against the Company. The "identified employees" referred to in the stipulated issue, and hereinafter referred to as the grievants, together with other members of the IUE, hereinafter referred to as the Union, respected the picket line. Sometime after the beginning of the Machinists' strike but before May 1, 1978 the grievants went on jury duty. On May 1 the Company obtained a temporary restraining order enjoining the Union and its members from any further respect of the Machinists picket line. The grievants completed their jury duty subsequent to the issuance
of the restraining order. The Machinists strike ended on July

Article XXV provides in pertinent part:

1. When an hourly-paid employee is
called for service as a juror he will
be paid the difference between the fee
he receives for such service and the
amount of straight-time earnings lost
by him by reason of such service, up to
a limit of 8 hours per day and 40 hours
per week.

The grievants claim jury duty pay for the dates subsequent
to May 1 that they were on jury duty. The Union asserts that
but for their service on the jury, the grievants would have
complied with the restraining order and returned to work on May
2, 1978, and therefore are entitled to jury duty pay for the
period May 2 until their jury duty ended.

In its simplest terms the question for determination is
whether the grievants, who respected the Machinists picket line
prior to commencement of their jury duty service, would have but
for that service, returned to work on May 2, 1978 in compliance
with the restraining order. If so they would be entitled to the
difference between their pay as a juror and their straight-time
earnings loss by reason of jury duty service. And if not, be-
cause no earnings were lost under circumstances where they would
have continued their respect of the Machinists picket line, they
would not be entitled to the jury duty pay.

The status of the record before me, largely because of the
speculative and special circumstances of this case, is wholly
inadequate to substantively determine the issue, one way or the
other.
The Arbitrator is not a mind reader. He cannot crawl into the minds of the grievants and find out whether on May 2, 1978 each of them, or some of them, or all of them would have returned to work in compliance with the restraining order but for their service on a jury.

The testimony of the two "representative" grievants is hardly probative evidence of what the other grievants would have done. More particularly I find their testimony to be inconclusive and equivocal with regard to what they would have done themselves.

I believe that neither the Company nor the Union knows whether the grievants would or would not have promptly complied with the restraining order had they not been on jury duty. Indeed, by the date of the arbitration hearing, more than two years after the effective date of the restraining order, I do not think that the grievants, including the two who testified, would know, retroactively, whether but for their service on the jury they would have been at work beginning May 2, 1978. The fact is that on May 2nd, 1978 the grievants were not directly confronted with the question. They were on jury duty and I doubt they gave attention at that moment to whether they would have reported to work in compliance with the restraining order if they had not been on jury duty, or whether they would have continued to respect the Machinists picket line for some days thereafter. In short, the precise question was not then before them because of their physical presence on a jury.

Arbitration decisions are based on facts, probative evidence and contract interpretation. Here, as I have indicated above,
the facts and evidence are respectively too speculative and too prophetic to meet the test of what is required to prove a grievance.

The record does indicate that many Union members who were not on jury duty did not promptly comply with the restraining order but rather returned to work sporadically over several days following May 2nd, with some not back until May 5th at the earliest. The Company asserts, without refutation, that one or two grievants did not return until several days later even though they had completed their jury duty on May 5th. I think it impossible to determine, based on the record, whether the grievants would or would not have been among them.

This is not to say that the grievants would have disobeyed the law by disobeying the restraining order. Rather it is to say that I can no more conclude that they would have promptly complied than they would not have complied. That they concededly respected the Machinists picket line from April 26th to the date they went on jury duty, an action of questionable legality in view of the subsequent restraining order, creates as much a presumption that they would have continued to respect the picket line for some days following the restraining order as the contrary presumption that in the face of an injunction they would have obeyed the law and complied with the order.

As the burden is on the Union to prove the grievance and considering my foregoing view that the record is inadequate to determine one way or the other what the grievants would have done regarding the restraining order had they not been on jury
duty, that burden has not been met. Hence the Union has not proved that the grievants lost straight-time earnings within the meaning of Article XXV Section 1 of the contract.

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

The Company did not violate Article XXV of the 1976-1979 GE - IUE National Agreement when it denied payment to certain identified employees for absences during the period April 26th and May 8th, 1978.

Eric J. Schmertz
Arbitrator

DATED: December 19, 1980
STATE OF New York )ss.:
COUNTY OF New York )

On this 19th 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 the Matter of the Arbitration:

International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 782

and

General Electric Company

The stipulated issue is:

Was the discharge of Brenda Silcott for just cause? If not what shall be the remedy?

A hearing was held on October 10, 1980 in Tyler, Texas at which time Ms. Silcott, 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 parties filed post-hearing briefs.

