In the Matter of the Arbitration:

District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO
and
The Hertz Corporation

The stipulated issue is:

Did the Company violate the contract by subcontracting the general cleaning of the interior of its vehicles? If so what shall be the remedy?

A hearing was held on January 25, 1982 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 disputed work is the major cleaning and shampooing of the interior of the Company's cars and buses.

The Union claims that this work belongs exclusively to the bargaining unit classification of Garage Attendant. It points out that under Appendix "A" of the contract the duties of a Garage Attendant include:

"All phases of vehicle cleaning"

The foregoing contract language notwithstanding, I am not persuaded that the type of cleaning involved is or has been bargaining unit work. It is well settled that there are times when the facts appear to be within the letter of the contract but
are not within its purpose and intent. I find that to be the case here.

The infrequent, but relatively extensive cleaning and shampooing of the interior of the Company's vehicles at both LaGuardia and JFK Airports has been performed regularly and exclusively by a subcontractor. At no time has this particular work been done to any significant degree by bargaining unit Garage Attendants. Over the years of the contractual relationship between the parties, the Union knew or should have known that this work was regularly assigned to a subcontractor (albeit as to the interior cleaning of cars, off the Company's premises. The bus interiors were cleaned at Company locations.) It seems to me that had the foregoing contract description of one of the functions of a Garage Attendant been intended to include the disputed work, the Union would have grieved earlier during the extended period of time that the work was being subcontracted, or made an issue of it at contract negotiations.

The record indicates that the routine, almost daily cleaning of the interior of the rental vehicles has been and continues to be performed by the Garage Attendant. Those duties, juxtaposed with the unvaried historical subcontracting of the more extensive interior shampooing, leads to only one logical conclusion. And that is that the contract language was intended to cover the routine cleaning which the Garage Attendants always performed, but was not designed to stop the ongoing practice of subcontracting the more elaborate and less frequent cleaning of the interiors of the vehicles.
Apparently two changes from the ongoing practice generated the grievance. The first is that the subcontractor now comes on to the Company's premises with his steam cleaning equipment and crews and cleans the interiors of the cars at the Company's airport locations. Previously he took the cars from those locations to his own property to do the work. The change in the locale at which the work is done does not transform work historically performed by a subcontractor into bargaining unit work. The other change is that for a short period of time there was some increase in the quantity of the more extensive steam cleaning and shampooing. This is because the Company kept cars in service longer and more extensive cleaning at more frequent intervals was necessary. Again, I do not find this to be a basis to transform the work into an exclusive bargaining unit assignment.

The bargaining unit has not been damaged. There has been no diminution in bargaining unit work or in the number of Garage Attendants. As the disputed work has not been performed by the Garage Attendants, the continuation of the work by a subcontractor has not eroded bargaining unit assignments. It is undisputed that no bargaining unit Garage Attendants have been laid off or either reduced in their work week or in the quantity of their job assignments by the continued or even increased utilization of the subcontractor to perform the work at issue.

Though it appears that the Garage Attendants are qualified to do the work; the equipment needed is not so special or costly
as to make impracticable the transfer of the work from the subcontractor to the Garage Attendant; and such transfer may even be less expensive, the Company's preference for the subcontractor is a managerial decision not barred by the contract as interpreted by practice. It is beyond the Arbitrator's authority to second-guess that decision.

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

The Company did not violate the contract by subcontracting the general cleaning of the interior of its vehicles.

Dated: February 15, 1982
State of New York ss.
County of New York

On this 15th day of February, 1982 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between

Seafarers International Union of
North America, Atlantic, Gulf, Lakes:
and Inland Waters District, AFL-CIO

and

Interocean Management Corporation

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:

Interocean Management Corporation violated Article VI Section 1 of the Agree-
ment in connection with the sale of the S.S. Cantigny.

The Arbitrator's Opinion will follow in
the near future.

The request of Interocean Management
Corporation for a separate hearing on
the question of remedy, is granted.
The American Arbitration Association
shall schedule that hearing.

DATED: February 26, 1982

Eric J. Schmertz
Arbitrator

STATE OF New York )
COUNTY OF New York)

I, Eric J. Schmertz do hereby affirm upon my Oath as
Arbitrator that I am the individual described in and who
executed this instrument, which is my AWARD.
On February 26, 1982 I rendered the following Award in the above matter:

Interocian Management Corporation violated Article VI Section 1 of the Agreement in connection with the sale of the S.S.Cantigny.

The Arbitrator's Opinion will follow in the near future.

The request of Interocian Management Corporation for a separate hearing on the question of remedy, is granted. The American Arbitration Association shall schedule that hearing.

My reasons for that decision are simple. I believe, and I am satisfied that it is still prevailing law, that when a party signs a contract, he is bound to all its terms and conditions.

Here, Interocian as an operator, signed a contract with the Union which contained the following clause, as Article VI Section 1 ("Vessels Sales and Transfers").

"SECTION 1. (a) Vessels Sales and Transfers. Prior to any vessel contracted to the Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO, being disposed of in any fashion, including but not limited to sale, scrap, transfer, charter, etc., ninety (90) days notification in writing must be sent to Union Headquarters, 6755 - 4th
Avenue, Brooklyn, N.Y., 11232.

(b) Within forty-eight (48) hours of the receipt of such notification, excluding Saturday, Sunday and Holidays, the Union shall have the right to demand that negotiation be commenced immediately on the impact of such sale, scrap, transfer, charter, etc. on the Unlicensed Crew."

The S.S. Cantigny was sold by its owner, Grand Bassa without ninety days notice to the Union.

When the contract was negotiated and/or signed there were no conditions, limitations, reservations, disclaimers or any other statements or acts by Interocean or by the parties which excluded or could be construed to exclude Interocean from coverage under or responsibility for the terms of Article VI Section 1.

Interocean, as is the Union, is a sophisticated and experienced negotiator in this industry. When the contract was signed there were no arbitration or court cases or any other adjudicatory decisions which relieved an operator from the application or performance of that particular part of the contract. Therefore it seems to me that if Interocean thought that this part of the contract was binding only on the owner of the S.S. Cantigny (Grand Bassa) and not on Interocean as the operator-signatory, it should have taken steps to expressly exempt itself in some probative form from this provision, or at the very least stated to the Union that that part of the contract was inapplicable to and inoperable against an operator. Especially so, to my mind, if, as Interocean now asserts, the contract was "boilerplate." Interocean took no such action to exclude itself from the effectiveness of that clause. Clearly, as experienced as Interocean was, it knew how to protect
itself against a contract provision which it now claims was not intended to apply. That it did not then estops it from doing so now.

Nor do I find that the critical clause is so obviously applicable only to an owner as to constitute constructive notice to the Union that it is not binding on or enforceable in contract law against Interocean as the operator. It is not a clause that is exclusively performable by an owner. The operator can give ninety days notice of the sale of a ship. He can arrange with the owner and even protect himself in his agreement with the owner, to insure that the required ninety days notice of the sale of a ship is given to the Union. In whatever capacity, as the operator, as an agent or representative of the owner or even as a guarantor of performance of the contract with the Union, it is neither impossible nor unreasonable to hold the operator responsible to give notice or to see to it that the owner gives the required notice. That only the owner as the right and power to sell the vessel does not mean that the operator of the ship cannot give the required notice and/or bind himself to see that that requirement is met.

The same is true with regard to commencing negotiations on the impact of the sale within forty-eight hours of receipt of the notice under sub-paragraph (b) of the clause. Again, as in the case of notice, the operator as agent or representative of the owner, or as a principal himself, has apparent if not actual authority to respond to any request by the Union for such negotiations or to act to bring the Union and the owner together. This
is not to say that this is precisely what the clause intended. Rather it is to say that in the absence of any prior cases dealing with the operator's obligations under this clause and without any express limitations on the operator's responsibilities under the contract, the presumption that the operator is bound is at least as strong as any presumption to the contrary. And I cannot find it unreasonable for the Union to have believed that Interocean would comply with the clause or would see to it that the duty to comply was met. I carefully note, that the duty I refer to is a contract duty and is not to be confused with nor is it necessarily the same as the duty to bargain under the labor law.

That presumption is not rebutted by the subsequent, so-called "admissions against interest." However styled, the statements and arguments by the Union in the actions in federal District Court, in the Court of Appeals and before the National Labor Relations Board were, in my opinion, traditional alternative positions in different forums, in different causes of actions in which different results were sought. It is accepted practice and not at all unusual for a party to pursue alternate or even conflicting theories in one forum without prejudicing its rights to other causes of action in a different forum.

In this arbitration the Union seeks to enforce a provision of a contract which it and Interocean signed. Its cause of action is an allegation of contract breach and is against the operator, Interocean.

In the federal court the Union sought to bind Grand Bassa to
the contract and to *enjoin* a change in operators. Its action was against Grand Bassa, the owner. In the matter before the NLRB the Union alleged an *unfair labor practice* under the NLRA and sought a *bargaining order* against both Grand Bassa and Interocean.

I do not find that the nature of the proceedings in court or before the NLRB for the remedies the Union sought in those cases constituted a waiver of the Union’s *contract* claims in this arbitration under its collective bargaining agreement with Interocean.

Interocean argues however that certain statements made by the Union in support of its positions in the Court and Labor Board cases should be deemed as admissions or concessions that Interocean is not bound by Article VI. Although the broad language of some of the Union’s statements can be taken as conceding that Interocean was not bound by Article VI, a realistic assessment does not support this view of the meaning or the effect of those statements.

In the court actions the Union was seeking to enjoin the sale of ships during the ninety day notice period. If Grand Bassa was not a party, injunctive relief was not available, and hence the Union argued, the provision might well be without significant effect. But in my view, the remedy the Union sought should not be confused with a cause of action. Therefore if it means that the significant remedy of an injunction against the sale was not obtainable it does not mean and was not intended to mean that Interocean was not bound to comply with the notice provisions of Article VI of the contract.

Judge Mishler stated that as a consequence of holding Grand
Bassa was not a party to the agreement, there probably would be serious dilution or diminution of the Union's remedies under Article VI. But again, in my view, the Judge is talking about remedy. The absence of the remedy of an injunction, whether against the owner or the operator, may have deprived the Union of the remedy it preferred, but is not res adjudicata to the question of whether the operator is bound to something different - the contract requirements of Article VI.

The same is true with regard to the decision of the NLRB. That neither Grand Bassa nor Interocean committed the unfair labor practice of refusing to bargain means that the Union did and does not have that remedy under the NLRA. But to my mind it does not mean that the Union has lost its cause of action to enforce its contract with Interocean, and particularly Article VI thereof.

I have carefully considered the statements and arguments of the Union and Union representatives in those other proceedings and the testimony of its Vice-President for Contracts and Contract Enforcement in this arbitration, and I conclude that the Union's position was and is that it would not have an effective remedy in an action solely against Interocean as the operator. Union Vice-President Campbell acknowledged in court that a "meaningful award" could not be obtained against Interocean. In this arbitration he said that Article VI can be enforced only against the owner. What he has said in my view relates to remedy, (i.e. what the Union can or wishes to effectively obtain), not to the question of a bare contract breach.
In the proceedings in the Court of Appeals, the Union argued that:

"It has no effective remedy as against Interocean the operator" (emphasis added).

Again, if that is a concession of inability to gain a remedy, it is not a waiver of a claimed contract breach, the availability of remedy not withstanding.

Also, the Union's charge to the NLRB was designed to gain the remedy of a bargaining order. If its failure there means that Interocean has no duty to bargain, I am not persuaded that it also means that Interocean had no duty to give notice of the sale of the ship and to respond, within its authority, to any subsequent requests by the Union for bargaining on impact.

Manifestly, for this phase of this arbitration, I have made a legal distinction between a cause of action under contract and remedy. I have found that Interocean was bound to Article VI of the contract and had some apparent obligations thereunder with which it did not comply. Its failure to do so constitutes at least a technical breach of the contract and that is the present status and limit of my Award. Whether, in view of the operational aspects of Article VI, the respective powers and authority of the owner and the operator, and the interpretations of Article VI as advanced by the Union in and as made by the decisions in other proceedings, the Union is entitled to any remedy from Interocean because the S.S. Cantigny was sold by its owner Grand Bassa without the Union receiving ninety days notice, is in no way yet decided. As my Award states, the question of remedy is deferred to and for
a subsequent arbitration hearing and the rights of all concerned on the remedy issue are expressly reserved for that hearing.

Eric J. Schmertz
Arbitrator

April 5, 1982
On February 26, 1982, I rendered an Award which found that IOM's failure to give notice to the Union of the sale of the S.S. Cantigny at least 90 days prior to August 5, 1982, the date of the sale, violated Article VI of the collective bargaining agreement between the parties. The question of remedy was reserved to afford the parties a hearing on that issue. A hearing on remedy was held on June 28, 1982, a stenographic record was taken, and briefs were submitted by both parties.

With respect to remedy, the Union claims damages. According to the Union, damages means or consists of severance pay. The Union argues that the measure of damages qua severance pay should assume that an SIU crew of the same size as that employed prior to notice would have been employed during the following 90 day period. The amounts for base pay as well as fringes and benefits not paid because of the early sale would be paid as severance. The parties reserved for later negotiation any amount for overtime, if I should find overtime should be included.
Under the Union's theory, the Company would receive credit for that portion of the 90 day period subsequent to the giving of notice, but prior to the sale and the discharge of the SIU crew. The period covered would be 72 days, according to the Union. (The Company claims no more than 49 days is involved).

The Union relies on the formula used by Arbitrator Christensen in the Falcon Carriers case and computes the total amount to be $222,865.92 plus 2 1/2 per cent per month interest, plus such amounts, if any, for overtime. It rejects IOM contentions as either irrelevant or without factual basis that the premature sale was occasioned by misconduct on the part of the Union or that there was any other contractual breach by the Union which precludes an award of severance payments.

The Company argues that no damages flowed from the failure to give timely notice and relies on Arbitrator Cole's award in MEBA-Texas City Tankers. The Company claims that as a non-owner it acted in good faith and had no control over the owner's decision to sell, the decision to accelerate the sale, or the identity or choice of the purchaser. It rejects Falcon Carriers as incorrectly decided and, in any event, would distinguish it primarily on the grounds that Falcon Carriers involved an owner-operator and IOM is a non-owner operator. It also claims that the expedited sale was due to Union misconduct during the "heat wave" events in the Houston-Galveston area. IOM also argues that the notice provision was in lieu of severance payments which the Union sought.
and failed to obtain in collective bargaining negotiations. It asserts that the notice provision was intended to afford an opportunity to negotiate the impact of a projected sale or transfer and this was made clear by the inclusion of subsection (b) of Section 1. (The provision enforced by Arbitrator Christensen did not contain subsection (b).) According to the Company, the Union was afforded the opportunity to negotiate impact and refused to do so, but instead insisted that the Company negotiate on the decision to sell or for a different purchaser or both, in order to assure continued employment to SIU members. If there was a breach, the Company argues, it was at most a technical breach for which no monetary damages, (unless they are nominal), should be awarded in this case.

**DISCUSSION**

In Falcon Carriers, Arbitrator Christensen rejected the Union's request for a "broad 'cease and desist'" order which would have deferred any transfer or change in charter arrangements "until receipt of the required 90 day notice" and presumably during the 90 day period. He concluded that the failure to give 90 days' notice was a contractual violation "limited to precise compliance with notice provisions." He went on to state that a remedy barring transfer "would, in net effect, convert an obligation to notify into a more stringent bar." In this proceeding, the Union's claim for severance pay would convert the notice provision into a significantly greater right to continued employment or, in lieu
thereof, severance pay. While Arbitrator Christensen's award may well be read to have this effect, I am neither compelled to nor am I inclined to follow his path.

Yet I agree with much of what Arbitrator Christensen concluded. Thus, he found that the Union, albeit reluctantly, accepted the notice provisions in lieu of severance pay provisions contained in other contracts. In this proceeding, a Union witness testified to the same effect. Mr. Christensen also found that the notice provision did not give "the Union any veto power over a change in vessel operation affecting crew employment but only a ninety day period of knowledge of that fact." I agree.

However, I part company with Falcon Carriers and the Union's reliance on what appears to be a non-sequitur. To wit, that breach of a notice provision which gives no right of veto, no right to defer transfer of a ship within the 90 day period and which was accepted in lieu of demanded severance pay provision, automatically results in damages equivalent to lost pay or to use the Union's characterization, "severance payments."

