In the Matter of the Arbitration:  
between 

United Steelworkers of America:  
Local Union No. 1082  

and 

The Babcock and Wilcox Company:  

**OPINION AND AWARD**  

In dispute is grievance No. 5726.  

A hearing was held on June 29, 1984 in Beaver Falls, Pennsylvania at which time representatives of the above named parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Union gave its summation verbally. The Company filed a post-hearing brief.  

Grievance No. 5726 reads:  

I, G. Fanno, Clock No. 8931, a Stamper on the 28" Bar Mill, grieve under Section 13, our departmental overtime agreement dated November 15, 1984, our incumbency overtime agreement dated August 13, 1956 and any other pertinent sections of our basic labor agreement that can be used by the Union in the settlement of this grievance. On the first turn, Saturday, January 16, 1982, R. Fray was scheduled as a Stamper. The Company moved him to fill the job of Gantry Crane Operator (Fray on overtime). The Stamper job was filled by A. Pallerino. Pallerino was paid at overtime rate on the job of Stamper. Again, if overtime is to be paid on a job it must be offered to the incumbents of each particular job. I was scheduled on the job of Stamper on the 7 to 3 shift. This overtime assignment was not proper. I request all wages due me because of the Company's actions (eight hours at overtime rate).

Prior to the start of the first shift on January 16, 1982 of the 28" Bar Mill Operation, J. Tondo, the scheduled Furnace Operator, reported off. The Company made several "move up"
re-assignments among the remaining new members. Pritchard was re-assigned from Gantry Crane Operator to Charge, Fray from Stamper to Gantry Crane Operator, and Pallerino from Test Stamper to Stamper. The vacancy that remained in the "bottom Test Stamper job was filled by assigning Johnson from the labor pool.

The Union claims that the re-assignment of Pallerino to Stamper was improper; that instead the grievant, Guy Fanno should have been called in from home for that assignment.

Essentially the dispute turns on whether the Stamper position, under the foregoing circumstances present on January 16, 1982, should have been filled in accordance with an agreement on "Day to Day Vacancies" (Joint Exhibit 4), or pursuant to the agreement "Filling Turn Vacancies - Steel Mill Units." (Joint Exhibit 5). The Company relies on the former and the Union on the latter.

The relevant differences between the foregoing agreements are that the provisions relied on by the Union in Joint Exhibit 5 are applicable to filling vacancies "when it becomes necessary to pay overtime..."; and the provisions of Joint Exhibit 4 relied upon by the Company apply to the filling of vacancies "without the payment of overtime..."

The pertinent parts of Joint Exhibit 4 read:

Procedure for Filling Turn Vacancies on a Day to Day Basis:
A. Policy in Individual Departments:

5. 28" Bar Mill - Move up within crew - fill in from Labor Pool on bottom jobs. Test Stamper can move to Stamper job only. Cannot cross turns.
B. Attempt to fill all vacancies without the payment of overtime. This applies to all schedules.

C. Fill in from Labor Pool (with straight time employee).

The pertinent parts of Joint Exhibit 5 read:

C. When it becomes necessary to pay overtime, we must handle it as follows:

b. Have the Employee working the subsequent turn called to report for work four (4) hours ahead of his regular schedule.

The Issue therefore narrows to whether the vacancy in question was filled "when it became necessary to pay overtime" or "without the payment of overtime." The Union argues that because the 28" Bar Mill crew was working on a sixth scheduled day, and Pallerino also was working a sixth day the work was performed on an overtime basis and hence that part of Joint Exhibit 5 relating to "when it becomes necessary to pay overtime" is controlling. There is no dispute that the grievant is "the employee working the subsequent turn" under Section C b of Joint Exhibit 5.

As I interpret it the Company's position is that a sixth scheduled day does not constitute the "need to pay overtime" within the meaning of Joint Exhibit 5. Its view is in the instant case Pallerino was scheduled as part of the crew, albeit on a sixth day at overtime, and was available to be assigned to the Stamper job without the payment of the additional overtime which would have been incurred had the grievant been called in earlier than his regularly scheduled "subsequent turn." Also,
as Johnson was already scheduled for a sixth day in the labor pool, he was available to fill in on the crew without additional overtime. The Company also asserts that the only other exception to the Day to Day procedures of Joint Exhibit 4 are when vacancies take place on paid holidays, pursuant to the Company's memorandum of May 29, 1967 to "All Steel Mill Supervisors." It concludes that a sixth work day under the instant circumstances is not a contractual exception to the Day to Day Vacancies procedures of Joint Exhibit 4.

I find the two critical agreements (Joint Exhibits 4 and 5) to be ambiguous, with neither fully conclusive. It can be reasonably argued, as does the Union, that because the operation was on a sixth day at overtime pay and because the Stamper vacancy was filled by an employee also scheduled for a sixth day at overtime pay, the provisions of Paragraph C of Joint Exhibit 5 ("when it becomes necessary to pay overtime") are applicable, and under subparagraph b thereof, the grievant should have been called in. On the other hand, to call in the grievant would have required the payment to him of overtime to fill the vacancy when that particular overtime could have been avoided by the "move up" procedure and by assigning to the "bottom vacancy" an employee from the labor pool who was scheduled to work anyway. Paragraph A can reasonably be interpreted to mean that an employee should be assigned to the Stamper job without paying overtime to fill that vacancy. In this case, because Pallerino and Johnson were already working that day, their "move up" assignments in and to the 28" Bar Mill crew made unnecessary the use of overtime for the purpose of filling the vacancies in the crew.
Joint Exhibit 4 and the express example of A.5 appear to track the facts of the instant case. In that regard, Joint Exhibit 4 supports what the Company did. As the example for the 28" Bar Mill states the Company "mov(ed) up within crew - fill(ed) in from Labor Pool at bottom jobs. Test Stamper...move to Stamper job..." However it should be noted that Paragraph C, relating to filling vacancies "without the payment of overtime" calls for a "fill in from (the) Labor Pool (with straight time employee)" (emphasis added). That the Labor Pool fill in is to be with a "straight time employee" could be interpreted to foreclose the use of any Pool employee on a 6th or scheduled overtime day, and that the entire process of Joint Exhibit 4 under Paragraphs A, B, and C relate and are confined to regularly scheduled days or in other words to the regular work week.

Confronted with ambiguities, the Arbitrator looks to past practice for clarification. Here the past practice has not been extensive enough or clear enough to determine precedent or mutual intent. Nor do I find the Award of Arbitrator Mullin to be in point.

Under these circumstances, the record is left inconclusive and hence unpersuasive one way or the other. The burden in this type of arbitration case is on the Union to prove its case clearly and convincingly. An inconclusive or unpersuasive record fails to meet that burden, and accordingly the grievance must be 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:

Grievance No. 5726 is denied.

Eric J. Schmertz
Arbitrator

DATED: October 15, 1984
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: Union, Local 281:
and:
Chicago Pneumatic Tool Company:

OPINION
and
AWARD

The stipulated issue is:
Did the Company violate the contract (Article XIX) by not recalling Agnes Hickel to the position of Accounts Payable Clerk? If so what shall the remedy be?

A hearing was held in Utica, New York, October 14, 1983 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. Both sides filed post-hearing briefs.

Instead of allowing Ms. Hickel, hereinafter referred to as the "grievant" to be recalled from layoff to the position of Accounts Payable Clerk, the Company recalled to that job, Joyce Bartlett, a less senior employee.

The Company recalled Bartlett because she had previously held the job of Accounts Payable Clerk. It denied the grievant the recall because she had never held the job.

The instant dispute between the parties is narrow and sharp. The Company claims that the right of recall is limited to a job once held. The Union asserts that recall rights are the same as bumping rights and cites in support of its position Section (c)(6) (second paragraph) of Article XIX which reads:
It is understood that all cases of recall shall be handled in reverse procedure as layoffs.

Over the years of the collective bargaining relationship, the parties expressly negotiated enlarged and more liberal layoff and bumping rights for exercise at the time an active employee is noticed for layoff. During that period of time, the aforesaid provision of Section (c)(6) remained unchanged.