The Company's "four warning notice" procedure is a proper exercise of its managerial authority. It provides for the penalty of discharge for an employee who receives a fourth disciplinary notice within a twelve month period. The grievant, who had received three disciplinary warnings within the preceding twelve month period, received a fourth for failing to report for work on June 19, 1980 in violation of a Company rule.

The grievant reported for work on June 10, 1980 with an injured and stitched forearm. The Company sent her home and would not permit her to work until the arm healed and until her physician and the Company's medical service approved her return to work. She resumed work at midnight June 20, 1980 after being cleared during the day on June 19 by the Company's medical service. The Company learned on the 19th that she had been released by her own doctor on June 18 at about 4 PM and could have reported to the Company's medical service and resumed work at midnight June 19th. She received the fourth warning notice because her absence on June 19 was not authorized. In other words, in the Company's view, she should have returned to work on her next regularly scheduled shift, about eight hours after she was cleared by her own doctor and not a day later.

Frankly I do not consider this much of an offense. If it is a violation of the work rule which prohibits absences without authorization, it is a technical violation. From June 10 the
grievant was authorized to be absent because of her disability. From the time she left work that day she regularly reported by phone to her foreman indicating virtually each day her condition and that she would not be in. She did the same on June 18th, although at 11:55 PM, five minutes before the start of the June 19th midnight shift, but also stated at that time that she would be in to work the next day. So rather than an unexpected or unexcused absence on June 19th, her failure to report that day so far as her foreman was concerned was nothing more than a noticed continuation of her absence since June 10th. There is no evidence that her department planned work or adjusted its production schedule to accommodate her return any earlier than June 20th. Though the department worked with one employee short there is no evidence that production or work schedules were curtailed or disrupted because of her absence on June 19th.

Though the Company claims deception and cover up on the grievant's part to gain an extra day off, I do not see so thick a plot. It is noted she came to work on June 10th with the arm injury and presumably would have worked that day and thereafter had the Company not ordered her to leave and stay out until the injury healed. If she wanted to work then I am not prepared to conclude now that after being approved for reemployment by her doctor at 4 PM on June 18th she willfully did not return to work the same day only because she wanted the extra day off. Rather, because it was as late as 4 PM I think she simply believed that it would not matter to the Company whether she resumed work that night or the next night, particularly since she had been out of work since June 10. Though perhaps a technical error, I do not think it so illogical or unreasonable for an employee under those circumstances to believe that a return to work the next day would be in compliance with the work rules. I agree with the Company that she made certain misstatements to the nurse and to her foreman about when she was released by her own doctor and why she did not report for the June 19th shift. But I believe she did so not as a cover up for a pre-planned scheme to gain an extra day off, but because on June 19 she learned that her delay a day in returning to work was being construed by the Company as a serious rule violation and she then foolishly compounded her initial error by those misstatements. But I am not persuaded that she set out to deceive the Company or to defraud it of time off.

This is not to say that the grievant is blameless. She should have known that she was to return to work as soon as her disability ended. If she was uncertain whether that meant within eight hours or a day later she should have made full disclosure, sought guidance and obtained the Company's permission if her return to work was to be delayed. Also in this case, the grievant was less than fully truthful. Additionally her prior record is not good and that is relevant to the measure of penalty. (However the events which occurred after she was dismissed, particularly her intemperate and threatening conduct towards her foreman is not relevant to the issue of just cause in this case, though it may be grounds for other discipline.) Yet, in light of the short period of time between when she should have returned and when she did return, her strict compliance with the rule to call in each day when she was legitimately out due to the
disability, the lack of damage to or disruption of the Company's work schedule and production, and my finding that she did not intend to defraud, I remain convinced that the automatic imposition of the penalty of discharge is too harsh. What is appropriate is a suspension. As the disposition of this case is largely on equitable grounds and the grievant is to be restored to her job, I do not think it fair or proper to impose any monetary liability on the Company. Therefore despite the period of time that has elapsed from the discharge to the arbitration, the grievant's reinstatement shall be without any back pay. Also this determination should not prejudice the Company's four warning notice procedure. Therefore the time that elapsed from the date of the fourth warning notice to the date of this arbitration Award shall not be calculated in any consecutive twelve month period as applied to the grievant.

Eric J. Schmertz
Arbitrator

January 5, 1981
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union of Electrical, Radio and Machine Workers, Local 359

and

General Electric Company, Silicone Products Division

AWARD

Case #1530 0750 80
N.D. 65905

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

Within the meaning of the provisions of the second sentence of Section 1 of Article XXVIII of the contract as previously interpreted and applied by this Arbitrator, the grievant, Mark A. Sheehan did not have the minimum qualifications to be upgraded to the Control Operator job (R20) in the Methyl Siloxane Production Unit in Building 27 on April 20, 1980.