I do not view the notice provisions as a measure to assure job security for a period of 90 days. Article VI, Section 1, by its very terms, was intended to afford the opportunity for and to require negotiation about the impact of the sale. In this case, I find that the Union was afforded the opportunity to negotiate impact albeit after what turned out to be late notice of the proposed sale, and that that was not inconsistent with the practice
in connection with other vessels. It appears to me that negoti-iations could have taken place after the sale, but it also appears, because the Union was offered a chance to do so, that there were attempts to begin discussions prior to the sale. One does not know that any such negotiations would not have produced a satisfactory settlement on the impact of the sale, particularly in light of the resolution of other prior sales involving other ships. In any event, the evidence is clear that the Union preferred to negotiate the decision to sell to a non-SIU purchaser, but it is unclear whether, as the Company claims, it rejected opportunities to discuss impact. However, as I see it, the only obligation was the obligation to bargain in impact.

In a contract so relatively carefully drafted in its attention to detail where important economic interests are at stake, I cannot conclude that there is a job security or severance pay provision implicit in a notice provision which expressly provides for impact bargaining as the obligations and rights of the parties after notice is provided. Indeed, in my view, to make the operator liable for money damages or severance pay, requires not only a more explicit contract clause supporting that obligation, but also requires proof of actual damages resulting from the failure to comply with the notice provision.

Here, and importantly, there is no probative evidence on the damages, if any, actually flowing from the instant breach even if I accepted the Union's contention in principle. There is no
evidence of the work history of the discharged crew members, including opportunities for employment after discharge and wages earned, if any. There is no evidence of what happened to the S.S. Cantigny after the sale or what would likely have happened if there had been no sale. Even if I accepted a concept of damage to the general pool of jobs available to SIU, there is no evidence on this issue. There are many assertions of counsel in argument, but they are all based on the assumption that loss of the ship to SIU necessarily is a total loss of an amount equal to the wages previously earned on the S.S. Cantigny. I am not convinced that I should draw this inference. It would be ignoring reality to conclude that IOM who was known by the Union not to be the owner when the contract was entered into was intended to be subject to this per se approach to damages. Thus, even if avoidance of loss of wages was intended to be the result of the 90 day notice provision, the loss must be proved and it was not. The Union had control over most of the facts, if there were any, and failed to present them.

Therefore, although I have found and continue to believe that there was a contractual obligation to give the 90 days' notice, the evidence fails to show that the breach which consisted of a failure to give timely notice on the part of IOM resulted in ascertainable damages. To automatically conclude that employment would have continued during the 90 days is speculative at best. To automatically impose the measure of damages urged
by the Union would be more in the nature of punishment than compensation and neither the contract nor the surrounding circumstances of breach warrant this result. Nominal damages could be appropriate, but I think meaningless and unnecessary. The terms of the contract have since been amended and it is highly improbably that the parties will again find themselves in this position.

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

The Union's claim for money damages is denied.

Eric J. Schmertz
Arbitrator

DATED: October 28, 1982
STATE OF New York )  ss.: 
COUNTY OF New York )  

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration between
Office and Professional Employees International Union, Local 153 and
International Ladies' Garment Workers' Union

OPINION AND AWARD

In accordance with Article 18 of the collective bargaining agreement dated March 28, 1979 between Office and Professional Employees International Union, Local 153, hereinafter referred to as the "Union," and International Ladies' Garment Workers' Union, hereinafter referred to as the "Employer," the Undersigned was selected as the Arbitrator to hear and decide a dispute involving Article 4.3 of said collective bargaining agreement.

Hearings were held on September 15 and September 29, 1982 at the offices of the American Arbitration Association in New York City. Representatives of the 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 filed a post-hearing brief.

The parties were unable to stipulate a mutually agreed to issue.

The issue submitted by the Union is:

"In the event of a layoff, under the terms of Article 4.3, is an employee entitled to use her or his seniority to bump into any job for which qualified in the participating office from which the employee has been laid off, and any participating office from which the employee has been involuntarily transferred."

The Employer sees the issue as:
"1. Whether seniority rights apply under Article 4.3 in the event that a layoff takes place for reasons other than decreased business activity?

"2. Assuming that seniority rights apply under such circumstances, does a worker with more seniority have the right to bump a worker with less seniority in the same participating office where the job or jobs she or he seeks has qualifications which are not equal to the qualifications of the job from which she or he has been laid off?

"3. Does such a worker have the right to bump into a participating office other than the office in which she or he was working when laid off merely because she or he was transferred involuntarily from another participating office, in light of the interpretation of the words "seniority rights shall be applied on an office-wide basis" in the award interpreting Article 4.3 rendered by Arbitrator Daniel House on April 4, 1975?"

Article 4.3 of the contract reads:

The Employer agrees that in the event decreased business activity necessitates a reduction of the office staff, seniority rights shall apply; that is, the last employee hired shall be the first employee laid off. Should business conditions improve and the staff be increased, the Employer agrees to follow the reverse procedure; namely, the employee last discharged shall be the first to be rehired. Except for secretaries, seniority rights shall be applied on an office-wide basis where jobs of equal qualifications are concerned.

At the outset of the hearing the Employer asserted that the Union's grievance was not arbitrable because there are no identified grievants claiming bumping rights for specified jobs. I ruled the grievance arbitrable under the broad language of Articles 18.1 and 18.2 of the contract. My arbitrability ruling
was based on my conclusion that the Union's grievance fell within the category of "any dispute" or "any controversy" (emphasis added) between the Union and the Employer within the meaning of the arbitration clause of the contract.

The instant dispute was triggered by the shutdown of the Employer's Computer Center in New York and the layoff of employees of that Center, including fifteen members of the bargaining unit represented by the Union.

In this arbitration case and in this grievance there are no individual grievants and none of the laid off employees are yet asserting seniority or bumping rights to any jobs. Rather, the Union seeks a ruling in the nature of a "declaratory judgment" that under the facts of its submitted issue, affected employees (except secretaries) would have the right to exercise their seniority and bump into any jobs they are qualified to perform in the Employer's office from which they were laid off as well as in the office from which they had been previously involuntarily transferred.

The Employer asserts that the Computer Center employees were not laid off because of a decrease in business activity and that therefore Article 4.3 is inapplicable; that the Computer Center employees had not been involuntarily transferred from the Dress

1. With reference to the Computer Center layoff, the Union is claiming that laid off employees should have the right to bump into jobs for which they are qualified in the Employer's General Office (where they were laid off) and at the Dress Joint Board (from which, the Union contends, they had been involuntarily transferred in 1975.)
Joint Board office to the General Office in 1975; that the arbitration Award of Daniel House of April 4, 1975 interpreted Article 4.3 to limit bumping rights to the separate office at which the lay off occurred; and that the phrase "jobs of equal qualifications" in Article 4.3 means the same job classification which the laid off employee occupied at the time of his lay off.

Put another way the Employer argues that as to employees laid off from the Computer Center there are no exercisable rights under Article 4.3; or alternatively, if Article 4.3 is applicable, the affected employees, because of the House Award and/or that they had not been involuntarily transferred, could exercise their seniority and bumping rights only in the General Office. And in that latter event only to the same titled jobs they held when laid off.

I reject the Employer's contention that the Computer Center lay off was not due to "decreased business activity" within the meaning of Article 4.3. That phrase is widely accepted in labor contracts to mean not only a diminution of sales, orders or demand for services, but also to cover the discontinuation of work because it is not profitable or because of excessive costs. The latter is what happened here. Though the Center had a good quantity of work, the Employer deemed it too costly to continue its operation. Also, the close down of the Center constituted a terminal "decrease in the business activity" of the Center brought about by the Employer's business decision to discontinue
its operation. A discontinuation is at least an effective "decrease" within the meaning of the contract. Hence I conclude that the Computer Center lay-off fell within the provisions of Article 4.3.

However, on the scope of bumping rights of employees so affected, I find the House Award to be determinative. That Award is logical, well reasoned, and appropriately related to the contract term. It is well settled that an arbitrator should not overturn a prior Award by a different arbitrator unless the Award is palpably wrong. Certainly that is not the case here.

But the Union points out that Arbitrator House did not have before him the factual situation of an "involuntary transfer" from one office to another. Not presented with that fact, the Union argues, his Award should not now be interpreted to bar the exercise of rights under Article 4.3 to and in the office from which an employee was involuntarily transferred as well as in the office in which the employee worked at the time of his lay off. In short, the Union asks me to expand the House decision to extend bumping rights of employees laid off from the Computer Center to the Dress Joint Board office as well as to the Employer's General Office.

The Union's case on that point is not persuasive. For it to prevail would mean that the Union obtained by arbitration what it failed or neglected to obtain by negotiation. The House Award was rendered April 4, 1975. Later that year the so-called "involuntary transfer" of Computer Center employees from the Dress
Joint Board office to the General Office took place. So, in 1975 and thereafter the Union knew or should have known that if Article 4.3 remained as interpreted by House, it would foreclose bumps into offices from which employees had been involuntarily transferred. As I see it, the Union was on notice and had the opportunity to modify Article 4.3 in subsequent contract negotiations or to modify the impact of the House Award, so as to include or extend bumping rights to an office from which an employee had been "involuntarily transferred." Its failure to do so in such contract negotiations, including the negotiations of 1979 preceding the instant arbitration case, estopps the Union from prevailing in this case. That latter result should have been sought and obtained by the Union during contract negotiations. By not dealing with it and obtaining it, the House interpretation, as a matter of contract law, was accepted and stands unconditionally as the correct way to apply Article 4.3 With that finding it is unnecessary for me to decide whether in fact the employees laid off from the Computer Center, or any of them, had earlier been involuntarily transferred to the General Office from the Dress Joint Board.

I do not agree with the Employer that the phrase "jobs of equal qualifications" means only jobs of the same classification as that held by the employee at lay off. Had it meant that it

2. It was a "bookkeeping" or "administrative" transfer, not a change in the physical location of the Center which remained located at the Joint Board.
could easily have said:

"...seniority rights shall be applied... to jobs of the same classification."

Rather, the language "jobs of equal qualifications" contemplates the possibility of more than one job or classification which have duties and responsibilities equal to the job from which an employee is laid off. By its own terms in the plural it is not limited to the single job classification or title held by the employee at the time of his lay off. What it means to my mind, and I consider it consistent with traditional and customary bumping rights, is that the senior employee shall have the right to bump into any job occupied by a junior employee which requires the same qualifications as the job he lost, provided he is immediately qualified to perform it. And, based on the contract language there may be more than one job title that meets that test. It also means that the Employer has no contractual duty to provide training or a trial period.

Under that circumstance, in my view, the senior employees are given a somewhat wider scope of bumping rights without any prejudice to the Employer's efficiency or productivity. For, if qualified at the threshold, the employee bumping into a job is interchangeable with the one he replaces.

That the instant contract language is different from and less specific than the clause on this point in the Union's contract with the Amalgamated Clothing Workers' Union, does not mean that they are substantively different. The fact is that
different contract language, some better or more explicit than others, may be used to mean or accomplish the same result. Indeed, it is well settled that "greater" encompasses "equal." So if an employee possesses more qualifications than needed for a job, those qualifications are "equal" to the qualifications required. Therefore, the language of Article 4.3 contemplates and allows bumping not only into the same job title as held at lay off, but also into other jobs, laterally or downward, for which the bumping employee is qualified. Conversely, "equal" does not encompass "greater." So what is not granted under Article 4.3 is the right to an upward bump. To bump upward to a higher rated job, even if the employee is qualified, is a bump not to a job of equal qualifications, but rather, impermissibly, to a job of greater qualifications.

As there are no individual grievants in this case, I make no determination on whether any of the laid off employees are qualified for any jobs of equal qualifications in the General Office; nor do I decide if there are any active jobs in the General Office occupied by junior employees which are "jobs of equal qualifications" within the meaning of this Award and Article 4.3 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 Union's grievance is arbitrable.

The Award of Daniel House of April 4, 1975
is determinative on the question of the scope of bumping rights under Article 4.3 of the contract. A laid off employee's bumping rights are limited to the separate office in which he worked at the time of his lay off. He does not have a right to bump into any other office including one from which he may have been previously "involuntarily transferred."

In exercising bumping rights under Article 4.3, any employee may bump laterally or downward into a job which he is qualified to perform without training and without a trial period, and is not limited to jobs of the same classification he occupied when laid off.

DATED: November 29, 1982
STATE OF New York ) ss.
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Did the Company violate the collective bargaining agreement when it hired a second driver at the Belmont Manufacturers, Inc. facility, thereby reducing the volume of work of Lewis Frix? If so what shall be the remedy?

A hearing was held in Pittsburgh, Pennsylvania on January 26, 1982 at which time Mr. Frix, hereinafter referred to as the "grievant" and representatives of the above named parties appeared. Roger Keadle, the employee who would be adversely affected if the grievance was granted, was actively represented at the hearing by counsel. 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 all interested parties were given the opportunity to file post-hearing briefs.

The Company's action in hiring a second driver to handle, with the grievant, its truck driving needs, was a proper exercise of its managerial authority in response to a legitimate business need. The consequence of that action, namely the equal apportionment of the available work between the grievant and the second
driver is mandated by and consistent with the terms of the collective bargaining agreement and cannot be faulted.

The Company learned, primarily from the grievant himself, that his driving schedule, including his time on the road and his rest and turnaround routine and practice, was in violation of applicable government regulations. As a result, to meet its truck driving needs and to comply with those regulations, an additional driver was hired.

Manifestly, the Company is not required to reduce its driving schedule or its trucking needs to meet the requirements of the law with one driver, nor could it continue to operate with one driver in non-compliance with the law. I am satisfied that its only choice to meet its business obligations was to increase its complement of truck drivers by one additional employee in that classification.

The Union asserts that the grievant could be scheduled as the sole driver and still meet the requirements of the regulations. The evidence does not support this assertion. In my view, if it could be done it would be only if the best and optimum conditions of travel, weather, truck reliability, and loading and unloading efficiency prevailed at all times. It is unrealistic to assume that those conditions would invariably obtain. The realistic probability is otherwise. The Company is not contractually obligated to maintain a truck driving schedule with a single driver on any such unrealistic basis.

As previously stated, with the Company's right to hire a
second driver sustained, the equal apportionment of the available work between the two drivers in that classification is required by the contract, and hence any diminution in the volume of work accorded the grievant is not a contract violation.

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

The Company did not violate the collective bargaining agreement when it hired a second driver at the Belmont Manufacturers, Inc. facility thereby reducing the volume of work of Lewis Frix.

Eric J. Schmertz
Arbitrator

STATE OF New York ) ss.:  
COUNTY OF New York)  
DATED: March 1, 1982

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

Eric J. Schmertz
In the Matter of the Arbitration:
   between
International Ladies' Garment Workers' Union, AFL-CIO
   and
Jonathan Logan, Inc., Calhoun Manufacturing

The stipulated issue is:
   Whether or not the discharge of Pernell Smoak was for good and sufficient cause?
   If not what shall be the remedy?

A hearing was held in Columbia, South Carolina on
March 23, 1982 at which time Ms. Smoak, 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 grievant was discharged for unauthorized removal
of Company property from the plant, specifically a quantity
of lace. She denies the charge claiming that the plant manager
Dominick Tursi and the guard John Randolph purposefully falsified
the allegation.

I accept Tursi's testimony as credible and accurate.
I find no reason why he would falsify what he saw and what happened. He testified that following a report that Randolph saw the grievant leave the plant with a plastic bag and place it in the trunk of an automobile, and following a loud speaker page for the owner of that car, he, Tursi, saw the grievant go to the car, remove the bag from the trunk and throw it under another vehicle. And that when the grievant was confronted and the bag retrieved, it was found to contain the lace.

Though Randolph did not testify and his sworn statement received in evidence would be, standing alone, of questionable probative value, Tursi's direct testimony clearly corroborates Randolph's written report that he saw the grievant leave the plant with the bag of lace, and endows that statement with credibility.

Obviously, had the grievant not placed the bag in the trunk of the car or had she not been responsible for doing so, she would not have gone to retrieve it when the Company asked that the owner of the car identify himself. (It is undisputed that it was the grievant's car.) There is only one logical explanation for the grievant's act, and that is that she sought to cover up what she had done.