It is conceded that if the grievant had been in a layoff situation she could have bumped into the Accounts Payable Clerk job, and indeed because of her greater seniority could have bumped Bartlett with respect to that job if Bartlett was then actively employed as the incumbent in that position. The Union argues therefore, that under the contract language which directs recall to be "handled in reverse procedure as layoffs" the grievant had the same seniority right to claim the Accounts Payable Clerk job on recall as she would have had if she had been subject to layoff.

The Company interprets the aforesaid contract language differently. It asserts that because it remained unchanged over the years, in the face of significant changes in layoff and bumping rights, recall rights remained fixed as original negotiated (when, undisputedly it accorded a right of recall only to a previously held job). Only layoff and bumping rights were expanded, and therefore recall rights were not and should not now be substantively construed to track those concededly enlarged layoff rights.
In short, the Company claims that through negotiations, the parties agreed on greater employee rights in layoff and bumping situations than for recall.

The Company points out that had there been an intention to expand recall rights to include the right of recall to jobs not previously held the language of Section (c)(6) should have been specifically enlarged accordingly.

The Union responds that the language of Section (c)(6) made any such change unnecessary; that the language is clearly "open ended" to accommodate the improved layoff and bumping rights; that the Union interpreted Section (c)(6) in that "self-enlarging" way and consciously saw no need to change its language to obtain expanded recall rights corresponding to expanded layoff rights; and that the Company should have known that the Union relied on that interpretation.

I conclude that the second paragraph of Section (c)(6) of Article XIX is ambiguous. Logically and reasonably it can be interpreted in support of either the Union's or Company's position. It is logical to conclude that unchanged contract language does not possess inherent "self enlarging" capabilities, but rather is confined to its original meaning and interpretation. Also the phrase "reverse procedure" is common to contracts in these circumstances, and generally means that "the last laid off is the first recalled" as a matter of reverse seniority procedure, but is not determinative of to which job(s) a recall right may attach.
Conversely, the full phrase is "reverse procedure as layoffs" (emphasis added). Emphasis on the latter words, may logically lead to the conclusion that the recall right, in claiming an available job, is the same as if the employee seeking the job was doing so because of layoff and pursuant to his bumping rights.

Also, it is reasonable to interpret the critical contract language as a "favored nation provision" which automatically increases recall rights in direct relation to increased layoff and bumping rights. And it is further reasonable for the Union to assert that both sides should have known that in view of the language tying and defining cases of recall to a "reverse procedure as lay-offs."

In view of this ambiguity it is impossible for this Arbitrator to determine if layoff and recall rights are different or synonymous.

Under that circumstance, the Arbitrator looks to past practice as evidence of what the parties intended and to clarify or reconcile the prima facie ambiguity. Here, it is undisputed that no employee has been recalled from layoff to a job that he or she had not at some previous time occupied or performed. If this information is construed as past practice, the ambiguity is resolved in the Company's favor. If this stipulated information is inadequate as a past practice, the case record is then left ambiguously inconclusive and the Union would not have met its burden of proving its case clearly and convincingly.

Hence, either way, in the face of the ambiguousness of the
critical contract clause, the Union's grievance fails. The issue remains therefore, a matter for collective bargaining rather than arbitration.

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

The Company did not violate the contract (Article XIX) by not recalling Agnes Hickel to the position of Accounts Payable Clerk.

DATED: February 20, 1984
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.
In the Matter of the Arbitration
between
Local 144, S.E.I.U.
and
Clearview and Shore View Nursing Homes and Sea Crest Health Care Center

AWARD

Under the collective bargaining agreement between the above named Union and the above named Nursing Homes and Center, said Homes and Center are required to make certain regular payroll percentage contributions to the Local 144 Funds. Also, as a result of collective bargaining between the Union and the Homes and Center, certain contractual agreements were reached regarding eligibility for a so-called "30% Forgiveness" of some of the contribution obligations; for disposition of a so-called "balloon payment" of monies due the Funds and for the handling of the labor costs of the so-called Feerick Award.

Considering the foregoing, the above named parties are in dispute over the total amount that said Homes and Center owe the Local 144 Funds, including the amount of the interest on said indebtedness and the calculation of and/or credits of payments towards that interest. There is also disagreement, in part, on the applicable contribution rates to the Funds.

Under the arbitration provisions of the collective bargaining agreement the Undersigned was selected as the Arbitrator to hear and decide those disputes.
Several hearings were held at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Homes and Center and the Union filed post-hearing briefs.

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

Clearview Nursing Home, Shore View Nursing Home and Sea Crest Health Care Center jointly owe the Local 144 Funds as of the date of this Award the total sum of ONE MILLION THREE HUNDRED THOUSAND DOLLARS AND NO CENTS.................($1,300,000).

Said Homes and Center are directed to pay said total indebtedness to the Funds forthwith. Provided said Homes and Center have been current in making current payments, the payment of said $1,300,000 shall be in full resolution and liquidation of all indebtedness, including interest, owed said Funds by said Homes and Center as of the date of this Award.

With respect to the reimbursement formula and procedures of the State of New York, said indebtedness and its payment pursuant to the foregoing shall relate to the 1979 base year.

The State of New York has recognized that the labor costs attendant to contributions to the Local 144 Funds are reimbursable as part of the Medicaid reimbursement rates. On
condition that the reimbursement process for said Homes and Center will apply to an increase, if any, in any of the contribution rates to the Funds, I direct that for the balance of the terms of the present collective bargaining agreements (which expire on March 31, 1984) the contribution rates of the Homes and Center to the Funds shall be the same as in the Industry Master Agreement.

DATED: March 5, 1984
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.
June 18, 1984

Irwin Bluestein, Esq.
Vladeck, Waldman, Elias & Engelhard, P.C.
1501 Broadway
New York, New York 10036

Re: Arbitration between Local 144, SEIU and
Clearview Nursing Home, Shore View
Nursing Home and Sea Crest Health Care Center

Dear Mr. Bluestein:

This is in reply to your letter of June 8, 1984
regarding the above matter.

I have replied to Mr. Presant's letter of May 31.
A copy of my reply is enclosed.

Sincerely,

Eric J. Schmertz

EJS:bp
Encl.
June 8, 1984

Eric J. Schmertz, Esq.
Hofstra School of Law
Hempstead, New York 11550

Re: Arbitration between Local 144, SEIU and Clearview Nursing Home, Shore View Nursing Home and Sea Crest Health Care Center

Dear Mr. Schmertz:

We have received by ordinary mail a copy of a letter hand delivered to you on May 31, 1984 from Howard B. Presant, Esq., the attorney for the employers in the above matter.

We think it inappropriate on Mr. Presant's part to have enclosed in his letter a copy of Local 144's motion to vacate your award in this matter. We also think inappropriate his request for confirmation from you of his recollection of discussions during the course of the arbitration relative to the rendition of a single pecuniary award and "any other additional facts which you believe would be helpful to the parties".

We are advised by Robert Cantore of this office, who represented Local 144 in the arbitration before you, that no discussions with regard to a single pecuniary award were had during the course of the hearings and that he specifically requested, orally and in writing, that each of the separate issues submitted for hearing and determination be separately addressed.
The factual question aside, we think it would be inappropriate for you to respond to Mr. Presant's letter, since you have previously refused to clarify your award notwithstanding motions made by the Union and the employers for such clarification.

Moreover, as we are sure you are aware, the policy considerations behind the substantial body of case law protecting an arbitrator from testifying under compulsion in a proceeding to confirm or vacate his award suggest that an arbitrator should not voluntarily testify or otherwise provide one of the litigants in such a proceeding with supporting evidence.

In the event that you respond to Mr. Presant's request notwithstanding the views expressed in this letter, we trust that you will provide us with a copy of any such response.

Very truly yours,

Irwin Bluestein

IB/bg
CC: Howard B. Presant, Esq.
June 5, 1984

Howard B. Presant, Esq.
Stein Simpson & Rosen
1370 Avenue of the Americas
New York, New York 10019

Re: Local 144 with Clearview Nursing Homes, et al.

Dear Mr. Presant:

This is in reply to your letter of May 31, 1984 in connection with my award in the above matter and in response to a portion of a motion made by Local 144 in District Court to vacate that award.

In the second paragraph of your letter you state:

"It is my recollection that at several of the hearings you advised the parties and their attorneys that you would render a single pecuniary award and that no objection was raised by Local 144 or their attorneys at any time during the course of the arbitration."