Eric J. Schmertz
Arbitrator

DATED: September 20, 1981
STATE OF New York )ss.:  
COUNTY OF New York )

On this 20th day of September, 1981, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
The stipulated issue is:

"Did the grievant, Mark A. Sheehan, have the minimum qualifications required under the provisions of the second sentence of Section 1 of Article XXVIII to be upgraded to a Control Operator job (R-20) in the Methyl Siloxane Production Unit in Building 27 on April 21, 1980?"

"If the Arbitrator finds that the grievant did have the minimum qualifications required for such upgrading, did the Company violate Article XXVIII when it upgraded Albert Truax to the job rather than the grievant? If so, what shall the remedy be?"

Hearings were held in Latham, New York on March 24 and May 4, 1981 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. A stenographic record was taken and both sides filed post-hearing briefs.

I have taken additional time to study the record in this matter to determine whether this case is the one in which I should
consider reconsidering my previously enunciated interpretation
of the second sentence of Section 1 of Article XXVIII of the
contract.* I conclude that it is not.

In Case #1130 0745 79 I stated in connection with the
difference between my interpretation of the foregoing contract
provisions and the Wirtz formula that:

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

The trouble with the Union's case in the
present matter before me is that it does
not reargue the critical contract inter-
pretation involved and it does not ask that
I reconsider my prior interpretative ruling."

In the case at hand the Union has again not relitigated
that question. Aside from a passing reference to the difference
in interpretations among panel arbitrators, the Union, particu-
larly in Mr. Shambo's testimony again relies on the Wirtz formula
and a history of negotiations between the parties involving that
formula. It did so with little or no regard for the obvious fact
that I had placed a different interpretation on the same contract
provision in four prior cases under the National Agreement, and

*International Union Electric, Radio & Machine Workers, Local 300
AFL-CIO and General Electric Company, AAA Case #1530 0217 77,
October 13, 1977 (Schenectady); International Union Electrical,
Radio & Machine Workers, AFL-CIO and General Electric Company, AAA
Case #5330 0345 77, February 17, 1977 (Cleveland) and Internation
Union Electrical, Radio & Machine Workers Local 707, AFL-CIO and
General Electric Company, AAA Case #5330 0040 78, January, 1979
Cleveland.
without probative demonstration of how and why I was wrong. The Union does argue the matter to some extent in its brief, but that is not enough to persuade me to consider reconsidering my prior rulings. For the Union to seek reversal of my prior interpretation and for the Company to be given its rightful opportunity to seek an affirmation of that interpretation - in other words for the issue to be properly joined - it must be part of the adversary arbitration hearing at least, and preferably reargued in the briefs as well.

Though the Company cites and relies on my prior decisions in its brief, the Union's failure to specifically relitigate and challenge the validity of my interpretation as part of its case in the arbitration hearing, negated the possible review of that interpretation under the necessary circumstance - namely in the adversary and adjudicatory forum of the arbitration hearing.

A final word about the difference between my interpretation of the critical contract language and the Wirtz formula is in order. I do not ignore relevant prior rulings and prior interpretations of other arbitrators. I am most respectful of Mr. Wirtz as a distinguished arbitrator and lawyer and I do not quarrel with the logic and interpretative reasonableness of the Wirtz formula. My own interpretation came about because in the first case in which I enunciated it, the issue was presented or appeared to be presented by the parties as one of first impression. My records and my recollection indicate that the Wirtz formula was not made a part of the record in that particular first case.
before me involving this particular issue. Therefore the Wirtz formula, which I may well have respected and accorded precedential weight consistent with my respect for arguably logical decisions by other arbitrators on the same point in dispute, was not accorded that consideration simply because it was not then before me. As a consequence, I interpreted the critical contract language de novo, believing, as I indicated, that it was a matter not previously dealt with. Having done so I established a precedent of my own which I believe is as logical and correct as the Wirtz formula, and to which I am bound unless the difference between my interpretation and the Wirtz formula is put to a full adversarial test. This requirement has not been met in the instant case.

Based on my interpretation of the critical contract language and the record on the merits I do not find that the Company's determination that the grievant lacked the minimum qualifications to be upgraded to the job of Control Operator in the Methyl Siloxane Production Unit was without a rational and logical basis. Hence that determination was not arbitrary, capricious or an abuse of discretion within the meaning of my prior cited decisions.

Eric J. Schmertz
Arbitrator