There is no claim by the grievant or by the Union on her behalf that she was authorized to remove the lace from the plant. It is undisputed that the lace was Company property.
The record fully establishes that the Company suffered inventory losses for an extended period of time; that the employees generally and the grievant particularly were repeatedly warned not to remove property from the plant or even to carry bags in and out of the plant; that before this incident the grievant was expressly warned not to appropriate Company property to her own possession and use, and that she and the other employees were specifically notified that unauthorized removal of any such property would result in immediate discharge.

This is a discipline case, not a criminal proceeding. The Company must prove its case "clearly and convincingly", not by the higher standard of "beyond a reasonable doubt."

Taken together, Tursi's testimony and Randolph's written statement, each consistent with and corroborating the other, adequately meet the burden of proof required in a disciplinary case.

It is well settled that this type of violation is grounds for discipline including summary dismissal, particularly when repeated notices and warnings to the employees proscribing such activity have been disregarded by the offending employee. Also, in view of the Company's inventory losses, as well as for other obvious reasons, the rule prohibiting the unauthorized removal of Company property is both reasonable and justified. Under these circumstances the penalty of discharge in this case was neither excessive nor improper.
The Undersigned, Impartial Chairman under the collective bargaining agreement between the above named parties and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The discharge of Pernell Smoak was for good and sufficient cause.

Eric J. Schmertz
Impartial Chairman

DATED: June 8, 1982
STATE OF New York )ss.:
COUNTY OF New York)

I, Eric J. Schmertz do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration:
between

GORDON J. LANG,  
Petitioner,

and

DR. ARTHUR J. WISE,  
Respondent:

This arbitration proceeding was held pursuant to a stipulation by the above parties which submitted to me, as arbitrator, the questions should there be any additional legal fees awarded Gordon J. Lang, Esq. in excess of the $10,000 already paid? If so, how much?

A hearing was held at my office at Hofstra University School of Law on June 18, 1982. Mr. Lang appeared pro se, and Meyer F. Goodman, Esq. appeared as attorney for Dr. Wise. They orally presented their respective positions. Mr. Lang submitted a "petition" and a supporting legal memorandum; Mr. Goodman submitted an "affirmation" in response to the petition. A document entitled, "Agreement Between Arthur J. Wise, Jr. and Cheryl H. Wise, dated June 1982," also was received.

The Facts

Gordon J. Lang, Esq., an attorney, was retained on or about October 6, 1981, by Cheryl H. Wise to represent her with respect to matrimonial difficulties between herself and her husband, Dr. Arthur J. Wise. Mrs. Wise had been the subject of outpatient and inpatient psychiatric treatment over the past several years. While a patient in the psychiatric ward of Hempstead General Hospital, she consulted with Mr. Lang and
determined that a dissolution of the marriage or at least a separation would be in her best interests. Some time around May 5, 1982, Mr. Lang commenced a proceeding (a "separation action") on behalf of Mrs. Wise. Mr. Lang claims that the proceeding was necessary because attempts to resolve the dispute by agreement were frustrated by Dr. Wise and that Mrs. Wise was not receiving her required financial support while negotiations were pending. Mr. Goodman denied that there was any need to bring an action and claims that Dr. Wise was supplying adequate funds to Mrs. Wise. The papers prepared and served in the separation proceeding were not submitted at the arbitration.

A document purporting to embody an agreement between Dr. and Mrs. Wise and described above was submitted at the arbitration. Mr. Goodman stated that the matrimonial problems are "now settled by Separation Agreement." (emphasis in original; Affirmation, p.1). Mr. Lang stated that "there is yet to be a review of and final negotiation of the agreement." (Petition, p.5.) The document submitted to me is incomplete in several respects. For example: it is not signed by the parties; it is undated; life insurance policies are referred to as existing and listed in the agreement, but are neither listed nor otherwise described (p.21); and the due dates for two of the future payments are not set forth (pp. 15, 19). Thus, the precise status of the agreement at the time of the hearing is not
entirely clear.

However, it is clear that the amount to be paid for Mr. Lang's services is the subject of dispute. The parties agreed that Dr. Wise would pay to Mrs. Wise as separate maintenance at least $10,000, presumably for legal fees, and claims for any amount in excess of $10,000 would be submitted to arbitration before the Undersigned who was to determine and make an award of such amount, if any, which he found to be "the fair and reasonable value of the services rendered by Mr. Lang in excess of the sum of $10,000." Dr. Wise agreed to pay the amount so determined, if any "forthwith," as "additional maintenance." (Agreement, Articles IX, XIV).

Mr. Lang has asserted in his petition that his firm has already expended 132 hours properly billable at a rate of $125 per hour, for a total sum of $16,500. He claims that his past services plus future services necessarily to be rendered support his claim of a total fee of $25,000 as "not unreasonable." Dr. Wise takes the position that the $10,000 already agreed upon "represents a sum considerably more than fair and reasonable."

The substance of Mr. Lang's position is that there are unusually unique and difficult problems involved in representing Mrs. Wise. She apparently has severe mental disorders, as well as physical problems, which most recently resulted in a 200 day hospitalization for her mental disorders. This condition has rendered it unusually difficult for Mr. Lang to deal
with her concerning legal matters. Mr. Lang claims he has been compelled to assume the burden of assuring Mrs. Wise's transition in establishing and maintaining a new and separate household and advising her concerning financial matters. This is due to her condition and Dr. Wise's conduct which Mr. Lang claims has exacerbated these problems. This includes conduct so "parsimonious" and hostile on the part of Dr. Wise that Mr. Lang's representation required effort and services rendered unusually difficult and beyond the usual ones rendered by an attorney.

In support of his claim, Mr. Lang proffered the following in his petition relating to the services rendered and to be rendered:

(1) An exhibit, entitled "Number of Hours," was annexed to the Petition in which Mr. Lang sets forth the dates on which 104 hours of services were rendered. They include:

- seven (7) hours where the services are not described;
- 35 hours where services are described as "met with client;"
- 22-½ hours where services are described as met with client and social worker;
- 3 hours where services are described as "met with social worker;"
- 8 hours where services are described as "discharged client and attended closing;"
- 13 hours where services are described as having met with the client or the client
and social worker and taking the client shopping; and

15 hours where services are described as having met with client or client and social worker and having gone shopping for an apartment.

(2) In addition, Mr. Lang's petition states that an additional 28 hours in services were rendered as follows: 15 hours in meetings with Dr. Wise's attorney at the latter's office in Mineola; 3 hours in telephone calls since October 6, 1981 when he was retained by Mrs. Wise; and ten hours in commencing a separation action and related motions pendente lite. These 28 hours plus the 104 hours claimed in the exhibit to the petition constitute 132 hours of services rendered for which Mr. Lang claims a value of $16,500 (132 x $125 per hour).

(3) In addition to the 132 hours of past services rendered, Mr. Lang also claims compensation for future services. He estimates he will have to expend 28 hours in explaining and reviewing the settlement agreement to Mrs. Wise in the presence of her psychiatrist. This process will be memorialized in a stenographic record. He estimates an additional 25 hours will be spent to assist Mrs. Wise in her transition period.

Dr. Wise, through his attorney, challenges Mr. Lang's claim for compensation for those services which he characterizes as being "in the nature of 'hand holding'." He attributes the entire 104 hours in the exhibit to the petition to these "guardianship" or "hand holding" activities. As to the claims for legal services represented by the additional hours, he points out that the "log" contains neither dates nor precise descriptions.
of the legal services performed. He also claims that institution of the suit was unnecessary because funds were being supplied by Dr. Wise and indeed, the pendent lite motion was withdrawn.

He also points out that the attorney for Dr. Wise took 6-1/2 hours to draft the agreement whereas Mr. Lang says he expects to spend 28 hours in review and final negotiation. Dr. Wise's attorney also rejects Mr. Lang's claim that the difficulties in dealing with Mrs. Wise and the rancor in the negotiations, if any, was a product of Dr. Wise's conduct. He also dismisses contentions concerning "fault" concerning the marital difficulties as not material to this proceeding. On the other hand, he claims that not only was Dr. Wise generous prior to the settlement, but that Dr. Wise "has been more than generous in agreeing to give her" the various amounts and rights provided by the agreement. (Affirmation, p.4.)

In summary, Mr. Lang claims compensation for services rendered in connection with the commencement of a separation action and the negotiation of an agreement. With respect to the agreement, there remain additional services to be performed in connection with finalizing the terms. He asserts that he has had responsibilities and rendered services beyond the usual because of the mental condition of his client. Her mental condition has necessitated extra time and effort in explanation and in maintaining a semblance of stability so as to enable her to deal with the trauma of marital breakup. Consequently, he has been and will be compelled to continue to confer and otherwise
deal with his client's psychiatrist and social worker. Further, he has had to assist her in performing matters that are essentially personal (e.g., shopping, apartment hunting) in large measure to maintain her ability to deal with the directly legal matters. Mr. Lang also claims that the agreement represents the product of much effort, thought and complex considerations. He also points out that because of Mr. Wise's location in a hospital for much of the relevant period and the fact that he met with Dr. Wise's attorney at the latter's office in Mineola, he spent an inordinate amount of time outside his own office and in transit.

Dr. Wise has not challenged Mr. Lang's hourly rate of $125. He does challenge Mr. Lang's right to be compensated for all he claims and contends that $10,000 more than adequately covers all services rendered and to be rendered. More specifically, he challenges the right to compensation from Dr. Wise for "hand holding" activities and expresses doubts about the number of hours Mr. Lang claims he expended on the traditional legal activities. With respect to the last point, he believes the number of hours was unnecessary and, in any event, no proper "log" supports the claim.

Opinion

The parties' submissions on the applicable law have not been helpful. No cases or other authority have been cited which deal directly with the most difficult aspect of this case -- the right to compensation for those services which are not
traditionally deemed "legal services". The memorandum on behalf of Mr. Lang cites a number of cases. I have read each of them and find they do not materially bear on this issue.

Mr. Lang also has referred to Section 237 of the Domestic Relations Law as governing the award of counsel fees in matrimonial proceedings. However, Section 237 does not govern the award of counsel fees in this proceeding which is concerned with the contractual obligation in the separation agreement and the supply of necessaries by a husband to his spouse. *In The Matter of Steingesser, 602 F2d 36 (2d Cir. 1979).* I do not believe that it is his purpose to rely solely on that section which permits recovery for the very limited purpose of enabling Mrs. Wise to maintain a matrimonial action. Rather his position is essentially that he is entitled to a fair and reasonable fee under the circumstances for services he performed for Mrs. Wise.

The cases cited by Mr. Lang deal with and arise out of counsel fees in matrimonial actions which are presently governed by §237 of the Domestic Relations Law. A summary review of the cases appears below.* However, the subject matter of this

*Kann v. Kann, 38 AD2d 545, NYSd 75,* is a First Department case which denied the wife counsel fees from the husband for the portion she had already paid to her attorney when he was retained. The Second Department refused to follow Kann in *Ross v. Ross, 47 AD2d 866 (1975)* and *Press v. Press, 49 AD2d 604 (1975)*, and it appears to have been distinguished out of existence or authority by the First Department in *Stern v. Stern, 67 AD2d 256 (1979).* The matter is now governed by §237, in any event.

*Kolmer v. Kolmer, 19 Misc.2d 298, 191 NYS2d 545,* also is of no aid to Mr. Lang. In *Kolmer,* Special Term denied counsel fees for that portion of the attorney's claim which it attributed to
arbitration is not limited to counsel fees in the context of §237. In this proceeding we are concerned with the fair and reasonable fees pursuant to a contract or separation agreement which purports, inter alia, to settle the outstanding financial differences and rights and obligations between Dr. and Mrs. Wise. Article XIV provides that "each will pay all fees for legal services rendered to him or to her, as an incident to the negotiations for, and the drafting and execution of this Agreement, as well as respect to the execution of this Agreement, and as well as with respect to any action for divorce instituted by either of the parties." Apparently, provision for making a simple case appear unnecessarily complex. The Court pointed out that counsel fees in a proceeding are awarded "solely" to enable the wife to defend or prosecute a matrimonial proceeding.

Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 NYS2d 572, reversed 43 AD2d 716, 350 NYS2d 435, cited by Mr. Lang deals with the obligation of the City to pay counsel fees for an indigent spouse. Hefey v. Hefey, 142 Misc. 147, 254 NYS 82 (no counsel fees for annulment; marriage void ab initio) and Quinn v. Gerber, 82 Misc. 2d 159, 368 NYS2d 667 (a person who claims counsel fees provided the wife as a necessity stands in no better position than the wife) also do not aid the inquiry. Except for general propositions concerning the status of counsel fees as a necessary to be provided by the husband, the other cases cited by Mr. Lang are not informative (Wood v. Wood, 21 AD2d 627, 253 NYS2d 195; Posner v. Stone, 182 NYS 564; Marocco v. Marocco, 53 AD2d 707, 383 NYS2d 939; Schoonagim v. Schoonagim, 21 AD2d 812, 250 NYS2d 931).

At the hearing, Dr. Wise's attorney expressed doubts about the applicability of any of the cases and specifically and I believe correctly pointed out that the doubtful viability of Kann v. Kann, supra, as authority. In his challenge to Mr. Lang's records of time expended as being insufficient "(w)here this an issue being litigated in the Court," Mr. Goodman cited Estate of Nachman, (Surrogate Ct., Bronx, N.Y.L.J. 10/18/80.)
payment of $10,000 as the wife's legal fees to be paid to the
wife as additional maintenance is provided in the agreement.
Article IX, subsection 2. Any amount in excess of $10,000
determined by me in this arbitration as "the fair and reason-
able services" rendered by Mr. Lang also will be paid as addi-
tional maintenance. Article IX, subsection 2; Article XIV(c).
Hence, the basic standard for determining what Mr. Lang's fee
should be relates to his provision of services to Mrs. Wise as
part of the negotiation of the settlement agreement. This is
not the statutory obligation under §237 but partakes of the
legal obligation of Dr. Wise to supply necessaries to his spouse
and a contractual agreement to do so. The language from Article
XIV of the agreement quoted above and the conduct of the parties
in relation to that language provides the standard for determin-
ing whether the fair and reasonable value of the services
rendered by Mr. Lang exceeds $10,000.

In reaching my conclusions, I have taken into account the
following factors:

(a) Traditional legal services were actually performed
by Mr. Lang in connection with the commencement of the proceed-
ings and the negotiation of the agreement;

(b) The precise amount of time spent on these matters
is difficult to ascertain with certainty, but because of the
apparent difficulties in dealing with Mrs. Wise due to her
condition, I believe that more than the usual time would be
necessary. Mr. Lang's claim of 15 hours of meetings with Dr.
Wise's counsel and 10 hours preparing the papers for the action are not unreasonable;

(c) A significant portion of the 104 hours claimed in the exhibit to the petition is not attributable exclusively to the so-called "hand holding" or "guardianship" activities. The entries designated as "shopping" total 28 hours. Many of the entries involve meetings at the hospital upon Mr. Lang being retained and represent time spent in learning about the client's problems and preparing for litigation and negotiation. In addition, the time spent after her discharge from the hospital also was apparently so spent. Further, services were rendered in connection with the closing of her apartment and the 104 hours includes those hours as well. However, it is difficult to separate precisely the time spent on each kind of service;

(d) There are some additional services to be performed in finalizing the agreement and explaining it to Mrs. Wise. However, I believe that Mr. Lang's estimate of 28 hours is beyond what will be necessary and cannot be justified;

(e) While the condition of the client and the circumstances of the negotiation presented difficulties, I do not believe the subject matter of the negotiations was overly complex. However, as Dr. Wise concedes, the result was a good one for Mrs. Wise and Mr. Lang deserves credit for the good result. Further, the difficulties of dealing with a person in Mrs. Wise's
condition should be reflected in the fee;

(f) I have no basis for finding either that Dr. Wise
was obstructionist or that he was cooperative and hence, base no
part of this decision on his conduct;

(g) I do not believe the time spent shopping for
personal effects or for an apartment, per se are compensable at
$125 per hour and, indeed, I have some reservations that they
are compensable at all. On the other hand, it is very difficult
to divorce some of this time from the time necessarily spent in
learning about the client and her condition and needs which
would be helpful in properly representing her in the negotiations.
Indeed, the $10,000 already conceded as a fee probably reflects
the propriety of taking these efforts into account to some extent;

(h) With regard to financial circumstances, it
appears that Mrs. Wise was wholly dependent on Dr. Wise whose
earning capacity is substantial; and

(i) There is no basis upon which to require Dr. Wise
to pay for the estimated 25 hours of business advice Mr. Lang
claims he will provide Mrs. Wise after the agreement becomes
effective.