The foregoing statement is correct. During the course of the hearings and in my authorized discussions with representatives of the parties I said that I would render an award which would determine the amount of monies owed by the Homes to the Local 144 Funds. The series of questions posed to me during the hearings were, in my opinion, merely components of the single fundamental question and issue, namely the amount of monies owed by the Homes to the Funds. I did not view those questions as precise issues which had to be answered individually. Rather, I viewed those questions, which I helped frame at the hearings, as guideposts to the single basic issue and question, namely the amounts owed by the Homes to the Funds.
Therefore, my decision which confined itself to answering the fundamental issue of the amounts of monies due and owing, was not only consistent with the issue in dispute, but was consistent with what I told the parties would be the form of my decision.

Very truly yours,

[Signature]

Eric J. Schmertz

EJS: bp
May 31, 1984

BY HAND

Eric J. Schmertz, Esq.
Dean
Hofstra School of Law
Hempstead, New York 11550

Re: Local 144 with Clearview Nursing Home, et al.

Dear Dean Schmertz:

In March of this year you rendered an award in an arbitration which resolved several long-standing disputes between the above parties. A motion has now been brought in District Court by Local 144 seeking to vacate your award. I have sent to you under separate cover a copy of the motion papers which were served upon me as the attorney for the Nursing Homes. You will note that the format (a single dollar amount) of your award has been questioned.

It is my recollection that at several of the hearings you advised the parties and their attorneys that you would render a single pecuniary award and that no objection was raised by Local 144 or their attorneys at any time during the course of the arbitration.

I would most appreciate your confirming this to me and any other additional facts which you believe would be helpful to the parties.

Sincerely yours,

Howard B. Presant

HBP/kh
enclosure
In the Matter of the Arbitration between Local 702 I.A.T.S.E. and Du Art Film Laboratories

The dispute involves the suspension, the involuntary transfer to the day shift and the subsequent discharge of Mr. Rafael Salinas.

A hearing was held on March 19, 1984 at which time Mr. Salinas and representatives of the above named Union and Company appeared. The Arbitrator's Oath was waived.

At the outset of the hearing, Mr. Salinas stated that he did not want his disputes with the Company decided in arbitration; that he had filed a charge with the Equal Employment Opportunities Commission; that he wanted the disputes determined solely by the EEOC and the courts; that he would not participate in the arbitration and did not want the Union to proceed in arbitration on his behalf.

The Union stated that though it was ready and willing to represent Mr. Salinas in the arbitration it could not do so without his participation. The Union asked for an indefinite adjournment of the arbitration hearing. The Company opposed the Union's request. I ruled that in the absence of a mutual request for or an agreement on an adjournment, I was prepared to proceed with the hearing and would entertain motions.
The Company moved that Mr. Salinas' grievance be dismissed with prejudice because of the failure of the Union to proceed with the arbitration in view or Mr. Salinas' refusal to participate and his position that he wanted his case decided in another forum. I granted the Company's motion.

Accordingly, the Undersigned, duly designated as the Impartial Chairman under the collective bargaining agreement between the above named parties, makes the following AWARD:

The grievance of Mr. Rafael Salinas and the Union's request for arbitration on his behalf, are dismissed with prejudice. The rights, if any, of Mr. Salinas and the parties in any other forum are reserved.

DATED: March 22, 1984

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
Industrial Union of Marine and
Shipbuilding Workers of America,
(IUMSWA), Local 5
and
General Dynamics Corporation

The stipulated issue is:

What shall be the disposition of grievance
No. 9554 dated August 5, 1981 under the
terms of the collective bargaining agreement?

A hearing was held on November 9, 1983 at which time
representatives of the above named Union and Company appeared and
were afforded full opportunity to offer evidence and argument and
to examine and cross-examine witnesses. The Arbitrator's Oath
was waived. A stenographic record was taken and the parties
filed post-hearing briefs.

The grievance is on behalf of certain employees
listed in the record who claim they were not
paid additional vacation pay upon their recall
from layoff.

More specifically, the grievants are those who were laid
off before completing twelve months of active employment within
the year; who received a pro-rated amount of vacation pay for the
time actively worked; who were still on layoff when they reached
their transitional anniversary year (i.e. the third, fifth or
tenth year of service); and who upon recall to work thereafter
received no additional vacation pay for that year.

The Union claims that under the contract those employees
are entitled not just to pro-rated vacation pay upon their lay-
off, but to full vacation pay for the entire year at the rate of pay applicable to their transitional anniversary.

The Company asserts that it paid vacation pay in accordance with the contract and consistent with past practice applied to hundreds of similar cases.

The burden is on the grieving party, the Union, to prove its case clearly and convincingly. The Union’s case fails to meet that standard.

I am not persuaded that the language of Article XIV supports the Union’s claim. The applicable contract clauses make no specific reference to the factual situation involved here. I find no specific provision which stipulates the vacation entitlement of employees who are on layoff a part of a measuring year and who during their layoff reach and pass their transitional anniversary and return to active work thereafter. Instead the Union relies on the provisions of Section 2(b) which provides for the payment of vacation pay based on “the employee’s normal rate as of the last Monday in the anniversary month” as supportive of its argument that entitlement to vacation pay includes the layoff period and that the full vacation pay should be at the higher rate of the anniversary month.

But Section 4 provides otherwise. For employees laid-off, the vacation pay is to be "one-twelfth (1/12th) of the employees full vacation pay for each month or fraction thereof worked since his preceding anniversary month." And Section 5 also provides
otherwise. It calls for a one-twelfth (1/12th) reduction in hours of eligibility for vacation "for each payroll month the employee is absent...on layoff...."

If Section 2(b) inferentially supports the Union's position, Sections 4 and 5, under which the grievants were paid vacations, are supportive of the Company's action.

Accordingly, the best that can be said for the Union's theory of the case is that the applicable contract sections are ambiguous.

Where the contract is ambiguous, the arbitrator looks for and to past practice for clarity, for interpretation, and for reconciliation of the various contract clauses.

Here, with the possible exception of a single instance (and a single exception neither makes nor breaks a practice) the evidence in the record shows scores of examples of situations like those involved in this grievance where the Company paid no additional vacation pay when the employee returned from layoff after reaching his transitional anniversary. I am satisfied that the Union had at least constructive notice of these many cases as well as the requisite opportunity of actual notice.

Under well settled principles of contract law, this extensive past practice is controlling, especially where, as here, the applicable contract language can be interpreted either way.

The remaining issue raised by the Union, dealing with the rates of pay of a few employees who returned to work from layoff before they reached their transitional anniversary, is not part
of grievance 9554. It is the subject of a different grievance and hence not part of this arbitration.

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

Grievance No. 9554 dated August 5, 1981 is denied.

DATED: November 18, 1984
STATE OF New York ) ss.: 
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.
The stipulated issue is:

"Did the grievant, Alfred Hunter, have the minimum qualifications required under the provisions of Section 1 of Article XXVIII to be upgraded to the position of Control Operator (R-20) in the Intermediates (MCS) area in November of 1982?"

"If the Arbitrator determines that the grievant did have the minimum qualifications required for such upgrading, did the Company violate Article XXVIII when it upgraded Anthony Martone to the position rather than the grievant? If so, what shall the remedy be?"

The parties have negotiated and stipulated that the "Wirtz formula" is applicable and controlling in this case. Therefore, notwithstanding my earlier decisions in which I interpreted Section 1 of Article XXVIII differently, it is to the Wirtz formula that I am now bound.

As applied to this case and as agreed to by the parties, the Wirtz formula is as follows:

The first issue is whether the grievant had the minimum qualifications to be upgraded to the position in question. If the Company agrees or the grievant is found to have met the minimum qualifications requirement, the issue is then whether the Company took "into consideration as an important factor the relevant length of continuous service" of the grievant when it placed another employee on the job.
Hearings were held on September 15 and 16, 1983 in Colonie, New York, at which time the grievant and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and both sides filed post-hearing briefs.

The grievant, with greater seniority, was bypassed in his bid for the job of Control Operator. The Company awarded the job to Anthony Martone, a junior employee whom it judged possessed the requisite minimum qualifications. The Company determined that the grievant was not minimally qualified. The question of the grievant's qualifications is the subject of this dispute and this case.