In arriving at a fair and reasonable fee, I attribute 25
hours to item (b), supra, 60 hours to item (c), supra, and
10 hours to item (d), supra, all at the rate of $125 per hour.
I would attribute 44 additional hours to item (c) at the rate
of $25 per hour. The total is $12,975 which exceeds $10,000
by the amount of $2,975 which I find to be the fair and reasonable
amount for Mr. Lang's services in excess of $10,000. Therefore, I award Mr. Lang an additional $2,975 to cover past services and services to be rendered to Mrs. Wise to be paid by Dr. Wise under the terms of the agreement.

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

In addition to the $10,000 already paid or agreed to be paid to Gordon J. Lang, Esq., Mr. Lang shall be paid $2,975 for legal fees.

Eric J. Schmertz
Arbitrator

DATED: July 15, 1982
STATE OF New York )ss.:  
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with Article XXVII of the collective bargaining agreement dated September 1, 1979 between the above-named Union and University, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Does the University's calculation of sick leave pay for faculty member Linda Zelski violate Article XV, Section 7 of the Collective Bargaining Agreement? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in New York City on April 30, 1982 at which time representatives of the Union and University 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.

The grievant was a non-tenured faculty member in the Nursing Department of the Brooklyn Center of Long Island University during the academic year 1980-1981. The grievant was ill and absent from her job while classes were in session during the Fall Semester from January 26, 1981 to February 20, 1981 and during
the Spring Semester from February 21, 1981 to March 13, 1981. The combined absences for the two semesters totaled seven weeks.

At the time of her illness she had accrued two months sick leave with pay in accordance with Article XV Section 7 of the collective bargaining agreement. The University did not give her two calendar weeks of sick leave pay. Instead the University applied her seven weeks absence to her thirty week annual teaching schedule and concluded that because she was absent 7/30ths of that teaching schedule, during which she would have earned 2.8 months of her annual salary, her sick leave entitlement was not enough to financially cover the period of her absence. On the basis of the University's formula, and because her absence exceeded her two months accrued sick leave pay by 0.8%, the University deducted 0.8% of one month's salary ($1,089.40) from her annual pay.

The University argues that its position and the application of this formula is supported by a long standing practice and policy and claims that the instant sick leave benefit must be viewed by comparing the entitlement for non-tenured faculty against the entitlement for tenured faculty. The University insists that the formula used in this case properly reflects an intention by the parties not to provide the non-tenured faculty with a benefit that is superior to the sick leave benefit for the tenured faculty. The University asserts that it has always applied its formula this way; that the Union must have known of it; that the Union never objected and hence is bound.

The Union contends that Article XV Section 7 clearly and
unambiguously gives a non-tenured faculty member one month's sick leave for each year of service at the University. As a result the Union claims that the grievant's two months accrued sick leave more than covered her absence of seven weeks. It maintains that the University violated the collective bargaining agreement by using a unilateral formula that both deprived her of full coverage for her seven weeks absence and also resulted in a deduction of $1,089.40 from her annual pay.

It is well settled that ordinary words in a contract are to be given their ordinary and customary meaning. Article XV Section 7 provides, in pertinent part, that:

"Non-tenured unit members are entitled to one month's sick leave for each year of service to the University up to a maximum of six (6) months."

Customarily and traditionally "one month" means one calendar month, "years of service" mean calendar years; and seven weeks of illness means seven calendar weeks not 7/30ths of a teaching schedule. There is nothing in the contract which indicates any bilateral agreement to interpret these traditional periods of time any other way. Indeed such language and such customary interpretation is common to virtually all collective bargaining agreements. No matter how logical or mathematically defensible the University's formula may be, it is simply not consistent with the language of the contract applicable to non-tenured faculty.

There is no evidence that the University's formula is a result of a bilateral understanding between the parties or even that the Union acquiesced in its application. To the contrary,
the probative evidence shows that the Union had not agreed to the formula and was unaware of its existence and use.

The University's contention that the Union's interpretation would provide the non-tenured faculty with a sick leave benefit that is superior to the sick leave benefit for tenured faculty is irrelevant. The tenured faculty sick leave benefit was not litigated as part of this case. What is relevant is that the non-tenured faculty sick leave provision is unambiguous and is subject to interpretation and enforcement in this case. Therefore I find it unnecessary to go beyond the stipulated issue and deal with the meaning of the sick leave benefit for tenured faculty. If it is claimed that there be discrepancies between the two benefits, as a result of this decision, it remains matters either for collective bargaining or for a different arbitration case in which the tenured faculty sick leave benefit is at issue.

Unless expressly included in the contract or unless the contract violation is willful or capricious, and those circumstances are not present here, it is not the practice of this arbitrator to affix interest on monies found to be due. Therefore the Union's request for interest is denied.

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

The University's calculation of sick leave pay for faculty member Linda Zelski violates Article XV, Section 7 of the Collective Bargaining Agreement. She shall be reimbursed $1,089.40 which the University
improperly deducted from her salary and shall be credited with additional sick leave that reflects the difference between the two months time she had accrued and the seven weeks time she used for her illness.

DATED: June 16, 1982
STATE OF New York )ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The parties did not explicitly stipulate a precise issue. But it is clear that the disputed questions are:

1. Did Gerald J. Gross, the Dean of the School of Arts, breach an agreement to be bound by a majority vote of the tenured faculty of that school with respect to the renewal of the contract of Assistant Professor Fredrik Wanger?

2. If so, is the Dean's alleged agreement binding on the Provost of Boston University?

3. If so, what shall be the remedy?

I deem the issue to be:

What shall be the disposition of the grievance of Professor Fredrik Wanger?

A hearing was held in Boston, Massachusetts on March 5, 1982 at which time Professor Wanger, hereinafter referred to as the grievant, and representatives of the above named Union and University appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken and the Union and the University filed post-hearing briefs.

The grievant is an untenured, probationary faculty member
in the Piano Department of the School of Music, a division of
the School for the Arts at Boston University. He enrolled in
the University as a graduate student in 1982 and continued his
studies for a doctorate degree and served as a teaching fellow
and teaching associate for five years. He has not yet received
his doctorate. In 1977, the grievant was appointed to the faculty
as an Assistant Professor without tenure. Thereafter, he received
four contract renewals, the last of which covered the 1979-80
and 1980-81 academic years. During the last year of that contract,
the grievant was considered for another renewal for a period of
one two or three years. If granted, the grievant would be consider-
ed for tenure during 1982-83.

In a letter dated November 7, 1980, addressed to Mr. Mario
di Bonaventura, the Director of the School of Music, Professor
Edith Stearns, Chairperson of the Piano Department, stated that
the tenured members of the Piano Faculty (then numbering two)
recommended in favor of a three-year renewal for the grievant.
On November 10, 1980, a meeting of a number of tenured music
faculty was held wherein a number of reappointments, including
that of the grievant were considered. Although Dean Gross was

1. Apparently, there is some dispute among the parties as to
whether this contract renewal should have been for a period of
two or three years. However, all parties agree that the grievant
would have been considered for tenure during the second year of
the contract. They also agree that if tenure were denied, the
grievant would be entitled to only one additional terminal year of
employment. If tenure were granted, the length of the contract
would obviously be irrelevant. Although I believe that the most
appropriate length of the contract would therefore be two years,
the dispute among the parties on this question is one of form
and not substance.
not present at that meeting, the then Associate Dean, Malloy Miller, was in attendance. Mr. Miller is now deceased. The grievant and the Union contend that at that meeting the faculty in attendance unanimously endorsed a three-year renewal for the grievant. The Dean testified that he received a report of that meeting from Associate Dean Miller, but that he believed that report indicated that the "feelings may have been mixed." Thereafter, the Director of the School of Music recommended to the Dean that the grievant's contract not be renewed, but rather that he be given only a one-year terminal appointment for 1981-82. He reported to the Dean that the tenured members of the Piano Department (then numbering three) were opposed to a three-year renewal by a vote of 2 to 1. The Director also discussed with the Dean the declining student enrollment in the piano program.

By a letter dated April 28, 1981, Dean Gross informed the grievant that:

"After consultation with the Director and after considering the consultation of the Associate Dean with the faculty of the School of Music, I have reached a decision in regard to your appointment. That decision has the approval of the Provost. I regret to inform you that we will not renew your appointment at the end of the 1981-82 academic year. Consequently, 1981-82 will be your final year of appointment at Boston University."

On May 4, 1981, Professor Wanger filed a grievance with the Dean pursuant to the provisions of the collective bargaining agreement between the University and the Union. He based his grievance on two grounds: (1) that the Dean had received inaccurate information in that the Piano faculty was not opposed
to his renewal; and (2) that a vote of the tenured faculty should be held on the question of his reappointment.

On May 14, 1981, a meeting was held to attempt to resolve the grievance. Present for the Union were the grievant, Warren Pyle, Esq., the Union's attorney, Professor Eugene Green, a tenured member of the English Department who is the Union Grievance Officer, and Professor Edith Stearns. Present for the University were Dean Gross, Associate Dean Miller, and Michael Rosen, Assistant University Counsel. All sides agree that there was a discussion of the accuracy of the reports to the Dean concerning the faculty's position on the renewal of the grievant's contract. More specifically, the Dean was informed that the Piano faculty was in favor of such a renewal. All sides also agree that in order to resolve the grievance, at the very least, the Dean promised to ascertain the views of at least 70% of the tenured faculty of the School of Music.

On May 18, 1981, the Dean convened a meeting of the tenured faculty. Prior to that meeting, he prepared secret ballots for a vote on whether the grievant would be given a one-year terminal appointment or a three-year renewal. The Dean first testified that neither the faculty members nor the Union were informed that a secret ballot vote would be held until the day of the faculty meeting. He later testified that he did raise his intentions in this regard at the grievance meeting. After discussion of the merits, the vote, which included two proxies, was 10 in favor of a three-year renewal and 6 in favor
of a one-year terminal appointment. No member of the faculty was present at the counting of the ballots. Thereafter, Dean Gross and the Director contacted at least four other faculty members by phone, although the faculty who were present at the meeting of May 18 were not told that further contact would be made. The four faculty members who were called were not offered an opportunity to cast a secret ballot, although the Dean testified that he made "it very clear to them that they were free to express themselves pro or con." Three of the faculty so contacted voted for a one-year terminal appointment; one voted for a three-year renewal. Thus, the total of more than 70% of the tenured faculty was eleven for a three-year renewal, and nine for a one-year terminal appointment. The precise vote was not communicated to the faculty, although the Dean informed them by memorandum that the vote was "sharply divided."

On May 22, 1981, the Dean wrote to the grievant informing him that based upon his consultation with the faculty, he would adhere to his initial recommendation. In that letter the Dean stated that he abided by his agreement to "consult with the tenured faculty." The grievant and the Union contended that the Dean had agreed at the grievance meeting to be bound by that agreement. Professor Wanger then filed a grievance with the Provost demanding that he receive a three-year renewal based upon his version of the Dean's agreement and the result of the faculty vote. The Provost denied the grievance. The Provost concluded that Dean Gross did not agree to be bound by the
faculty vote. The Provost also stated that the 11 to 9 division of the faculty would itself persuade him to disapprove a decanal recommendation for renewal. Lastly, the Provost concluded that his independent review of the case provided no basis for reversing the Dean's negative recommendation.

Article IV, §D(2) of the Collective Bargaining Agreement between the Union and the University provides:

"All decision to renew or not to renew probationary appointments without changes in rank shall be made by the Dean, with the approval of the Provost, after consultation with the department faculty and the chairperson."

The clear meaning of this term of the contract between the parties negates any requirement that the Dean be bound by the faculty's views. Consultation with the faculty is all that is required and that entails only a free and mutual exchange of views and information. This conclusion draws additional support from the fact that the Collective Bargaining Agreement specifically requires a faculty vote on tenure and promotion matters, but not for reappointments. Nor has the Union introduced any persuasive evidence of past practice tending to show a generally accepted variation from the meaning of this language. Although Professor Green testified that the faculty and chairperson of the English Department have agreed to bind each other by the result of a majority vote of the faculty, that practice does not establish that the Dean of that school, much less the Dean of the School of Art, has been so bound. Further, the contractual provision in question requires an independent approval by the
Provost as a condition to the grant of a contract renewal. Thus, as the Union, I believe, concedes, the application of the express terms of the contract would result in the denial of Professor Wanger's grievance.

The Union contends, however, that the Dean and the Union agreed to vary these contractual procedures during the step 1 grievance meeting of May 14, 1982. The Union further contends that the Dean's alleged agreement is binding on the Provost because the Dean communicated the Provost's approval of the Dean's initial recommendation not to renew the grievant's contract, and because the Collective Bargaining Agreement provided that the Dean has power to resolve grievances at the first step of the grievance process. The University contends that the Dean made no agreement to be bound by a faculty vote, but rather that he agreed only to consult with the faculty. In any event, the University argues that an agreement by the Dean could not bind the Provost who was not a party thereto. I have concluded that the Union has not satisfied its burden of proving the existence of an explicit agreement by the Dean to bind himself to a majority vote of the faculty. Thus, it is not necessary to decide whether such an agreement would have bound the Provost as well.

This arbitrator believes that agreement to vary the express and unequivocal terms of a collective bargaining agreement should be clear and unequivocal. Attention is called in the instant matter to Article XXVI of the contract, which denies the
the arbitrator power to "add to, subtract from, or in any way modify the provisions" of the collective bargaining agreement.

I conclude that the Union has the burden of proving the existence of an explicit agreement by the Dean to vary from the contractually mandated procedures. A thorough review of the testimony persuades me that the Union has failed to meet its burden.

Dean Gross flatly denies that he agreed to be bound by the vote of the faculty. He testified that he agreed to further consultation as a way to resolve the grievance in light of the fact that he did not personally consult the faculty prior to his initial decision of April 28, 1981. The grievant's own testimony does not support a contrary conclusion. The grievant did not testify that the Dean said he would be bound by the faculty vote. Indeed, despite repeated questioning, the grievant stated only that the Dean "indicated he would like to resolve the grievance, and within the school...and he suggested a special meeting with the tenured faculty..." Not only does the grievant's testimony fail to establish an explicit agreement by the Dean to be bound by the results of the consultation, but since the initial grievance dealt with the failure of the Dean to obtain accurate information as to the views of the faculty, a resolution of the grievance is consistent with personal and thorough consultation by the Dean with the faculty.

Nor does the testimony of Professor Green satisfy the Union's burden of proof. Professor Green testified that he asked
the Dean whether it was the practice of the school to have a consensus of the Dean and the faculty and that the Dean responded affirmatively. On cross-examination, however, Professor Green testified that he couldn't "repeat his (the Dean's) words." He also testified the Dean agreed to "largely be bound by the vote," then that "he (the Dean) said in gist,...that in accordance with past practice he would be guided by the vote of the faculty..." However, Professor Green admitted that this conclusion reflects his own understanding, since the "words I do not know." He then testified that the Dean agreed to the "consensus of the vote of the faculty" and finally "to the vote." Lastly, during cross-examination Professor Green returned to his position that the Dean had said that he would "guide himself by the vote," but then he admitted that he could not recall the Dean's specific words. In short, Professor Green's testimony is equivocal and imprecise. At most, it establishes only that the Dean might have given an impression that he would be bound by a consensus vote of the faculty in favor of the grievant. It does not show that a promise to be bound was made. And it is unclear whether a vote of 11 to 9 or even 10 to 6 constitutes a "consensus."

I do not doubt the credibility of the grievant, Professor Green, or Mr. Pyle. It is apparent that they believed that the Dean offered to bind himself to the faculty vote. However, it is well established that one side's subjective belief that a promise had been made does not, in itself, establish the existence of that promise. Though I find some of the actions taken by the
Dean in this case to be disturbing, if not unprofessional, particularly, his failure to notify the music faculty or the Union of his intention to take votes by secret ballot, his failure to notify the faculty or the Union of his intention to telephone other members of the faculty without offering them secret ballots, and his failure to tally the votes in the presence of a member of the Union, they do not prove that a contract variation had been agreed to by the Dean. Indeed these tactics are as much consistent with a plan not to be bound by the faculty vote as otherwise.

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

The grievance of Professor Fredrik Wanger is denied.

DATED: June 15, 1982
STATE OF: New York )ss.: COUNTY OF: New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Telephone Traffic Union (N. Y.) and
New York Telephone Company

OPINION AND AWARD
Case #A-81-24

The stipulated issue is:

Whether Louise Vann was discharged for just cause.

A hearing was held on February 5, 1982 at which time Mrs. Vann, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

In accordance with Article XV Section 3(b) of the contract the Arbitrator's authority is limited to either sustaining the discharge or reversing it in its entirety. He does not have the power to mitigate the discharge to a lesser penalty if he finds that an offenses was committed, warranting in his opinion, discipline less than dismissal.

In the instant case the grievant was discharge for violating the following Company rules:

"Anyone who...misuses the equipment at his/her disposal will be subject to the disciplinary action of suspension or dismissal. Misuse of equipment, as the term is used in this practice, includes, but is not limited to, the following:...7. Making a personal call from the position...9. Establishing a free call for any person not so entitled."
"I understand:...4. Under no circumstances am I to make a personal call from the switchboard. 5. That anyone apprehended failing to observe the points enumerated above will be subject to immediate dismissal."

The evidence establishes that while working her operating position the grievant connected a phone call between her husband at home and her mother in Florida; that the connection was made in such a way as to make the call free of charge and unrecorded.

The record also shows that the grievant knew of the rules prohibiting personal phone calls and establishing free calls from the operating position and that these rules were well publicized not only to the grievant but to the employees generally. Also, the probative evidence shows that the rules have been regularly applied to employees who have violated them, and that uniformly the penalty for violation has been dismissal. The Union's assertion that other employees who violated the rules in the same manner were suspended or otherwise dealt with less severely is not supported by sufficient direct evidence to show an unevenhanded or varied disciplinary practice or policy.

Nor can the grievant be excused because of her assertion that the call connection between her husband and her mother was a "medical emergency." No evidence was offered in support of that assertion. I fail to see how it would be such an emergency if the talking was done between the husband and his mother-in-law and, as the evidence shows, the grievant did not participate in that discussion. For if, as she claims, her mother was ill or preparing for an operation and that it was an emergency, I
think it logical to assume that the grievant would have spoken to her mother or at least participated in a three-way conversation. In any event I fail to see why the call connection had to be made this way when the use of regular phone service was available.

That the grievant is relatively long serviced without a prior disciplinary record might be mitigating factors if the arbitrator had the contractual authority to mitigate the penalty. But as the contract bars the arbitrator from exercising that discretion, those mitigating facts remain for the discretionary consideration of the Company.

The grievant violated the working rules. The rules, if violated, call for the penalty of suspension or discharge. The probative evidence shows that the penalty of discharge has been uniformly applied. Therefore, as the grievant committed the rule violation, this arbitrator has no contractual basis to relieve the grievant of discipline, and therefore must uphold the discipline imposed.

With its rights so established, it seems to me that the Company may now be in a position to consider reducing the grievant's discharge to a lengthy suspension because of her long service and her prior unblemished record. If in its sole discretion the Company did so, it should be because the grievant's disciplinary record may be better than those of other employees who were discharged for the same offense, and would be without precedent for any other matters, and without prejudice to the
Company's right, based on a legitimate business need to prevent unmonitored and misuse of its service, and as sustained herein, to impose the penalty of dismissal for violations of these rules.

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 Louise Vann was for just cause.

DATED: March 29, 1982
STATE OF New York )ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument which is my AWARD.
In the Matter of the Arbitration
between
Communication Workers of America, AFL-CIO
and
New York Telephone Company

OPINION AND AWARD
CWA Case #1-77-958
TELCO Case #A-77-35

The stipulated issue is:

Has the Company violated the collective bargaining agreement when RSB (Plant Service Center) management personnel access COSMOS terminals for purposes of getting information in connection with RSB (Plant Service Center) operations? If so, what shall be the remedy?

The proceedings commenced before Arbitrator Benjamin C. Roberts. Hearings were held in 1979 on June 28 and 29, September 21 and November 26 and 29. Mr. Roberts died before the hearings were completed. I was appointed by the parties as arbitrator to complete the hearings, to consider the entire record and to render an Award. Further hearings were held by me on June 11 and 25, 1980. A stenographic record was taken of all of the hearings. Both parties submitted briefs, reply briefs and also submitted reply memoranda.

COSMOS is a computerized data bank. The Repair Service Bureau (RSB) is one of many organizational bureaus, divisions, groups, etc., through which the Employer functions. Thus, the issue is narrow. It is limited to (1) accessing COSMOS (2) by management personnel (3) in connection with RSB functions and not in connection with any other function.
The Union claims that accessing COSMOS is exclusively bargaining unit work. The Employer claims that both management personnel and bargaining unit personnel may access COSMOS and that, management may access COSMOS in order to obtain information which management uses in performing management functions.

The parties have not pointed to any contract provision which expressly deals with the issue. Both parties presented evidence concerning current accessing and uses of COSMOS and both prior and current information retrieval practices not involving COSMOS in the operation of the RSB. The briefs and memoranda of the Union and the Employer reflect sharp disagreement over not only the significance of the testimony, but also the content of the testimony itself. Although I would have reviewed the record carefully in any event, the sharp disputes concerning the testimony when I did not have the opportunity to personally hear most of it required particularly careful reading and re-reading of the record to determine the facts.

In large measure, evidence was tendered to aid the determination of whether access to COSMOS in RSB operations was exclusively bargaining unit work under the contract as the Union contends. The Union presented one witness, Mario Gerecitano, and relied on those portions of the Employer's witnesses' testimony which it viewed as favorable to its cause. It also relied on opinions and awards in arbitration proceedings with the Employer involving the use of other computer data banks. Proceedings in-
volving BISCOM and COMAS were the principal ones relied on by the Union. The Employer presented testimony of witnesses which challenged both the weight and credibility of Mr. Gerecitano's testimony; and it sought to distinguish the situations involving BISCOM and COMAS from COSMOS.

Summary Description of RSBs: "Line Cards," LMOS, COSMOS.

Although much of the testimonial detail appears to be complex and laden with many terms of art, I have concluded that the basic thrust of the testimony as it bears on the stipulated issue can be stated fairly in relatively simple terms. A basic description of the Repair Service Bureau, the history of the development of the methods of information retrieval in the RSB and the practices of bargaining unit and management personnel in retrieving information were the primary subjects of the testimony.

The Repair Service Bureau (RSB) operates or has operated through two groups: the repair testing group and the installation testing group. Personnel may overlap, but both are in the Repair Service Bureau. As the name indicates, the former is involved in repair testing and the latter's task is testing lines and equipment in connection with new installations. There are several Repair Service Bureaus throughout the area.

Currently, there is some diversity in how information can be and is accessed in the performance of RSB functions. Up to the early 1970's, the repair testing groups operated in a "line card environment." The "cards" stored in "tubs" contained basic customer information on the front of the card and trouble history
of the customer on the back. The information on these cards was accessed manually. While the primary record for the repair testing group was the "line card," the primary record for the installation testing group was the service order. As with the "line card" in the repair testing group, accessing information in the installation testing group was a manual operation. Much of the testimony revolved about who had accessed this information and for what purposes during this period.

In the mid-1970's access to the line cards was gradually mechanized by computerizing the line card information in a system known as LMOS. Currently, LMOS is the primary data system in RSB operations.

Sometime in the late 1970's COSMOS (Computer Systems for Mainframe Operations) was introduced. This is a computerized data system designed primarily for use in main frame operations in central offices. It contains information which also appears on line cards and is in LMOS. It also has information contained in service orders, and other information as well, including such information as whether the frame force is "in jeopardy" of not completing its work by a due date. Some of the information which ultimately finds its way into LMOS appears earlier in COSMOS, and this has been offered as one of the reasons for accessing COSMOS and not LMOS. The foregoing data as well as other data in COSMOS may be helpful in RSB functions although COSMOS is designed primarily for frame operations.

COSMOS terminals have been installed in each RSB which
serves a district in the COSMOS system. The Employer claims that for RSBs, COSMOS serves as an information file like LMOS, line cards, service orders. As for some of the other information contained in COSMOS, if COSMOS were not accessed it would be obtainable through a telephone call to another bureau, division, or through service orders. Accessing COSMOS avoids the need for the call.

Accessing Information: The "Line Cards" Environment.

Deskmen, or TDTs (Test Desk Technicians), are the key bargaining unit personnel who test and analyze trouble in the RSB. The Union's sole witness, Mario Gerecitano, served as a deskman for several years in a Repair Service Bureau. He described the kind of work RSBs perform and the respective roles of bargaining unit personnel and managerial and supervisory personnel. In describing their respective functions, he claimed that bargaining unit personnel took customer complaints, filled out source data or "trouble" tickets, and in the line card environment they accessed relevant information from line cards, made relevant entries on those cards and engaged in the testing and analysis function. He claimed not to have witnessed supervisory or managerial personnel access the line cards or other data in pre-COSMOS days or make entries nor have they done so in the post-COSMOS environment where there is reliance on non-COSMOS data.

The Company's witnesses testified that prior to COSMOS, in the line card and manual access environment, management personnel was involved in accessing information in situations:
(1) where customers insisted on speaking to a manager; (2) where requests or inquiries came from field supervisors, management from other offices or higher management; (3) or where inquiries came from the Public Service Commission; or (4) when management performed quality checks on the work of subordinates. The Employer conceded that in the routine situation, bargaining unit personnel performed without managerial involvement. However, in the non-routine but nevertheless everyday situations listed above, management personnel was regularly involved and they accessed information themselves and at their option, depending on how the supervisor or manager decided its management function would be performed best.

The testimony clearly shows that supervisory personnel pulled line cards upon receiving customer inquiries. Richard McGrath, while an RSB foreman from 1970 to 1976, testified he did it from 6 to 40 times a day. Edward Wortman, an RSB foreman since 1969, similarly testified and also testified he pulled line cards for various other purposes as well, such as quality checks and in response to inquiries from other management personnel. Dennis May, as RSB foreman at two locations since 1971, also testified he pulled line cards with respect to the foregoing matters as well as responding to PSC complaints. Similar testimony was provided by John Weber, a foreman at three locations since 1970, George Brandt, a foreman at several locations since 1964, and Ralph Bozzi, also a foreman at several locations since 1969. In addition most testified they personally made entries on
the cards and observed other management personnel pulling cards. Line cards are still used in some unusual circumstances and Dennis May, a foreman, testified he was pulling line cards in 1979.

Some of the Company witnesses had been deskmen, the same bargaining unit position as Gerecitano's; some had also been CWA shop stewards. As deskmen, they had observed foremen accessing information in the line card environment. As shop stewards, they had never grieved such management personnel conduct nor had they been instructed to grieve such conduct.

**Accessing Information: LMOS.**

During the mid-1970's, LMOS was introduced. Gerecitano described LMOS as "an automated line card system." The Company characterizes LMOS as "the primary data system for operations in the RSB." LMOS was and is regularly accessed by foremen for the same reasons they had previously accessed line cards.

**Accessing Information: COSMOS.**

As noted above, COSMOS was introduced in the late 1970's and is the primary data tool for frame and not RSB operations. According to the Employer, less than 10% of the troubles handled by RSB require any resort to COSMOS and management access of COSMOS in RSB functions is but a small percentage of the 10%.

The Employer's position is that management personnel use COSMOS essentially for the same reasons they always have accessed line cards, service orders and LMOS and other sources of information. According to Dennis May, John Weber, George Brandt and
Ralph Bozzi, their jobs as supervisors are essentially the same as before and after the introduction of COSMOS. They accessed COSMOS for the same reasons they accessed manual sources and LMOS. They also use COSMOS to obtain information they might previously have obtained by making a telephone call to the appropriate source. In fact, there is testimony they have accessed COSMOS, on occasion, at the specific request of a deskman.

The Union's view of the pre-COSMOS and post-COSMOS environments is captured in the following statement from the Union's Brief (p. 16):

A comparison of the pre-COSMOS and post-COSMOS work performed by the various employees engaged in trouble resolution will amply demonstrate that the employees are doing the same things they used to do before the introduction of COSMOS. The COSMOS database merely eliminates the need for a manual search for the appropriate records required to analyze the problem, and permits these same employees to make a computerized search for, and assignment of, cable, pair and other associated equipment necessary to restore service to the customer.

The Union and the Employer are in essential agreement on this point. However, while the quoted Union statement refers to bargaining unit employees, the Employer claims that it is also applicable to management personnel. COSMOS eliminates the need for a manual search of records and in some instances contains more up-to-date information than LMOS. Thus where COSMOS contains the relevant data, resort may now be had to the quick search method it affords. Indeed, the essence of the Employer's position is that it uses COSMOS for the foregoing purposes in
The Employer claims the record shows that in the pre-COSMOS manual access environment, managerial personnel did access information in the first instance, as did bargaining unit employees. Although the occasions for doing so were limited in number and purpose, such accessing of information was regular and open. As to Mr. Gerecitano's implicitly contrary testimony, the Employer doubts the accuracy of his observations, and his capacity to report what occurred. Indeed, even if he never observed managerial or supervisory personnel accessing information, it does not mean such accessing never occurred. He also conceded his observations were limited to one RSB.

Although the Union seeks a finding that any Employer accessing of COSMOS violates the collective bargaining agreement, it did present through Mr. Gerecitano testimony of three specific incidents of managerial use of COSMOS which it claimed violated the contract. The first involved access by George Spalthoff on about six occasions. The facts, however, show that on those occasions Mr. Spalthoff was assigned as a field installation supervisor in the Field Installation Department and was accessing COSMOS at a terminal located in an RSB office. The Field Installation Department is not part of the RSB. He was not accessing COSMOS with respect to RSB functions. While access for RSB functions wherever the COSMOS terminal is located is within the stipulated issue, access of COSMOS for other functions is not within the stipulated issue. Hence, Spalthoff's conduct
is not relevant to any material issue in this proceeding.

Another incident testified to by Mr. Gerecitano involved an objection he had made to Richard McGrath's accessing COSMOS. Mr. Gerecitano claimed that he was told that McGrath had assured the Union that management would not access COSMOS during the arbitration except under extreme circumstances. McGrath denied that such an assurance was given. The person to whom this assurance was allegedly given (Alvarez) was not called as a witness.

At the hearing, McGrath described the circumstances of access. McGrath had received a request for information from a higher level manager and asked a bargaining unit employee for the information. The employee advised McGrath he did not have the information and that he had tried to obtain it from COSMOS. Thereupon, McGrath accessed COSMOS himself. The Company claims McGrath's accessing COSMOS was either a "quality" check or a secondary search after the craft employee had failed to obtain the information or it was an attempt to expedite a direct inquiry from McGrath's superior, or it was all three.

Another incident involved accessing COSMOS involved obtaining and using a report known as a List of Pending Orders (LPO). Although both sides spent time describing the incident, it does not appear material to this proceeding. Indeed, the briefs of neither side rely on this practice as material to the issue.

Discussion

The Union, in substance, argues that except possibly for
"emergency or urgent" situations, the Employer's managerial employees are absolutely precluding from accessing COSMOS in connection with RSB work. Accessing COSMOS is exclusively bargaining unit work. The Union contends that prior practice demonstrates that accessing COSMOS is exclusively bargaining unit work and the contract makes this exclusively bargaining unit work regardless of prior, albeit nongrieved, prior practice. The Union also argues that whether or not prior practice arguably supports managerial access to COSMOS, the significant differences between management accessing information prior to COSMOS and the circumstances under which management would obtain information from COSMOS requires a prophylactic rule denying all managerial access to COSMOS.

The Employer contends that neither the contract nor prior practice supports the Union position. It denies that accessing COSMOS is exclusively bargaining unit work and points to many types of situations in which supervisors may properly access COSMOS in the performance of their managerial duties.

Although much of the testimony dwelt at length on the specific kinds of information available from the various data sources, including COSMOS, the record establishes that the kind of information available from COSMOS is not the decisive element in determining the function in the RSB performed by management and the bargaining unit. The same type of information is usable and can be required by both management and bargaining unit employees in performing their respective RSB functions. Hence,
the only real question is whether management personnel must rely on bargaining unit personnel to access COSMOS in order to acquire information management uses in the performance of its functions.

Based on the testimony of all the witnesses, it is clear that prior to the advent of COSMOS, supervisory and managerial personnel in RSBs regularly, openly and without Union grievance accessed the information now obtainable from COSMOS manually from line cards and from LMOS when that system was instituted. Further, management personnel obtained information from telephone calls, personal contact and service orders when that information was to be used in the performance of managerial functions. Although management personnel would personally access information without the intervention of bargaining unit personnel, it was not unusual that a request would be made for a bargaining unit employee to obtain the information for the management or supervisory employee. It appears that convenience, the degree of identifiable personal responsibility a management employee had incurred in a specific situation and considerations of non-interruption in the task another employee was engaged in were the primary factors in the management employee's decision.