The Company's right to unilaterally promulgate minimum qualifications for upgrading to job vacancies and to set forth those qualifications in the job posting has been sustained in prior decisions, and is not challenged by the Union in this case. For the Control Operator job in question, the posting required the applicant to have:

- Operating knowledge of the Methyl Chlorosilane production process or similar continuous fluidized bed reaction processes handling silanes
- Sufficient experience to train inexperienced operators
- Satisfactory work record

The reasonableness and relevance of the foregoing conditions are also not in dispute. Rather, the Union contends
that the grievant possessed the minimum qualifications to meet these requirements; and that even if he lacked the immediate knowledge referred to in item #1 or the experience referred to in item #2, the Company has regularly upgraded senior bidders to Control Operator jobs who possessed no greater knowledge or experience.

It is the Company’s position that the grievant did not meet the minimum requirements of items 1 and 2. It concedes that his work record has been good.

The Union also claims that because the job posting referred only to Control Operator in the Intermediates Work Area, the grievant should not be held to the Company’s imposed higher qualifications standards for the specific job of Control Operator MCS-2.

At the threshold, it is my conclusion that the Union’s argument on this latter point is unpersuasive. The fact is that the vacancy into which the Company intended to place the successful bidder was in MCS-2. I consider it a managerial prerogative to determine where the vacancy occurs, especially where, as here, the MCS-2 location is part of the overall Intermediates area. So, realistically, it is the minimum qualifications for the Control Operator MCS-2 that is at issue. Though the Company could have transferred Control Operators around, thereby possibly freeing up a vacancy with less demanding qualifications, I find no contractual requirement that it do so. Therefore the Union’s suggestion that the
Company should have done so to avoid a dispute over the grievant's eligibility for the MCS-2 job, cannot be contractually supported.

As I see it, the Wirtz formula is not inconsistent with my often expressed view, shared I believe by the large majority of arbitrators, that in matters of ability and qualifications, the employer's judgment enjoys a presumption of validity unless shown to be arbitrary, capricious, discriminatory or unreasonable.

In the instant case, applying the Wirtz formula and the foregoing view, I conclude that the Company's determination that the grievant did not possess the threshold qualifications for Control Operator MCS-2, should be affirmed.

Assuming that in the first step of his two step formula, Arbitrator Wirtz interpreted "minimally qualified" to mean "an ability to perform the job passably," I do not find that the grievant's disqualification on that basis was arbitrary, capricious, discriminatory or unreasonable.

The Union has not clearly and convincingly shown that the grievant's good work record in other jobs gave him the type of knowledge and experience that was transferable to the Control Operator position to reasonably insure his ability to perform it "passably." On the other hand, I cannot find the methods employed by the Company in judging the grievant's qualifications to be wrong. The questions which supervision posed to the grievant in considering his bid were fully related to the job and its duties and responsibilities as listed
in the posting. It is undisputed that the grievant could not answer those questions or answer them correctly. As the questions asked related reasonably to the minimum qualifications enumerated in the posting, I cannot fault the Company for deciding that the grievant's inability to respond correctly meant that he lacked the minimum qualifications for the job.

This is not to say that the grievant could not perform the job satisfactorily or that he could not learn and adjust to its requirements and responsibilities in due time. Indeed, the grievant struck me as highly intelligent, poised, stable and well motivated. His good work record is stipulated. Rather it is to say that the Company's process of deciding on his qualifications; the implementation of that process, and the consideration of his other work experience, were not irrelevant, unfair or unreasonable, and that the conclusions reached were not arbitrary, capricious or discriminatory, albeit arguably subject to different interpretations.

In short, under the instant circumstances; under the Wirtz formula; and under the presumptions previously mentioned, this arbitrator finds no legitimate basis to substitute his judgment for that of the Company.

The Company has shown by adequate evidence that the Control Operator MCS-2 has greater responsibilities, requiring more independent decision making than Control Operators in other locations. Though much of the work in MCS-2 with which
he is concerned is automated, a mistake, accident or the failure
to take prompt remedial or preventative action could be more
serious and dangerous than in other locations where Control
Operators function. That all Control Operators are paid the
same may be the subject of some other grievance, but standing
alone, it does not rebut the Company's evidence on the differ-
ence in responsibilities among them. Therefore I do not find
it unfair, unreasonable or discriminatory for the Company to
require a higher standard of threshold qualifications for the
job of Control Operator MCS-2.

The main thrust of the Union's case is that the grievant
was no less qualified than a number of other senior bidders
who were upgraded to other Control Operator positions. The
Union offered substantial evidence of other upgradings where
the senior bidder was awarded a Control Operator job though
he did not meet the qualifications set forth in the posting.
Specifically, the Union showed that in other upgradings to
Control Operator, the senior bidders were not, for example,
"able to train inexperienced operators," nor had they the
knowledge of or experience with the "production processes"
involved.

Setting aside the previously found fact that the Company
has demonstrated a difference between the Control Operator
MCS-2 and other Control Operators, the Union's argument in
this regard founders on the very Wirtz formula which, by
mutual agreement, is controlling in this case. Put another
way, only if a prior practice was consistent with Wirtz would that practice be probative or precedential. If not, the Wirtz formula cannot be preempted by practices contrary thereto.

My analysis of those prior upgradings relied on by the Union, and about which there were no disputes, grievances or arbitrations (except the Tarsa case which was settled without precedent or prejudice), leads me to question whether they were consistent with the Wirtz formula. Frankly, I fail to see how a senior successful bidder who does not possess the qualifications, experience or ability reasonably set forth in the job posting can be considered to have met the "minimum qualifications" or be "minimally qualified to passably perform the job." In short, in the absence of more evidence showing that those undisputed upgrades were mutually agreed to or undertaken as the correct implementation of the Wirtz formula, I am constrained to view them as mutual arrangements where the Wirtz formula was not invoked or tested because it was unnecessary to do so, and not as determinative examples of what a senior bidder is entitled to within the meaning of Wirtz, when the upgrading bid is disputed.

Within the meaning of Wirtz, I consider it proper in the instant case for the Company to have required the grievant, as the remaining senior bidder, to know enough about the job he sought and to be sufficiently familiar with its duties and processes to be able to answer the questions put to him, as reasonable evidence of his minimum qualifications for the job.
That other Control Operators were appointed on a less demanding basis and in the absence of any dispute or adjudication is no more evidence of what Wirtz means than examples of pragmatic variations from Wirtz, which the parties, in those instances, found mutually acceptable. Hence a reliance by the Union on those undisputed examples does not clearly and convincingly show that Wirtz or the contract has been breached by the Company in the instant matter.

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 grievant, Alfred Hunter did not have the minimum qualifications required under the provisions of Section 1 Article XXVIII to be upgraded to the position of Control Operator (R-20) in the Intermediates (MCS) area in November 1982.

DATED: January 23, 1984
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 the termination of Patrick Lay on August 15, 1983 for just cause? If not, what shall the remedy be?

A hearing was held in Louisville, Kentucky on April 18, 1984 at which time Mr. Lay, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and the parties filed post-hearing briefs.

Under the Company's Rules of Conduct, which are not in dispute in this proceeding, the penalty of discharge may be imposed for a fourth warning notice within a one year period. It is undisputed and uncontested herein that prior to the incidents which resulted in his fourth warning notice, the grievant had received three warning notices within the stated period.

Therefore the question simply is whether the fourth warning notice was justified. If so, under the Rules of Conduct, the grievant's discharge must be sustained.

The grievant's fourth warning notice resulted from his
absences from work on April 21, May 3 and May 5, 1983. Under the Company's Attendance Control Policy (which has been upheld in prior arbitrations and which is unchallenged in this proceeding) an employee receives a warning notice for two or more unexcused absences within a two-and-one-half week period. The grievant's absences of April 21, May 3 and May 5 met that chronology and triggered a warning notice, which because of his accumulated record, constituted the grievant's fourth.

It is the Union's position that the Company imposed the fourth warning automatically and ministerially and failed to consider mitigating circumstances. The Company acknowledges that mitigating circumstances are to be considered in the application of its Rules of Conduct and Attendance Control Policy; that it considered that factor in this case and that mitigating circumstances were not present.