Where line cars are still in use, the practice continues, also without a Union grievance. LMOS, the line card substitute, continues to be accessed by supervisory and managerial personnel. However, the record does indicate there was a separate pending grievance with respect to LMOS at the time of the hearings. There was no written policy requiring or permitting managerial personnel
personally to access the information nor was access in all cases a consequence of emergency or such urgency that much if any time would be lost if managerial personnel first requested bargaining unit employees to obtain the information. In short "convenience" and not "necessity", was the reason for managerial conduct in most of the cases.

Despite Mr. Gerecitano's testimony that he never witnessed managerial and supervisory personnel access information in the line card and LMOS environment, the evidence is overwhelming that both bargaining unit and managerial personnel contemporaneously accessed such information sources, nongrieved and for a long period of time. The frequency of managerial access varied from location to location and from manager to manager, but it took place openly and as a matter of course.

There is neither a contractual provision nor any other written policy that prohibits managerial personnel from personally accessing information in the line card, LMOS or COSMOS environment or that permits only bargaining unit personnel to do so. In this proceeding, the Union has not contested the Employer's position that it is a proper management function for management to use the information obtained from COSMOS or any other source in the following situations:

1. responding to customers who have demanded to speak to a manager;
2. responding to other managers on the same or higher level;
3. quality checks;
4. secondary searches; and

5. responding to Public Service Commission inquiries.

In the absence of express agreement on the subject the long practice of the parties surely is evidence of their understanding. Here, the longstanding practice prior to COSMOS saw both managerial and bargaining unit personnel accessing information for their respective purposes. The current managerial use of COSMOS has been a modernized form of what managerial personnel did before with other methods and equipment. These information sources were being utilized in the same manner at the time of the hearing. Therefore I conclude that with regard to the specific disputed work involved in this case, both bargaining unit and managerial employees had concurrent jurisdiction.

However, in my view, if accessing COSMOS by management involves the performance of a function necessarily so indivisible from exclusive bargaining unit work, it would be proper to rule that all such work is exclusively for the bargaining unit in order to avoid the destruction or erosion of exclusive bargaining unit work. This, indeed, was the choice made by Arbitrator Roberts on the facts of the BISCOM case when he decided in favor of the Union. However, as Mr. Roberts pointed out at the very outset of this proceeding, that case did not preclude a different finding with respect to COSMOS if the facts warranted it.

Another possibility is that accessing COSMOS is so integral a part of the "testing" and "analyzing" function which the parties
have either conceded or assumed to be exclusive bargaining unit work that a finding in favor of the Union’s position would be required. This was the basis of the conclusion of Arbitrator Friedman under the facts of the COMAS case, who, however, expressly recognized that the Employer could access COMAS for use in managerial work where it was not an integral part of the exclusive bargaining unit work.

I find the set of circumstances in the BISCOM or in the COMAS case not to be present in this proceeding. It is clear that management is entitled to information obtainable from COSMOS to perform its managerial duties. It is equally clear that information from COSMOS is utilized by bargaining unit personnel for the "testing" and "analysis" functions. However, by obtaining the information from COSMOS, management does not necessarily perform either the bargaining unit testing or analytic functions. This is unlike COMAS where accessing the information in that case necessarily involved the performance of the switchman’s analytic work, according to Arbitrator Friedman.

In the instant case, obtaining the information from COSMOS is and can be separate from how it is subsequently utilized. Thus, by merely accessing COSMOS, no previously exclusive RSB bargaining unit work is destroyed or performed in whole or in part by management nor does that appear to have been the purpose of management. The real concern is how the information is used, not who obtains it.

The Union urges that a prophylactic rule denying management
access to COSMOS is essential no matter how the specific information is actually used and even if no bargaining unit work actually is affected. It argues that there is no way the Union can be certain or even ascertain how information is utilized by management. Indeed, the Union argues, there is no way the Union can even know when COSMOS has been accessed by the Employer because not only is there no paper record of access, but access can be accomplished from terminals remote from the RSB locations. The fact that the Union did not grieve or even may have acquiesced in management accessing information in a line card environment can be attributed to the ability of unit personnel to observe or monitor access and even use of the information by management personnel. Hence, the Union argues, a total prohibition on management access of COSMOS is the only feasible way of protecting the Union's legitimate interests.

Further, the Union argues that inasmuch as "convenience" and not "necessity" determines when management accesses COSMOS, the balance of interests favors the Union's request for a prophylactic rule prohibiting managerial access to COSMOS. The short answer to this contention is that there is no contractual barrier to basing shared work (or even exclusive work) on "convenience" and there surely is no necessity that accessing COSMOS be exclusively bargaining unit work except if one relies on prophylactic purposes. However, there is no evidence in the record nor any claim that COSMOS was inaugurated or even is being used as a guise for destroying or otherwise affecting exclusive
bargaining unit work. Rather, the core of Union concern is that management might abuse its powers if permitted to access COSMOS. The assuaging of this fear may be a proper subject of collective bargaining, but it is not for me to rewrite the contract of the parties. Put another way, I do not have the authority to prohibit the Company from exercising a right on the speculative ground that in doing so it may overstep its bounds. Of course, in a different case, where the evidence shows the Company accessed COSMOS wrongly, the contractual grievance procedure is available.

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 accessing of COSMOS terminals by RSB (Plant Service Center) management personnel for purposes of getting information in connection with RSB (Plant Service Center) operations, does not violate the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: August 5, 1982
STATE OF New York ) ss.: COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument which is my AWARD.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 1930 District Council 37 AFSCME, AFL-CIO and

New York Public Library

The stipulated issue is:

Did the Library violate Article 18; Article 18 Section 1, 2, 4 and 5; Article 24 which incorporates Library Administrative Memoranda 1 and 2 by denying Diane Lachatenere promotion to the position of Head Archivist at the Rare Books Manuscripts and Archives Section of the Schomburg Center for Research in Black Culture? If so what shall be the remedy?

Hearings were held at the offices of the American Arbitration Association in New York City on November 6 and 7, 1982 at which time Ms. Lachatenere, hereinafter referred to as the "grievant" and representatives of the above named Union and Employer appeared. A stenographic record was taken. All concerned were offered full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

At the conclusion of the Union's direct case, the Employer made a motion to dismiss the grievance on the grounds that the Union had failed to make a prima facie case that the grievant was "fully qualified" for the promotion within the meaning of Sections A 1 and B 7 of Library Memorandum Number 2. Those Sections read:
Vacancies will be filled by the transfer or promotion from within the Library staff if a fully qualified person is available; and

If in the judgement of the Department and the Personnel Office none of the staff members who applied for the vacancy are fully qualified for it all who applied will be so advised by the Personnel Office. That office will then be free to recruit and refer to the Department candidates from outside the staff.

The Employer asserts primarily and inter alia that the grievant is not fully qualified because she does not have a "reading knowledge of French" as required by the job posting of December 14, 1981 and the New York Times newspaper advertisement of January 10, 1982.

It is undisputed that the grievant lacks reading knowledge of French.

Considering the facts in this case, I fail to see how an arbitrator can disregard the requirement that an applicant for the job in question possess the ability to read French to be "fully qualified." A reading knowledge of French has always been a requirement of this job. The prior occupants of the job were able to read French. The incumbent appointee reads French. Undisputedly a significant part of the rare books and manuscripts in the collection are in French. Though substantially cataloged in English, it is clear that additional work with documents in French remains to be done. Also, there are strong indications that because manuscripts of Black culture have their origins in countries and cultures that are French speaking, additional
acquisitions by the Employer are likely to be in French. Considering the history and practices of the acquisitions of the Collection involved, this latter assumption is reasonably based.

I find the ability to read French to be properly related to the job requirements and hence to be a reasonable condition which the Employer may require of a job applicant to meet the threshold contractual test of "fully qualified." I can find nothing arbitrary, discriminatory, capricious or even unreasonable about the Employer's requirement in this regard.

This is not to say that the grievant could not do the job without the ability to read French. Rather it is to say that under the circumstances present the Employer has the right to require a reading ability in French, and that absent that ability, an applicant is not fully qualified. For the arbitrator to rule otherwise is for him to impermissibly substitute his judgment for that of the Employer and for the express language of the relevant Library Memorandum on what the job requirements should be. He may not overturn either the Employer's judgement or the Memorandum language unless he finds them to be arbitrary, capricious, discriminatory, irrational when compared to the job duties or, in some circumstances, unreasonable. None of those are present under the facts of this case.

The grievant is obviously a skilled, talented and dedicated archivist. I find simply that she was not fully qualified for the promotion she sought.
With that finding it is unnecessary to determine whether she received pursuant to Article XVIII Section 5 of the contract, an adequate explanation for her rejection. Even if the requirements of that contract clause were not explicitly met by the Employer, that procedural defect could not result in an order granting the job to the grievant. Her lack of full qualifications would remain as an insurmountable contractual impediment.

Also because she is not fully qualified, and therefore ineligible for the promotion, it is immaterial and unnecessary for me to address the Union's claim that the job was filled by an outside hire by "prearrangement or preselection" in violation of Article XVIII Section 1 of the contract.

Similarly, in view of my conclusion that the grievant did not fully meet the job qualifications, other contentions by the Union are irrelevant to the disposition of her grievance.

The Undersigned, duly designated as the Arbitrator, having been duly sworn, and having duly heard the proofs and allegations of the parties makes the following Ruling on the Employer's motion to dismiss the grievance:

The Employer's motion to dismiss the grievance on the grounds that the grievant is not fully qualified for the promotion, is granted.

DATED: November 15, 1982
STATE OF New York )
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my RULING.
In accordance with Article XXVI of the collective bargain-
ing agreement effective as of December 8, 1981 between the above named Association and Employer, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the grievant, LaTanya Watson, discharged for just cause? If not, what shall be the remedy?

A hearing was held in New York City on March 19, 1982 at which time representatives of the Association 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 grievant began work on November 3, 1980 and received a satisfactory probationary review dated March 9, 1981. It noted some problems with her typing skills. The grievant's supervisor, Barbara J. Swanson, discussed the grievant's work performance with the grievant on March 19, 1981 and issued a written warning on April 2, 1981 concerning eight items related to the grievant's work performance. The grievant served a three-day suspension for
poor work performance beginning on June 23, 1981. She was discharged on July 2, 1981 for poor work performance.

The Employer asserts that the grievant was unable to perform the job of Secretary in the School of Social Work despite repeated efforts by representatives of the Employer to counsel her. Specifically, the Employer claims that it followed the rules of progressive discipline by giving the grievant a verbal warning, a written warning, and a suspension for poor work performance. The Employer maintains that it discharged the grievant only after her performance failed to improve.

The Union contends that the Employer hired the grievant to be a receptionist, directly from a six-month training program. The Union argues that after serving satisfactorily as a receptionist for three months the Employer changed the nature of the job by assigning increased typing duties. As the grievant lacked the skills to perform such heavy typing assignments and had been hired as a receptionist to perform only light typing, the Union insists that there was not just cause to disciplinarily charge the grievant for poor performance of heavy typing assignments.

It is well settled that an employee may be terminated from employment for inability to satisfactorily perform the duties assigned to the job. In such cases, arbitrators uniformly require the imposition of progressive discipline to place the employee on notice that retention on the job is in jeopardy unless the employee corrects whatever deficiencies exist.

But in the instant case, there is persuasive evidence
indicating that the job for which the Employer hired the grievant had duties and thus expectations significantly less than those for which the Employer later held the grievant responsible. The original Request to Recruit Form signed by Ms. Watson indicated the job title for the opening to be Receptionist and listed the job duties and responsibilities as "receptionist for the School; screening visitors; telephone; typing; filing; other duties as assigned." The job posting notice identified the job title as Secretary and the accompanying job description provided: "Serve as receptionist for school. Duties also include typing, filing."

The memorandum regarding the grievant's termination referred to the position as Receptionist-Typist.

I am persuaded that the grievant's job evolved from Receptionist to Secretary to Receptionist-Typist between September 29, 1980 and July 2, 1981. These changes, which carried with it, increased typing duties, occurred despite the Employer's direct knowledge that the grievant had just completed a training program before being hired. The evidence also indicates that at the time of hiring the Employer considered the grievant to be less qualified than other applicants, but knowingly hired her because it feared that the more qualified applicants would quickly leave the position if another, more attractive opening arose.

The evidence further reveals that the written warning of April 2, 1981, which summarized the verbal discussion on March 19, covered eight different areas. Specifically, the written warning referred to "typing, telephone communication skills, office procedures, following through on original assignments,"
accepting criticism and instructions, using judgement and initiative, showing common sense, and following complex instructions."
The June 22, 1981 letter that announced the imposition of a three-day suspension referred to "the quality of your typing" and errors in the most routine clerical functions." The memorandum of termination, however, relied solely upon the grievant's typing as a basis for the discharge. The letter noted that: "As of the last memo in which I wrote of your difficulty typing assignments, it is the opinion of this office that your work is still not satisfactory for this department . . . ."

On the basis of these statements and the entire record, it is clear that the Employer discharged the grievant because of typing deficiencies. The other problems mentioned in the letters dated April 2 and June 22 were not referred to in the July 6 termination letter. The discharge, therefore, did not rely on those other prior deficiencies.

It is unfair and unreasonable, to knowingly hire a person with minimum skills for a position, to thereafter assign more complicated tasks to the new employee, and then discharge such a beginning employee for being unable to perform the work satisfactorily. Having controlled the original job posting, recruitment, and selection process, the Employer is estopped from disciplining the grievant for an inability to perform the new and different job duties satisfactorily.

In my judgement the typing assignments relied upon by the Employer to support the discharge were not of a routine nature that a receptionist may be reasonably expected to perform. A
receptionist is subject to repeated interruptions that impede the sustained concentration that heavy typing requires. By reshaping the grievant's position to include such heavy typing responsibilities, the Employer constructively disqualified the grievant from retaining her job. If the Employer viewed such changes as being necessary, it could have made them, provided contractual obligations were met. The Employer then could have transferred the grievant to a more suitable position if one was available or could have placed the grievant in layoff status due to a lack of suitable and available work. Under the circumstances of this case, however, to attach to the grievant the stigma of discharge for poor work performance and thereby burden her with a discipline record when seeking other employment, is not consistent with the intent of the just cause requirement of Article XXIV (Discipline, Suspension, Discharge) or the provisions of Article XXVIII (Management Rights).

Accordingly, my Award shall direct that the grievant be reinstated with back pay less what she earned elsewhere in gainful employment during the period of her discharge, and less back pay for the period between January 20, 1982 and March 19, 1982 during which the processing of this case was delayed by an adjournment requested by the Association over the Employer's express objection.

The Undersigned, having been duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:
The grievant, LaTanya Watson was not discharged for just cause. She shall be reinstated with back pay less what she earned elsewhere during the period of this discharge. The grievant shall not receive back pay for the period between January 20, 1982 and March 19, 1982. The Employer’s right to revise the job consistent with the duties to be performed and as referred to in the Opinion, is reserved.

DATED: April 19, 1982
STATE OF New York )
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.
The stipulated issue is:

Was there good and sufficient cause for the discharge of Eduardo Zuniga? If not what shall be the remedy?

A hearing was held at the Company offices in Yonkers, New York on October 21, 1982 at which time Mr. Zuniga, 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.

Based on the record before me, I conclude that the Company has met its burden of establishing that it had compelling reasons to believe that the grievant had violated Company Citizenship rule #4.

The Company also showed that those rules were distributed to the employees including the grievant and that the grievant understood them. By its terms, a violation of the cited rule is a dischargeable offense. Considering the nature of the offense, I do not find that penalty to be excessive. Therefore the imposition of that penalty on the grievant was not contractually improper.
If later acquired information, or if the grievant's long service and possible innocence of any willful intent to commit a wrong could be construed as mitigating factors, a modification of the discharge penalty is for the sole discretionary consideration of the Company.

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 Eduardo Zuniga was for good and sufficient cause.

Eric J. Schmertz
Arbitrator

DATED: October 24, 1982
STATE OF New York ) ss.
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Was there just cause for the disciplinary warning and three-day suspension given Roy Fielding? If not what shall be the remedy?

A hearing was held at the Company offices on November 15, 1982 at which time Mr. Fielding, 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 grievant was given the warning and three-day disciplinary suspension for producing defective work. There is no disagreement between the parties over the fact that he produced the defective work. Rather, the dispute is over the Company's application of progressive discipline.

I find that the application of progressive discipline in this case is out of sequence and hence contrary to the universally established methodology of and purpose for that disciplinary formula. As such, it fails to meet the standards of just cause.
The parties are experienced and knowledgeable in labor relations. They know that the procedure of progressive discipline is to impose in sequence, increased disciplinary penalties for each subsequent offense, leading ultimately, in the absence of rehabilitation or improvement, to discharge. Where the offenses do not warrant summary dismissal, the employee's first offense is treated with a warning (verbal or written); his next offense with a suspension; and thereafter, for a subsequent offense he may be discharged. The sequential, increased severity of penalties for succeeding offenses has as its purpose both the effort to correct the offending employee's conduct or unsatisfactory work and to put him on notice - again through the use of a more severe penalty for each subsequent incident - that his job is in jeopardy if he does not improve or bring his record to a satisfactory level.

Obviously, if the sequential steps are not followed and are not attached to succeeding and subsequent offenses, the purpose and impact of progressive discipline fail.

Here, the penalties imposed and the sequence of offenses are "out-of-phase" with the prescribed methodology.

In December, 1981, the grievant turned out defective work. In March, 1982 he again produced defective work. For the March, 1982 offense he was given a written warning. For the earlier December, 1981 offense, he was given the instant warning and three-day suspension. The greater penalty was imposed for the earlier offense because the defective work was not discovered until April,
1982, after the second incident. Having already imposed a written warning for the March, 1982 offense, the Company upon discovering in April, 1982 the December, 1981 error, imposed the suspension for that earlier mistake.

That the Company's action with regard to the grievant was inconsistent with the progressive discipline methodology is obvious. The question is whether it should be reversed or modified. For two reasons, I answer affirmatively - for modification.

First, a suspension of three days for the first offense of making defective work, albeit discovered after a second similar offense, penalizes the grievant, not for that first offense, but rather as a second offense. It does not serve the end for which a suspension is intended - to put an employee on notice that because he has committed a second or subsequent offense, his job is in jeopardy if he does not change his ways or work practices. Also, it is supposed to "hit the employee in his pocketbook" by loss of time, to impress upon him the unacceptability of his continued unsatisfactory work. Neither applies here because the suspension attached to the grievant's first offense, though imposed after his second. In short, the Company seeks to sustain and justify the greater penalty of suspension by "bootstrapping" it to the point of time that the earlier offense was discovered rather than to when it occurred. That is not progressive discipline and therefore a modification is required.

Both incidents of defective work warrant discipline. If
progressive discipline had been imposed properly and consistent with its purpose, the December 1981 offense should have been handled with a written warning, and the March 1982 incident with a warning and suspension. As the Company has imposed only a warning for the latter offense, that penalty cannot now be increased and must therefore stand. Under the circumstances the December 1981 incident which should have resulted in only a warning, should now have that penalty attached to it.

Accordingly, the warning and three-day suspension is modified to a written warning. It is not inconsistent with progressive discipline for both of two successive offenses to be dealt with by written warnings.

The second reason that I reduce the suspension to a written warning is that I do not find the Company blameless in the lapse of four months before the defective work was discovered. I conclude it could have and should have discovered the poor work soon after it was produced, thereby obviating the "up-side-down" disciplinary problem presented in this case. The evidence shows that the production schedule or production plan for the defective work involved called for an inspection stage shortly after the grievant made the parts. At the hearing the Company could not tell whether that inspection took place, was overlooked or skipped, nor could it tell what the results were if it took place. The Company does not claim that the called for inspection was not part of the production schedule. Under that circumstance I conclude that the Company has the burden of showing why the defective work
was not discovered at that point, and therefore early enough to impose the correct measure of discipline in its proper sequence. The Company has not met that burden.

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

There was not just cause for the disciplinary warning and three-day suspension given Roy Fielding. It is reduced to a disciplinary warning. Mr. Fielding shall be made whole for the three days lost.

Eric J. Schmertz
Arbitrator

DATED: November 30, 1982
STATE OF New York )ss.: COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration:

between

Local Union No. 855

and

Public Service Electric & Gas Co.:

OPINION OF CHAIRMAN

Grievance No. 227-1981

The stipulated issue is:

Did the Company violate the collective bargaining agreement between the parties by imposing a three-day suspension on Mr. Holley Sims? If so, what shall be the remedy?

A hearing was held at the offices of the New Jersey State Board of Mediation on July 15, 1982, at which time Mr. Sims, 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 Undersigned served as Chairman of the Board of Arbitration and Messrs. Clarence E. Bell and C. W. Grevenitz served respectively as the Union and Company designated members of said Board. The Arbitrators' Oath was waived. A stenographic record was taken, and the parties filed post-hearing memoranda. The Arbitration Board met in executive session on October 14, 1982.

The weight of the credible evidence persuades me of the accuracy of the testimony of Supervisor DePalma regarding what happened on the working platform on May 8, 1981. I conclude therefore that the grievant purposely, abusively and insultingly used an obscene phrase to and about DePalma. Manifestly,
that conduct warrants discipline including a suspension.

On the issue of credibility, a past disciplinary record is relevant. Here, the grievant had committed at least one prior offense of a similar type, showing a propensity for what he is charged with in the instant case. Moreover, the grievant's own version of the facts is prejudicial to him. He admits using the obscene phrase but contends it was just part of his conversation with fellow employees and that DePalma just happened to hear it "as he was passing by." The grievant admits that the obscene characterization was about supervision and that his statement included a reference to supervisors "taking his parking spot in the Company parking lot."

Standing alone, as the grievant explains it, his statement itself was disrespectful and with DePalma "passing by" and considering the events in the parking lot on the two preceding days, must have been timed and intended for DePalma to hear. With the coincidence of the parking lot incident and DePalma's presence, I cannot believe the grievant's version. And though the grievant claims he was only speaking to fellow employees, none came forward to support or corroborate his story. Rather I conclude that the grievant was angry about what he perceived to have been the taking of his parking spot by DePalma (or more accurately by the driver of the car in which DePalma was riding), and, prompted by that anger, confronted DePalma and directly insulted him with obscene language.

I do not find provocation. Assuming arguendo that the
that the grievant's parking spot was taken and that, as the grievant also claims, DePalma cursed at him in the lot, using the very language the grievant is presently accused of using to DePalma, those circumstances would not meet the test of provocation.

For a wrongful act or response to be excused because of provocation, requires a close or immediate proximity between the provocative act and its response. Here, at least a full day elapsed between what the grievant claimed DePalma did in the parking lot and the events on the working platform which gave rise to the discipline. The passage of that time negates any condition of provocation. The grievant had no excusable reason to remain provoked for that period of time. He had ample time to redress what he thought were wrongs done him by reporting them to the Union and by complaining through the grievance procedures of the contract. There were no immediate or sequential events in the facts of this case which would allow an emotional or unthinking response to an alleged act or statement of provocation.

Hence I need not decide what in fact happened in the parking lot on the day or days before the incident for which the grievant was disciplined.

The suspension of the grievant is upheld.

Dated: October 24, 1982

Eric J. Schmertz
Chairman
In the Matter of the Arbitration between
Local Union No. 855
and
Public Service Electric & Gas Co.

AWARD

Grievance No. 227-1981

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

The three day suspension of Holley Sims did not violate the collective bargaining agreement.

Eric J. Schmertz
Chairman

C. W. Grevenitz
Concurring

Calvin E. Bell
Dissenting

DATED: October 24, 1982
STATE OF New York )ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

Eric J. Schmertz

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

Eric J. Schmertz

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

Eric J. Schmertz
DATED: Dec. 7 1982
STATE OF New Jersey
COUNTY OF Essex

I, C. W. Grevenitz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

[Signature]

DATED: Dec. 7 1982
STATE OF New Jersey
COUNTY OF Essex

I, Calvin E. Bell do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

[Signature]
In the Matter of the Arbitration:  
between:  
Local Union No. 855:  
and:  
Public Service Electric & Gas Co.:  

OPINION OF CHAIRMAN  
Grievance No. 227-1981  

The stipulated issue is:

Did the Company violate the collective bargaining agreement between the parties by imposing a three-day suspension on Mr. Holley Sims? If so, what shall be the remedy?

A hearing was held at the offices of the New Jersey State Board of Mediation on July 15, 1982, at which time Mr. Sims, 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 Undersigned served as Chairman of the Board of Arbitration and Messrs. Clarence E. Bell and C. W. Grevenitz served respectively as the Union and Company designated members of said Board. The Arbitrators' Oath was waived. A stenographic record was taken, and the parties filed post-hearing memoranda. The Arbitration Board met in executive session on October 14, 1982.

The weight of the credible evidence persuades me of the accuracy of the testimony of Supervisor DePalma regarding what happened on the working platform on May 8, 1981. I conclude therefore that the grievant purposely, abusively and insultingly used an obscene phrase to and about DePalma. Manifestly,
that conduct warrants discipline including a suspension.

On the issue of credibility, a past disciplinary record is relevant. Here, the grievant had committed at least one prior offense of a similar type, showing a propensity for what he is charged with in the instant case. Moreover, the grievant's own version of the facts is prejudicial to him. He admits using the obscene phrase but contends it was just part of his conversation with fellow employees and that DePalma just happened to hear it "as he was passing by." The grievant admits that the obscene characterization was about supervision and that his statement included a reference to supervisors "taking his parking spot in the Company parking lot.

Standing alone, as the grievant explains it, his statement itself was disrespectful and with DePalma "passing by" and considering the events in the parking lot on the two preceding days, must have been timed and intended for DePalma to hear.

With the coincidence of the parking lot incident and DePalma's presence, I cannot believe the grievant's version. And though the grievant claims he was only speaking to fellow employees, none came forward to support or corroborate his story. Rather I conclude that the grievant was angry about what he perceived to have been the taking of his parking spot by DePalma (or more accurately by the driver of the car in which DePalma was riding), and, prompted by that anger, confronted DePalma and directly insulted him with obscene language.

I do not find provocation. Assuming arguendo that the
that the grievant's parking spot was taken and that, as the
grievant also claims, DePalma cursed at him in the lot, using
the very language the grievant is presently accused of using
to DePalma, those circumstances would not meet the test of
provocation.

For a wrongful act or response to be excused because of
provocation, requires a close or immediate proximity between
the provocative act and its response. Here, at least a full
day elapsed between what the grievant claimed DePalma did in
the parking lot and the events on the working platform which
gave rise to the discipline. The passage of that time negates
any condition of provocation. The grievant had no excusable
reason to remain provoked for that period of time. He had
ample time to redress what he thought were wrongs done him by
reporting them to the Union and by complaining through the
grievance procedures of the contract. There were no immediate
or sequential events in the facts of this case which would
allow an emotional or unthinking response to an alleged act
or statement of provocation.

Hence I need not decide what in fact happened in the
parking lot on the day or days before the incident for which
the grievant was discipline.

The suspension of the grievant is upheld.

Dated: October 24, 1982

Eric J. Schmertz
Chairman
The stipulated issues are:

Which collective bargaining agreement, Joint Exhibit 1 or Joint Exhibit 2, covers Licensed Mates aboard the SS Anderson, Callaway and Clarke; vessels owned and operated by United States Steel Great Lakes Fleet Service, Inc., a wholly owned subsidiary of United States Steel Corporation? If it is Joint Exhibit 1, what shall be the remedy?

A hearing was held in Pittsburgh, Pennsylvania on August 25, 1982 at which time United States Steel Corporation (USS Great Lakes Fleet Service, Inc.), hereinafter referred to as the Company, and representatives of District 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO, hereinafter referred to as MEBA, and Masters, Mates and Pilots Great Lakes and Rivers District ILA, AFL-CIO, hereinafter referred to as MMP, 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 MEBA and MMP filed post-hearing briefs. The Arbitrator's Oath was waived.

This grievance involves a jurisdictional dispute between MEBA and MMP over representation of licensed mates aboard the SS Arthur M. Anderson, Cason J. Callaway and Phillip R. Clarke. The mates aboard these ships, which were constructed in the 1950's as straight decker bulk freight vessels, were represented for many years without dispute by MMP pursuant to its various collective bargaining agreements with the Company. However, during the 1981-1982 winter season, the vessels were equipped with deck booms which permits them to self-unload cargo without the necessity of using shore-based equipment. These vessels had been, and despite the change in their configuration, will continue to be primarily engaged in the transport of iron ore. Subsequent to their conversion to self-unloaders, the Company decided to continue to staff them with licensed mates represented by MMP. MEBA, however, filed this grievance contending that it now has jurisdiction over these vessels pursuant to Article I, Section 2 of its 1980 collective bargaining agreement with the Company which provides:

"The Company recognizes the Union as the exclusive bargaining agency with respect to rates of pay, wages, hours of work, and conditions of employment for all Licensed Mates employed on deck-equipped boom-type self-unloader vessels operated by the Company's Great Lakes Fleet."

1. The Company has taken a position of neutrality with respect to this dispute.
MEBA argues that, since the three vessels in issue in this proceeding are now "deck equipped boom-type self-unloader vessels," they come under its jurisdiction rather than that of MMP. Further, MEBA contends that the vessels are no longer covered by the language of the 1980 collective bargaining agreement between MMP and the Company which provides:

"The Company recognizes the Union as the exclusive bargaining agency with respect to rates of pay, wages, hours of work and conditions of employment for all Licensed Mates employed on straight-decker bulk freight vessels used to transport steel products and newly constructed vessels engaged primarily in the transport of iron ore...."

The evidence clearly demonstrates that these vessels are now "deck-equipped boom-type self-unloader vessels" and are no longer "straight-decker bulk freight vessels." MMP does not contend that the ships have been "newly constructed," or used to transport steel products. Instead, MMP asserts that, it "can see no difference between a newly constructed vessel engaged in the iron ore trade and a vessel that was in the iron ore trade, has improvements made thereon, and returns to the identical trade such as the Anderson, Callaway and Clarke," and that the collective bargaining agreements among the parties are really intended to divide jurisdiction between MMP and MEBA by reference to the cargo which the vessels primarily transport. More specifically, MMP argues that past practice and history demonstrate that vessels which primarily transport iron ore, such as the three in issue in this proceeding, are within its jurisdiction, while those which primarily transport limestone are within the jurisdiction of MEBA.
A thorough review of the transcript, exhibits and arguments of the parties has persuaded me that the plain and unambiguous language of the agreements among the parties mandates that the licensed mates aboard these vessels as they are now equipped be covered by the MEBA contract. It is to the clear contract language that the arbitrator is bound. MMP has not introduced sufficiently persuasive evidence to establish a clear and consistent past practice which led or should have led MEBA to believe that the contracts among the parties mean something other than what they said, or that the contract language has been changed by the conduct of the parties.

The contractual language used to define the scope of the bargaining rights of both MEBA and MMP has remained without material change since March, 1968. Juxtaposed, the two jurisdictional clauses grant MEBA representational rights for licensed mates aboard all deck-equipped boom-type, self-unloader vessels, unless they are newly constructed and engaged primarily in the transport of iron ore or unless they transport steel products. Clearly, the only boom-type self-unloader vessels to which the MMP may make claim are those newly constructed and engaged in carrying iron ore or those transporting steel.

The instant disputed vessels are not "newly constructed and engaged in the transport of iron ore." The most that can be said is that they transport iron ore. But they do not meet the additional requirement of being "newly constructed," and hence do not qualify for MMP jurisdiction under the contract language.

The disputed ships are no longer "straight-decker bulk freight
vessels. The cargo reference in the MMP contract is manifestly connected to the ship's configuration. Cargo alone is not contractually determinative. There is no disagreement over the fact that both types of vessels can and have transported iron ore and limestone.

Further, the language of the contract was the product of an intensive collective bargaining process among knowledgeable and sophisticated parties. If the Company and MMP intend to divide jurisdiction among the unions on some basis other than that which was unambiguously stated, they could and should have done so by the use of simple language using cargo as the crucial determinant. Indeed, the Company's agreements with the Steelworkers' locals explicitly distinguishes between vessels "primarily used for the transport of iron ore" and those "primarily used for the transport of limestone." The Steelworkers' agreements were negotiated for the Company by Mr. C. Edward Newmeyer, the Company's then Director of Labor Relations. Newmeyer also negotiated the 1968 MEBA and MMP agreements for the Company and no such similar delineating language was included. Although MEBA and MMP have each negotiated four agreements with the Company since 1968, neither the Company nor MMP made any changes in the "scope" language to reflect a general distinction based upon cargo.