The grievant and the Union on his behalf explained that on April 21st the battery from the grievant's truck had been stolen; that on May 3rd the grievant was ill; and that on May 5th his alarm clock failed to work.

Based on the evidence in the record I cannot conclude that the Company acted arbitrarily or unreasonably in refusing to accept those excuses as mitigation. Under the Attendance Control Policy, especially where a fourth warning notice is involved (or also as here, in the face of prior violations) the Company has the right to require reasonable proof or documentation of the excuses, including a doctor's statement where illness is claimed. Based
on uniform practice, I am satisfied that the employees, including the grievant, know of these requirements. At meetings at which the Company sought reasons for the grievant’s absences, the grievant was unable to produce the requisite documentation. Under the circumstances I do not think it unreasonable for the Company to ask for the receipt for the purchase of a new truck battery and for a copy of the police report which the grievant ultimately stated had been filed. These were not or could not be produced within the reasonable time afforded by the Company during the investigative stage of this discipline. Indeed, though the grievant claimed he filed a police report, it was not produced even at the arbitration hearing. Also a medical statement authenticating the grievant’s alleged illness was not produced. The grievant claimed that he did not see a doctor. At the terminal stage of the Control Policy, and as previously stated, it is not unfair or unreasonable for such a statement to be required and for the employee to be expected to see a doctor in order to substantiate the claim of illness.

An alarm clock malfunction or problem is uniformly unacceptable as an excuse under circumstances of this type.

Accordingly, and in short, I am unable to conclude that the Company failed to consider mitigating circumstances in this case. That documentation may be available somewhere or is now produced begs the issue. It was not produced when needed and any after production cannot now be retroactively supportive of a claim that
mitigating factors were ignored. Indeed, assuming arguendo that the battery theft explanation was accurate, the Company established that at the time the grievant lived adjacent to the plant; could have walked to work; and even if he made a police report and bought a new battery, could have come to work late, thereby avoiding an absence. That he did not, together with his questionable assertions regarding the filing of a police report, support the Company's contentions that no valid mitigating circumstances were present.

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

The termination of Patrick Lay on August 15, 1983 was for just cause.

DATED: July 2, 1984
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.
The stipulated issue is:

Was there just cause for the discharges of James McNabb, Nommie Hood, and Ronald Strack? If not what shall be the remedy?

A hearing was held in Cincinnati, Ohio on August 29, 1984 at which time the above named employees, hereinafter referred to as the "grievants" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The grievants were discharged for falsifying their time cards. They are accused of leaving work about two hours before the end of their shift, not returning thereafter and having arranged to have their time cards punched by someone else at the end of the shift. They deny the charge.

The Company's case is based on the testimony of foreman James E. Madden. While "staked out" in a hidden area and making observations for a different purpose, (as part of an investigation of thefts) he states that he saw the grievants leave the plant at 4:35 AM, enter a car belonging to one of them and drive off the property. He testified that he maintained his observations until
about 7:20 AM, leaving his position for only a few minutes to make observations from another location, and that at no time did the grievants return to the plant at or before the end of the shift. That the grievants' time cards were punched out at 6:30 AM led Madden and the Company to conclude that the cards were fraudulently punched by someone else based on pre-arrangement with the grievants.

I conclude that what the foreman said he saw is accurate and truthful. All his other time recordings of the activity of the period of his observation coincide with the time cards of the other employees he observed. As there is nothing in the record to support any assertion that he had reason to falsify his testimony and observations of the grievants, I conclude that his testimony that they left the plant at 4:35 AM and then left the Company's premises by car, is what actually happened.

I further find that the conclusions that the grievants did not return to the plant that shift and by consequence had arranged to have their time cards punched by someone else, are reasonable and logical, and based on sufficient probative evidence for disciplinary purposes (recognizing that this is not a criminal proceeding nor an offense which parallels a crime).

Madden testified that when the grievants left at 4:35 PM they were dressed in street clothes. Not only did they leave the plant and the premises by car but grievant's Strack's van which was parked in the parking lot at the time was still there the next morning after the shift ended. I am persuaded that that meant
that Strack did not return to clock out at 6:30 AM, and I am similarly persuaded that neither did the other two grievants. That being so, I accept Madden's testimony that despite no recordings by him of in and out of the plant activities after 5:40 AM he nonetheless maintained his observations until 7:20 AM; that the grievants did not return and that he was not away from his observation post long enough to have missed their return.

Under those circumstances, there can be no logical explanation for the 6:30 AM punch-outs on the grievants' time cards except that the grievants had arranged for someone else to do it for them. That inference and that conclusion may be properly drawn in this type of disciplinary case.

Under the Company's Code of Conduct this kind of time card misconduct or record falsification is a violation which "will normally result in discharge for the first offense." I am not persuaded by the Union's assertion that the Company has tolerated or even participated in similar time clock violations which would render the penalties in this case discriminatory or unevenhanded. There are clear distinctions. In the instant case the grievants arranged a falsification of their time cards without the knowledge, participation or acquiescence of management. In the other instances cited by the Union, the time clock variations were sanctioned and approved or administratively participated in by supervision, and hence, though arguably irregular, could not be deemed as a fraud on the Company. Moreover, only small amounts of time were involved or the time allowances were time compensa-
tions for other extra time worked, and hence not "falsifications."

Additionally, I do not accept the Union's argument that the Code of Conduct and the proscription on this particular offense were not well publicized to and known by the employees. I am satisfied that the Company posted and disseminated the Code and enunciated the prohibitions sufficiently for purposes of enforcement.

What I do find however, is a type of "contributory negligence" by the Company and an uneven application of discipline for an offense of equal severity going on at the very time that the grievants were engaged in their misconduct. By the latter I mean the testimony of Madden that other employees that night and morning on the same shift, went in and out of the plant during times they should have been at work; that they were drinking beer and even took beer back into the plant.

In my view, and as codified in the Code of Conduct, use or possession of intoxicants on Company property also "will normally result in discharge for the first offense." Hence it is as serious as a time card falsification. Yet the employees observed drinking beer in the parking lot, and bringing it into the plant were not fired, but rather suspended for short periods of time.

As to what I characterize as "contributory negligence," it is undisputed that the shift on which all this took place was left unsupervised. In order to engage in the "stake-out" Madden had not only left his supervisory post that night and early morning, but, to cover his real purpose, led the employees to believe
that he was "going hunting." Supervision of course is for a number of purposes including production, instruction, and significantly in this case, for the maintenance of discipline and compliance with the work rules.

Though not condoned, it is not surprising that when there is no supervision, especially on a night and early morning shift, employees are tempted to take advantage and engage in wrongful activities. Hence, though the employees involved in work rule violations and especially the grievants are not to be fully excused from or relieved of the consequences of their improprieties, I think the Company should bear part of the responsibility for creating the circumstances which contributed to the acts of misconduct.

For the two foregoing reasons - namely the responsibility I attach to the Company for failure to maintain supervision on the shift and because other employees engaged in drinking beer and bringing beer into the plant were not punished as severely as the grievants, I shall rule that the grievants' discharges should be reduced to suspensions. As the degree of seriousness among the various acts of misconduct on that shift may be subject to legitimate debate, and recognizing the very serious nature of the grievants' offenses, I shall not equate the grievants' suspensions with the suspensions imposed on the other employees.

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 the particular facts of this case there was not just cause for the discharges of James McNabb, Nommie Hood and Ronald Strack.

Their discharges are reduced to suspensions. They shall be reinstated without back pay and the period of time from their discharges to their return to work shall be deemed disciplinary suspensions for their misconduct.

DATED: November 18, 1984
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.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between:

IUE, Radio and Machine Workers, Local 191

and

General Electric Company

The stipulated issue is:

Did the Company violate Article VI, Section 4 (a) and (b) of the 1979-1982 National Agreement when the piece price for assemble, weld, test, repair and flush tube unit radiators was changed on April 27, 1982? If so, what shall be the remedy?

A hearing was held in Atlanta, Georgia on June 26, 1984 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record was taken and the parties filed post-hearing briefs.

Article VI Section 4 (a) and (b) of the contract reads:

4. Piece Prices-Hourly Rated Piecework Employees

(a) Piece prices are classified as standard, temporary or special and all piecework vouchers will indicate the classification.

(1) A Standard Piece Price is one set where the manufacturing method has become established.

(2) A Temporary Piece Price is one set where the manufacturing method is under development or has been changed, or the average pieceworker on the job has not yet attained normal performance.

(3) A Special Piece Price is one set on work which
usually repeats infrequently or is in small quantities or has some special feature or purpose.

(b) There will be no change in a standard price except where there is a change in manufacturing method.

Where such a change in manufacturing method is made, the price may be adjusted. However, such adjustment shall be limited to those parts of the job affected by the change.

In order that the operator will be able to make the same hourly earnings under a new price where a change in manufacturing method is made which does not reduce the job value on which the original price was computed, the adjusted price will be in direct proportion to the change in allowed time for the part of the job affected by the new method. When a price is reduced on such jobs, the employee and his representative will be given at least one week’s notice that the price is to be changed.

The method changes in the instant case upon which the Company relied in making a rate change and which tightened the rate are:

(1) Slag box I.D., and
(2) Tap outholes and asm pipe plug.

Item #1 above is also identified in the record as wire welding with resulting flux residue or slag.

Prior to the disputed rate change, the job of assemble, weld, test, repair and flush tube unit radiators carried a Standard Piece Price. That Standard Piece Price was determined and made effective in 1973, based on a piece rate and method audit at that time.

I am persuaded that there is an orderly, albeit implicit
chronological schedule for rate changes under Article VI Section 4 (a) and (b) of the contract. Once a Standard Piece Price has been determined, the methods of the job existing at that time are deemed to be reflected in the Standard Rate. It is noted that the contract provides that a Standard Piece Price "is one set where the manufacturing method has become established" (emphasis added). In other words, it is contractually assumed that a Standard Price reflects all the methods in place at the time a Standard Price is fixed. It follows then that method changes which allow subsequent price changes are method changes which take place in point of time after a Standard Piece Price has been affixed to the job. Included in such method changes would be also those which may have begun inconsequentially or insignificantly prior to the fixing of a Standard Piece Price, but which matured thereafter into a demonstrable and measurable method change. Upon the latter event, a change in the Standard Piece Price might be proper.

But, I am not persuaded that a Standard Piece Price can be impeached by re-rating a job because of method changes which took place before the Standard Price is determined and fixed, even if the change is not discovered until after the Standard Price is affixed to the job.

Applied to the instant case, the Company's right to change the Piece Price must be based on its showing of changes in the manufacturing method which have in fact come into being or "matured" after 1973 when the Standard Piece Price was established.
With regard to one of the two method changes in this case, the Company has not met that burden. During the hearing, it became apparent, based on Company testimony, that the wire welding and the residue or flux produced thereby was part of the job in 1973 and at that time it was performed in the same manner and with the same magnitude as it was being performed in 1982 when the Company reduced the Standard Piece Price. Thus this method change does not qualify as a gradual or "maturing" change to which I have previously referred.

Therefore to allow the Company to reduce the piece price based in part on a change in the methods of welding wire (and attendant work as a result of that welding) would permit the Company to go behind and impeach a Standard Piece Price which was set, as the contract provides, "where the manufacturing method has become established."

The inconsistency and hence impermissability of any such action by the Company in the face of the latter contract language and contract finality of a Standard Piece Price is obvious.

Accordingly, I find that one of the two "method changes" relied on by the Company, does not contractually qualify for the purpose used by the Company in this case. That being so, it is manifest that the nature of the price change effectuated by the Company was violative of the contract.

The Arbitrator's authority is not to review the validity of the new Price, nor to calculate a different Price. Rather it is confined to deciding whether the action of changing the Price,
based on method changes, was contractually proper. Based on
the foregoing findings, the Company's action was not in accord-
ance with the contract, and hence must be reversed. It is un-
necessary therefore to deal with or make determinations regard-
ing the other alleged method change relating to "tap out holes
and assemble pipe plug." The rights of the parties on this
latter method are reserved.

Determinations solely on the method "tap out holes and
assemble pipe plug" raises such questions as whether the Company
could change the Price based only on this method (assuming it
was a method change subsequent to 1973) and whether any such
Price change was mathematically correct. Those questions are
not within the jurisdiction of the arbitrator in this case.

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

The Company violated Article VI Sections 4
(a) and (b) of the 1979-1982 GE-IUE National
Agreement when the Piece Price for assemble,
weld, test, repair and flush tube unit radiator
was changed on April 27, 1982. The Piece Price
so established is voided; the prior rate is re-
established, and the affected employees shall
be made whole.

DATED: December 20, 1984
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.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
Greater New York Health Care Facilities
Association, On Behalf Of Its Members

and
Local 144, Hotel, Hospital, Nursing Home:
and Allied Services Union, S.E.I.U.,
AFL-CIO

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

The Union's motion that the Association's
petition on behalf of its members for the
"30% forgiveness" be dismissed with prej-
udice, is granted.

Eric J. Schmertz
Arbitrator

DATED: June 25, 1984
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.
June 25, 1984

Mr. Peter Ottley  
President  
Local 144, S.E.I.U.  
233 West 49th Street  
New York, N. Y. 10019

Mr. Bartholomew J. Lawson  
Executive Director  
Greater New York Health Care  
Facilities Association  
2 Dag Hammarskjold Plaza  
New York, N. Y. 10017

Robert A. Cantore, Esq.  
Vladeck, Waldman, Elias  
& Engelhard, P.C.  
1501 Broadway  
New York, N. Y. 10036

Jeffrey R. Cohn, Esq.  
Greater New York Health Care  
Facilities Association  
2 Dag Hammarskjold Plaza  
New York, N. Y. 10017

RE: Greater New York Health Care  
Facilities Association -and-  
Local 144 S.E.I.U. "30% Forgiveness"

Gentlemen:

I enclose my duly executed Award in the above matter.

Very truly yours,

Eric J. Schmertz  
Arbitrator

EJS:hl
In the Matter of the Arbitration:
between:

District 15, AIMAW

and:

Kentile Floors, Inc.

The stipulated issue is:

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

A hearing was held on August 17, 1984 at which time Mr. Perez, 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 particular circumstances of this case, and without precedent for any other matter, I find that the penalty of discharge was too severe, and I reduce that penalty to a disciplinary suspension.

The grievant was discharged for insubordination, walking off the job and for being under the influence of alcohol while at work. The charges relate to certain events at the Banbury machine on October 21, 1983.

Despite the Company's allegation regarding the grievant's
conduct on October 21st, the Company witnesses readily concede that otherwise the grievant was "quiet and cooperative and a good worker."

Generally, as is well settled in arbitral law and industrial relations, an Employer has the right to impose discipline including discharge on an employee who is insubordinate or who is at work under the influence of alcohol, especially where safety of persons and equipment are involved. Those rights are among those reserved by the Company under this collective bargaining relationship by its promulgation of Company Rules and Regulations, particularly Rules No. 2 and 3 thereof. Of course, the factual circumstances of the events leading to any such disciplinary action and the propriety of the penalty, especially the extreme penalty of discharge under the circumstances, are subject to the grievance and arbitration provisions of the contract.

However, it is well settled, and is applicable under this collective bargaining relationship, that if serious offenses of insubordination or unfitness for duty due to the consumption of alcohol, are shown, discipline including summary discharge should be sustained by an arbitrator regardless of the employee's prior record and whether or not progressive discipline had been applied.

In the instant case I conclude that the grievant acted irresponsibly by drinking some beers before coming to work (especially when he acknowledges that he is an alcoholic.) Knowing his medical problem, having previously undertaken treatment for it for a year before he joined the Company, and therefore
responsible for knowing the probable adverse effect it would have on him while at work, he had a special duty to refrain from drinking before reporting for work. For that irresponsibility and disregard of his special duty, he is subject to discipline.