It is clear that prior to 1968 MEBA represented licensed mates aboard vessels belong to the Bradley Fleet which were primarily engaged in the transport of limestone and MMP represented licensed mates aboard vessels belonging to the Pittsburgh Fleet
which were primarily engaged in the transport of iron ore. However, the evidence also shows that all but one of the vessels then in the Pittsburgh Fleet were straight deckers and apparently all of those in the Bradley Fleet were self-unloaders. Hence the earlier practice was consistent with the physical configuration of the ships as specified in the language of the agreements. MMP has established that since 1968 it, and not MEBA, has represented licensed mates aboard vessels primarily engaged in the transport of iron ore. However, the evidence also demonstrates that since 1968, MEBA has represented licensed mates aboard all self-unloaders, except for newly constructed vessels carrying iron ore and vessels transporting steel products. Further, between 1956 and 1967 four vessels were removed from MMP's jurisdiction after the ships were converted from straight deckers to self-unloaders. Eventually, these ships were staffed by MEBA mates. Although after conversion the vessels were used primarily to transport limestone, their transfer out of MMP's jurisdiction is as much probative of the parties intent to assign jurisdiction by configuration as by cargo.

2. The one vessel which was not was the Clifford Hood which was used to transport steel products.
3. The evidence demonstrates that the Blough, Gott and Speer fall within this category.
4. As noted previously, the evidence demonstrates that the Clifford Hood falls within this category.
The only witness for MMP who purported to testify directly as to "meaning," was Newmeyer. He testified, fourteen years after the execution of those agreements, that the Company intended to divide jurisdiction among the unions on the basis of cargo rather than configuration. However, Newmeyer did not testify that MEBA had or should have had a similar understanding in light of the clear language of its agreement. Indeed, Newmeyer admitted that "I don't know whether it was the union's desire, but we had to eliminate the term "Pittsburgh Fleet." In response to a question as to the Company's intent, he cautioned that "there was different language at different times." Lastly, the contemporaneous documentary evidence introduced by MEBA, including the certification of the results of the election between MEBA and MMP, uses physical configuration and not cargo in assigning jurisdiction among the unions.

MMP's reliance on the position taken by the Company during the most recent collective bargaining between the parties is also unpersuasive. During those negotiations, Mr. William Miller, Vice President Labor Relations, USS, wrote MMP concerning the three vessels in issue in this proceeding and stated:

"It is planned that upon resumption of operation by these three vessels following the refitting, they will be assigned primarily in the transport of iron ore. Given this fact, and the fact that your Union has heretofore been the bargaining representative for the Mates on these vessels, the Company intends to continue its recognition of your Union in respect to these mates."

However, the uncontradicted evidence indicates that the
Company did not reach any such agreement with MEBA with respect to these vessels. Indeed, the Company has explicitly maintained a position of neutrality on the issues in this proceeding. Thus, I find that the Company's position taken during the most recent negotiations with MMP was only a reflection of its desire to maintain the then status quo unless and until the matter would be resolved by litigation or arbitration. Any other conclusion would create a situation wherein the Company would probably be required to breach one of the collective bargaining agreements, since no agreement between the Company and MMP could bind MEBA which was not a party thereto. In other words, for Miller's letter to MMP to be determinative, the Company's assignment should have been translated not just into an agreement with MMP, but critically, had to be agreed to, or acquiesced in by MEBA. In this case, neither agreement, knowledge or acquiescence can be imputed to MEBA.

Lastly, there is no dispute that MEBA licensed mates are or would be equally capable as those of MMP in performing their duties on these vessels, even if the ships are used to transport iron ore. In fact, the Company's neutrality is indication that competency is not an issue. If by this ruling MMP suffers more than MEBA, by the loss of vessels from its jurisdiction, the hardship is a result of the clear and unambiguous language of the agreements entered into among and between the parties over the last fourteen years.

5. The evidence demonstrates that the Clarke is one of the three vessels currently transporting iron ore under MMP's jurisdiction.
For the reasons set forth above, the MEBA grievance is granted. In accordance with the express stipulations between MEBA and the Company, I do not now decide what damages, if any, may be owed by the Company to licensed mates represented by MEBA. Instead, I refer that issue to the parties for resolution within 30 days. I will, however, retain jurisdiction over this case in the event that that issue cannot be so resolved.

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

Joint Exhibit No. 1, the Collective Bargaining Agreement between the United States Steel Company and District 2 Marine Engineers Beneficial Association covers the Licensed Mates aboard the SS Anderson, Callaway and Clarke.

Eric J. Schmertz
Arbitrator

DATED: November 26, 1982
STATE OF New York )ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Was Jeanne Edwards assaulted by her supervisor, James McAdam?

A hearing was held at the Medical Center on May 19, 1982. Representatives of the above named Union and Medical Center appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Union and Medical Center filed post-hearing statements.

There is a threshold issue of arbitrability. The Medical Center asserts that the grievance is not arbitrable because the Union failed to comply with certain time limits set forth in Step 2 of Article 23 (Grievance and Arbitration Procedures) of the collective bargaining agreement. More specifically the Medical Center claims that the Union failed to process the grievance from Step 1 to Step 2 within the prescribed five calendar days; also failed to notify the Medical Center that it was taking the dispute to arbitration within the fifteen calendar days prescribed in Step 2(a); and failed additionally to request a list of arbitrators from the Federal Mediation and Conciliation Service.
Service within the fifteen day time period required by Step 2(b).

Article 23 Section 8 reads:

All time limits in this Article will be extended only in individual grievances by mutual consent. Failure of the Center to observe the time limits shall entitle the employee to advance the grievance to the next step. If the employee or the Union fails to appeal from one step to the next step within the time limits established in this Grievance Procedure, the grievance shall be considered settled on the basis of the last decision and the grievance shall not be subject to further appeal or consideration.

The parties are reminded that they, not this arbitrator, negotiated and agreed to Section 8. That clause is clear and explicit. It makes the time limits set forth in the Steps of the grievance procedure mandatory. The arbitrator cannot ignore or change the terms of the contract. Therefore unless there has been a mutual agreement to extend the time limits, a waiver of the time limits, or a past practice which has ignored them, those time periods are statutes of limitation binding on the parties and the arbitrator.

In the instant case I find that the Union constructively and hence substantially complied with the five calendar day time limit in processing the grievance from Step 1 to Step 2 following the answer of the Canteen Officer. The Medical Center's answer was given on August 12, 1981. Though the Union did not specifically appeal the grievance to the Canteen Field Director until September 28, it did notify the Canteen Officer and the Medical Center Director by separate letters both dated August 14, 1981 that the Step 1 answer was unsatisfactory and in both
letters requested an investigation of the facts. Though the two letters of August 14th did not specifically comply with all aspects of Step 2 (e.g. they failed to communicate dissatisfaction with the Step 1 answer to the Cantee Field Director), I am satisfied that both letters, submitted within two calendar days after the Center's Step 1 answer, served to notify the Medical Center of the Union's plan to pursue the grievance further. In that respect I conclude that it met the purpose and intent of the five-day time limit prescribed by Step 2.

However, the Union failed to comply with the requirements that it notify the Medical Center and the Federal Mediation and Conciliation Service within fifteen calendar days following the Center's Step 2 answer. Nor can I find constructive or even substantial compliance with those time limits.

The Medical Center Director responded to the Union's August 14th letter by a letter dated August 19th. The last letter from the Medical Center's Canteen Field Director is dated September 4, 1981. Though the Union again wrote the Field Director on September 28 asking for "a survey and review of the case," that letter did not indicate to the Medical Center that the Union was "taking the issue to binding arbitration." In view of the express requirement that the Union inform the Center of its plan to initiate an arbitration, I am unable to construe the Union's letter of September 28th as constructive or substantial compliance with that explicit condition.

The first notice of the Union's intent to seek arbitration
of this grievance is in its letter of October 22nd to the Federal Mediation and Conciliation Service, copies of which were sent to the Medical Center's Canteen Officer and Canteen Field Director. October 22 is well beyond a fifteen day period from any of the Medical Center's last letters in answer or response to the grievance at Step 2.

Section 8 accords the Union the right to advance the grievance to the next step if the Medical Center fails to observe the time limits. Therefore the Union cannot persuasively claim that it could not comply with the time limits to notify the Center of its intent to arbitrate and to seek the assistance of the Federal Mediation and Conciliation Service because of any substantive omissions in the Center's letters or because of any failure by the Center to undertake the investigation which the Union sought. Section 8 requires the Union to process the grievance in accordance with the contract time limits irrespective of the Center's answers, or failure to answer, and if the Union does not do so Section 8 mandates that the grievance be considered settled "on the basis of the last decision and the grievance shall not be subject to further appeal or consideration."

In the instant case there is no evidence that the parties mutually agreed to extend the prescribed time limits. There is no evidence that the Medical Center waived the time limits or that there has been a past practice ignoring the time limits. Hence, the Center is within its rights to assert the time limits as a defense and to insist that those time limits and the
not unhesitatingly comply with McAdam’s directives regarding where she was to work and what she was to do. She wanted to complete cleaning the refrigerator, and he wanted her to attend to the salad cases. It is well settled that an employee must comply with the instructions of supervision even if she believes those instructions to be wrong. The exceptions to that rule were not present in the instant case. Had the grievant not insisted on completing the work in the refrigerator before working on the salad cases as instructed, the incident involving the refrigerator door would not have taken place. This is not to excuse McAdam for his loss of temper and for his improper physical response (by slamming the refrigerator door) when the grievant would not move from that location. Rather it is to say that both bear blame for what happened.

Finally, and significantly, had I dealt with the merits of this case, I would not have been able to grant the remedy which the Union seeks. The Union asks that McAdam be demoted and transferred. The Arbitrator’s authority extends to employees covered by the collective bargaining agreement and to the enforcement of the contractual provisions. It does not extend to fashioning or imposing discipline on supervisory employees. It is my recommendation however that if practicable, the grievant and McAdam be separated and be assigned to work in different locations or on different shifts.
provisions of Section 8 be enforced.

Accordingly, because 48 days elapsed from the September 4th Field Director's answer to October 22 when the Union filed the grievance with the Federal Mediation and Conciliation Service and 24 days elapsed between the Union's letter of September 28 to the Field Director and its October 22nd request for arbitration, the grievance is not arbitrable because it was not noticed for arbitration to the Medical Center or to the Federal Mediation and Conciliation Service within the respective fifteen day time periods required by Step 2(a)(b) of the contract.

Lest this be an incomplete answer to the grievance, I shall make some comments, in the form of dicta, on the merits of the grievance. There is no question that Supervisor McAdam and the grievant engaged in a heated argument concerning the work which the grievant was to perform. I think that McAdam, in an unplanned and spontaneous effort to get the grievant to move to the location where he wanted her to work, angrily and vigorously closed the refrigerator door on her shoulder when she would not move away from the refrigerator. In this regard I accept the grievant's testimony, which was clear, unequivocal, and unshaken. I reject McAdam's assertion that she "pushed herself back against the refrigerator door." Because the incident took place as part of a confrontation, with tempers high, I would conclude that McAdam's act though wrong was more a matter of negligence and foolishness than a willful assault. There are elements of "contributory negligence" on the part of the grievant. She did
The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

The Union's grievance on behalf of Jeanne Edwards is not arbitrable.

Eric J. Schmertz
Arbitrator

DATED: July 27, 1982
STATE OF New York ) s s .:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument which is my AWARD.
In the Matter of the Arbitration:

between:

AFGE Local 1119
Stipulation

and:

FDR Veterans Administration
Hospital

Without prejudice to the positions of the parties on the merits, the dispute over the removal of Dr. Chimapan is resolved on the following basis:

(1) Dr. Chimapan shall be reinstated to the position of Dietition Grade 9 as soon as a vacancy exists at the FDR Veterans Hospital. (Said vacancy is expected within the next month as an incumbent employee is expected to be transferred to Long Beach).

(2) Dr. Chimapan shall begin the regular probationary period anew; shall be subject to that status for the requisite period; and shall not receive any back pay.

(3) It is expected that when reinstated, Dr. Chimapan will not be under the direct supervision of Ms. Pedersen.

(4) Mr. Schmertz shall retain jurisdiction over this matter for the probationary period and in the case of any dispute either side may refer the matter back for further proceedings.

(5) In case the foregoing cannot be implemented because the expected vacancy does not materialize by November 22nd, a further hearing of this case is scheduled for November 22, 1982.

DATED: October 20, 1982
In the Matter of the Arbitration between
Whitcom Investment Company and
Thomas W. Smith

The stipulated issue is:
Under all the circumstances, what is fair for Thomas W. Smith to contribute to Whitcom?

Hearings were held on July 22, 1982, August 24, 1982, August 26, 1982, September 10, 1982 and October 4, 1982, at which time Messrs. Walter Thayer and Edward Barlow, representatives of Whitcom Investment Company, hereinafter referred to as "Whitcom," and Thomas W. Smith, hereinafter referred to as "Smith," appeared. Mr. Alan Englander also appeared as a representative of Smith. All concerned were afforded the opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken of all hearings except for the hearing of July 22, 1982. The Arbitrator's Oath was waived.

Based on the entire record before me I find no probative reason why Smith should not be bound to the contract he agreed to dated February 1, 1973.

Though the primary settlement arising out of the U. S. Financial Incorporated litigations between the plaintiff shareholders and Whitcom was large and expensive, I am not persuaded

1. The Agreement was not actually executed until June, 1973.
that it was either excessive or imprudent under the circumstances involved, particularly in the light of the potential liability of the Whitcom partners who were directors of U.S. Financial Incorporated. I conclude that irrespective of actual liability, Whitcom had realistic grounds to fear that a suit against its partners who were U.S. Financial directors would result in a joint and several judgment far in excess of the settlements.

In reaching agreement on the terms of the contract dated February 1, 1973, Smith had ample opportunity to limit the extent of his 5% contribution liability or to provide for a reopening or renegotiation of that agreement if the level of possible settlement exceeded any point. I conclude that the possibility of what Smith would view to be a large settlement was or should have been reasonably within his contemplation at the time the 5% agreement was reached. Smith had the opportunity to, and did indeed seek legal advice on that agreement before he accepted it. Yet no limitations on the magnitude of an ultimate settlement or Smith's percentage liability thereof were sought by Smith and no such limitations were included. Though Whitcom could have kept Smith informed as the settlement negotiations reached higher economic levels, I find no obligation on the part of Whitcom to have done so.

Also, I do not view the agreement to arbitrate as a waiver by Whitcom of its claim that Smith is and was bound by that contract. The agreement to arbitrate was, in my view,
basically procedural. It substituted the forum of arbitration for litigation in court to determine the ultimate rights and liabilities of the parties. But the substantive rights of the parties were reserved, including the right of Whitcom to assert the continued applicability of Smith's agreement to pay 5% of the total settlements, attorneys fees and other costs and expenses.

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

Under all the circumstances what is fair for Thomas Smith to contribute to Whitcom is as follows:

Less the amount he has already paid, Smith is directed to pay to Whitcom forthwith the amount equal to 5% of the settlements, attorneys fees and other costs and expenses which were paid by Whitcom in connection with the U.S. Financial Incorporated litigations and which amount was billed to but not paid by Smith, plus interest on the above amount commencing, with respect to each portion of such amount, on the thirty first day after the date of the first bill demanding payment of such portion and running until full payment is made. The rate of interest shall be the traditional rate on money due and owing on a contract which is silent with respect to interest rate, i.e. the statutory rate. That rate is 6% simple interest per annum until July 25, 1981 and 9% thereafter until full payment is made. However, interest on $70,000 of the total amount due and owing by Smith shall not run subsequent to December 19, 1978 when Smith offered to pay that amount.

without prejudice to an ultimate determination of the rights and liabilities of the parties.

I direct that the parties and/or their counsel work out the mathematical computations necessary to determine the precise amount due and owing by Smith to Whitcom pursuant to this Award. I shall retain jurisdiction over this matter to decide any dispute on these computations which the parties cannot resolve.

ERIC J. SCHMERTZ
Arbitrator

DATED: December 12, 1982
STATE OF New York )
COUNTY OF New York )ss.: 

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.