However, I cannot find that the evidence supports a conclusion that he was drunk or "under the influence" of alcohol. He was performing his work satisfactorily and without difficulty. Though he was animated and "loud" and alcohol was smelled on his breath, there was no testimony of the other regularly required symptoms of drunkenness. There is no evidence that his speech was slurred, or his eyes glassy, red or watering, or his gait unsteady. No blood alcohol test was taken (though I do not hold that any such procedure is required). Accordingly I do not find that the grievant was "under the influence of alcohol" within the traditional meaning of that phrase and within the meaning of that charge as set forth in the Employee Disciplinary Notice of October 21, 1983.

Considering the grievant's actions alone, he was insubordinate when he refused to comply with the supervisor's order to "step aside and let the mechanic open the Banbury side door," when he walked away from the work place (to get a drink of water or otherwise) after being instructed to remain, and when he engaged in an argument with the supervisor about the performance of the work in question. But I find that though the supervisor did not intend to provoke the grievant, the grievant had reasonable grounds to believe that he had been provoked. Provocation
is a defense to insubordination. I do not find that the grievant had any such complete defense here, but rather that the particular events at the time created mitigating circumstances which warrant a lesser disciplinary penalty for the offense. The evidence discloses that when the foreman instructed the grievant to stop unbolting the door and to step aside to let the mechanic do it alone, he placed his hand on the grievant's chest, and with a pushing motion, guided the grievant backward and away from the location of the door. I think the supervisor did not intend to use physical force for intimidating or confrontational purposes. I think, probably, it was automatic rather than adversarial. However, I am not persuaded it was needed. Considering the fact that at other times the grievant often opened the Banbury door and was permitted if not instructed to do so by his regular week-day supervisor, I am not surprised that he was startled and then annoyed when told on this day to refrain from doing so, and thereafter angered, when the foreman used a physical gesture to remove him from the area. In short, I do not excuse him from his failure and refusal to follow instructions, but rather find a relevant element of mitigation. The balance of the incident, including "walking off the job" was part of the same "transaction" and hence does not require separate attention herein.

Finally, in addition to the Company's acknowledgement that the grievant was otherwise a good and cooperative employee, I found the grievant to be contrite and regretful about the event,
with an apparent understanding that it probably had its origins in his drinking. He expressed a readiness and willingness to return to an active alcohol program. In short, I think that the incident of October 21st was uncharacteristic of what can be expected of him as an employee and not an example of chronic misbehavior or defiance of managerial authority. On that basis I think he is entitled to another chance. He is warned however that if I am wrong, and he commits future violations of Company rules, he would be subject to dismissal.

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 David Perez is reduced to a disciplinary suspension. He shall be reinstated but without back pay. The period of time from his discharge to his reinstatement shall be the disciplinary suspension for his offenses of October 21, 1983. Additionally, he shall be required to actively participate in an acceptable alcohol rehabilitation program and remain in that program for the period prescribed.

DATED: August 20, 1984
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 question to be answered is whether the firm Graubard, Markovitz, McGoldrick, Dannett & Horowitz, as counsel to the employer trustees of the above named Funds should receive from the Funds annual retainers equal to the retainers received by the firm Lewis, Greenwald & Kennedy, P.C., counsel to the Union trustees.

A hearing was held on August 21, 1984 at which time representatives of the Funds and the law firms involved appeared and were afforded full opportunity to offer evidence and argument. The Arbitrator's Oath was waived. Both sides filed post-hearing memoranda.

The question is answered in the affirmative for the reason that the Trustees resolved the question by their votes of January 17, 1984. The Resolutions adopted that day by the unanimous vote of the Trustees of both Funds granted the Graubard, Markovitz, McGoldrick, Dannett & Horowitz firm the same annual retainer as Lewis, Greenwald & Kennedy, P.C., specifically $8400 a year from the Welfare Fund and $9600 a year from the Pension Fund.

I liken this situation to a circumstance where a grievance has been settled during the grievance procedure by authorized representatives of the parties, but the Union thereafter attempts
to submit the original dispute to arbitration in denial of or in an effort to reverse the settlement. Here the Trustees decided the matter by unanimous Resolution in January 1984. I find no compelling reason why that Resolution should now be impeached by arbitration. That the Union Trustees subsequent to the Resolution sought its revocation, to which the employer Trustees refused to agree may create a technical impasse, but to my mind and under these particular circumstances, it is not an impasse which contractually opens up for a new adjudication and decision what was unanimously decided by the Trustees a few months earlier.

This is not to say that a bonafide impasse among the Trustees cannot occur on an issue previously decided by them. Rather it is to say that when a motion to revoke or rescind a previously unanimous Resolution is made shortly after that Resolution, there should be new or previously unknown facts or circumstances which warrant a de novo consideration. A mere change of mind by one of the contractual parties or by a set of Trustees should not be sufficient. Here, the record does not disclose any significantly new or previously unknown or unascertained facts or conditions which would support a re-opening in arbitration of the Resolutions of January 17, 1984.

The Undersigned, Permanent Arbitrator under the relevant Trust Agreements, and having duly heard the proofs and allegations of the parties involved in the above captioned dispute, makes the following AWARD:
The Resolutions of January 17, 1984 of the Trustees of the Local 702 Welfare Fund and the Local 702 Pension Fund are affirmed and enforced. Pursuant to those Resolutions the firm of Graubard, Moskovitz, McGoldrick, Dannett and Horowitz is entitled to annual fees of $8400 from the Welfare Fund and $9600 from the Pension Fund.

Eric J. Schmertz
Permanent Arbitrator

DATED: October 16, 1984
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:

and:

New York Telephone Company:

OPINION AND AWARD

CWA Case No. 1-84-116

and:

N.Y. Telco Case No. A-84-73

The stipulated issue is:

Was the two day suspension of Robert Schmalzigan on April 2, 1984 without just cause?

A hearing was held on September 20, 1984 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs. This Opinion and Award is rendered within five working days of receipt of the briefs as required by Article 45.03d of the contract.

Mr. Schmalzigan, hereinafter referred to as the "grievant" was suspended for refusing to cooperate with the Company's investigation of an alleged physical altercation between the grievant and his supervisor. The Company deemed the grievant's refusal to answer the investigative questions of the Company's security personnel as an act of insubordination.

As the offense charged is as stated above, it is unnecessary for me to determine whether the altercation actually took place or whether the grievant's report to the police was accurate in any respect. What is questioned is
whether the Company has the right to conduct an independent investigation and if so, whether the grievant had a duty to cooperate with that inquiry.

I answer both the foregoing questions in the affirmative. The Union errs when it argues that the altercation was "not job related" but rather a personal matter "between two citizens of the United States." Also I must disagree with the Union's claim that the matter was exclusively criminal in nature and not subject to investigation by the employer. The fact is that the alleged altercation took place between two Company employees, a supervisor and an hourly employee; it took place on Company property, on the job, and presumably during working hours. A relationship between two such employees which is characterized by a charge of assault is clearly a matter of legitimate concern for the Company. Indeed the failure of the Company to inquire into the circumstances and take remedial or preventative action if needed, would open the Company to potential charges of negligence or even complicity. In this case the assault charge was made by the grievant to the authorities. Having done so, the grievant should have expected that the Company would investigate the facts for any needed employment related action. As he started the chain of events, and as the events he alleged involved employees of the Company in the job setting, the grievant was responsible to cooperate with all the legitimate investigations that resulted. I deem the Company's investigation to have been
legitimate, and the grievant's refusal to cooperate by declining to answer the questions of the Company's investigators was defiantly wrong. I do not quarrel with the Company's classification of it as insubordination.

Whether the Company had the police report by the time it began its own investigation is immaterial. (The parties disagree on whether it did or not). A police report is for criminal or civil investigation and possible action. The elements of such actions may be different from disciplinary matters under the contract. Hence the Company is not required to rely on a police report for the facts of the event. As its interests and possible actions are different from a criminal or civil prosecution or suit, it is entitled to collect its own information on what happened.

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 two day suspension of Robert Schmalzigan was not without just cause. The suspension is sustained.

DATED: October 15, 1984
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.
In the Matter of the Arbitration
between
Local Union Nos. 310, 314, 315, 319, 322, 329, 330 and 337, Brotherhood of Utility Workers of New England

and

Massachusetts Electric Company
and Narragansett Electric Company

AWARD
of
ARBITRATORS

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

The Unions have not shown by clear and convincing evidence that the introduction of video display terminal equipment in the Company's Customer Service Department warrants any increase in the pay rate for the employees in the classifications set forth in the stipulated issue.

As requested by the parties, the Board of Arbitration retains jurisdiction for the purposes stipulated.

Eric J. Schmertz
Chairman

John J. Langan
Concurring

George P. Fogarty
Dissenting

DATED: January 30, 1984
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.
DATED:
STATE OF
COUNTY OF

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

DATED:
STATE OF
COUNTY OF

I, George P. Fogarty 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 Nos. 310, 314, 315, 319, 322, 329, 330 and 337, Brotherhood of Utility Workers of New England
and
Massachusetts Electric Company
and Narragansett Electric Company

OPINION
of
CHAIRMAN

The stipulated issue is:

Does the introduction of video display terminal equipment in the Company's Customer Service Department warrant any increase in the rate of pay for employees in the classifications as follows:

As to Narragansett: Customer relations clerk, clerk customer service, clerk senior inquiry, clerk senior, clerk stenographer.

As to Massachusetts Electric Company: Clerk customer service and senior clerk.

If so, what increase in rates of pay is appropriate?

The parties also stipulated that the Board of Arbitration shall hear the case involving the classification clerk customer service at both Narragansett and Massachusetts Electric and render a decision with regard to that particular job classification in both locations, but that the Board will retain jurisdiction after rendering that decision to afford the parties an opportunity to work out the application of that decision to the other job classifications.

If they can work it out, that would complete the case. If not, the Board would be reconvened for purposes of hearing cases with regard to the other classifications.

In accordance with the arbitration provisions of the
collective bargaining agreement between the above named parties
the Undersigned was selected as the Chairman of the Board of
Arbitration, and Messrs. George P. Fogarty and John J. Langan
were named respectively as the Union and Company members of
said Board.

Hearings were held on April 27 and July 19, 1983 at which
time representatives of the above named Unions and Companies
appeared. All concerned were afforded full opportunity to offer
evidence and argument and to examine and cross-examine witnesses.
The Arbitrator's Oath was waived. A stenographic record was
taken; both sides filed post-hearing briefs, and the Board of
Arbitration met in executive session on December 21, 1983.

As the stipulated issue indicates, the Companies changed
the methods of the work of the variously classified customer
service clerks from certain manual methods and methods using
less sophisticated communication and informational equipment,
to the primary use of video display terminals.

There is no significant dispute between the parties over
the nature of the work performed by the affected employees and
classifications before and after the introduction of the video
display equipment.

What is in dispute is the affect on the employees, physical,
mental, medical and psychological, by the extensive, if not
almost exclusive use of the video display terminals (with atten-
dant telephone headsets).

Let me come right to the point. It is apparent to me
that the issue turns on the testimony of the two experts, Dr.
Gavriel Salvendy and Dr. Harry L. Snyder, who, respectively,
were the key witnesses of the Unions and the Companies.

As the parties well know from the record, these two ex-
perts gave divergent views in the critical areas, on the impact
on employees and on the jobs in question, by the introduction
of the video display equipment. Both men enjoy impressive pro-
fessional credentials; both are apparent authorities in the
field; and both were unquestionably sincere and convinced of
the validity of their differing points of view.

I found their testimony to be tremendously interesting;
impressively scholarly; well documented by knowledge, experience
and research; and mutually offsetting. And I find nothing else
of sufficient probative value in the record including my own
observations of the jobs to change the resultant inconclusiveness.

In this case, no less than in any other, there is the
burden, here on the Unions, to prove the case and the merits of
the grievance by clear and convincing evidence. Because the
substance of the Unions' case (and that of the Companies too)
rests on the testimony of its expert, and because as good and
as impressive as that testimony was, it is offset by equally
professional and persuasive expert testimony to the contrary,
I am unable to conclude that the Unions' assertions of substan-
tial and adverse physiological, mental and psychological effects
on the employees in the classifications involved, have been shown
by the requisite clear and convincing standard.

Specifically, by example, in the face of the intensely differing views of the experts (as well as the other evidence in the record) on the matter of the amount and effect of the "constraint" placed on the employee by the use of the video display terminal, as compared to the "constraint" (or lack thereof) when the job was more manual, I am unable to find an evidential basis which would give the Unions' case on this point the persuasiveness required for its affirmation.

In short, on the matter of "constraint" I do not find such an increase in "constraint" as to have the kind of physical, mental or psychological impact on the employee which would justify a wage increase. The job has changed with the introduction of the display equipment. In some respects the evidence shows that the job duties are now easier, and the work load lighter. This is not to say that the changes have not produced new tensions, anxieties, and different if not unpleasant mental and physical demands and consequences. Rather it is to say that the offsetting critical evidence and testimony do not show a convincing consequence of the change which now endows the job with added demands, increased responsibility, additional work-load, or more pointedly, a physiological or psychological impact warranting a new evaluation and a higher level of compensation.

Finally, as to the ergonomic aspects of the job, the matters cited by the Unions are no longer significantly present. The Companies have made most if not all of the physical changes
in chairs, desks, lighting, decor, etc., which related to that phase of the job complaints. There is no evidence that for the period before those ergonomic improvements were made the employees suffered any ill effects for which they should now be additionally compensated.

For the foregoing reasons, I would deny the grievance. In my view, under the circumstances the matter is best left for collective bargaining.

DATED: January 30, 1984

Eric J. Schmertz
Chairman
January 10, 1984

Richard L. O'Hara, Esq.
Colleran, O'Hara, Kennedy
& Mills, P.C.
1044 Franklin Avenue
Garden City, New York 11530

Joseph Rosenthal, Esq.
1140 Avenue of the Americas
New York, New York 10036

RE: Local 100 TWU -and-
New York Bus Co.
(Spink and Spacek Arbitration)

Gentlemen:

This is in reply to Mr. O'Hara's letter of December 15, 1983 regarding the above matter.

May I have the Company's position on this matter.

Very truly yours,

Eric J. Schmertz
Impartial Chairman

EJS:hl
January 10, 1984

Richard L. O'Hara, Esq.
Colleran, O'Hara, Kennedy
& Mills, P.C.
1044 Franklin Avenue
Garden City, New York 11530

Joseph Rosenthal, Esq.
1140 Avenue of the Americas
New York, New York 10036

RE: Local 100 TWU -and-
New York Bus Co.
(Thompson and Spacek Arbitration)

Gentlemen:

This is in reply to Mr. O'Hara's letter of December 15, 1983 regarding the above matter.

May I have the Company's position on this matter.

Very truly yours,

Eric J. Schmertz
Impartial Chairman

EJS:hl
December 15, 1983

Dear Dean Schmertz:

This letter will serve as a petition for the restoration of the above named grievants to their jobs as regular bus drivers. They have been unemployed since being taken out of service in June, 1983. In support of this petition I enclose a letter from each grievant dated December 1, 1983 indicating an agreement to totally abstain from marijuana or any controlled substance.

On the basis of the punishment already inflicted as well as their letters, I respectfully request that you direct their immediate restoration to their positions as bus drivers.

Very truly yours,

RICHARD L. O'HARA

RLO/dm

Encl.

cc: Joseph Rosenthal, Esq.
    Harry Greenbaum, Esq.
    Sonny Hall
    Joseph Castorina
December 1, 1983

Richard O'Hara, Esq.
1044 Franklin Avenue
Garden City, New York 11530

Dear Mr. O'Hara,

This is to advise that I wish to be reinstated in my former position as a bus operator with the New York Bus Company.

This shall further confirm that I agree not to use marijuana or any controlled substance at any time.

Very truly yours,

[Signature]

PETER SPACER
December 1, 1983

Richard O'Hara, Esq.
1044 Franklin Avenue
Garden City, New York 11530

Dear Mr. O'Hara,

This is to advise that I wish to be reinstated in my former position as a bus operator with the New York Bus Company.

This shall further confirm that I agree not to use marijuana or any controlled substance at any time.

Very truly yours,

William J. Spina
driver [E. S. F.] of marijuana or other prohibited substance.

In support of the [W]s. [pet.] on behalf of the [so] for their [re] and [id] by [I have received letters from, I] wishes [regard the case of applying to the Board of Review and Spc.] [are dated December 1, 1983, and their] [copy for the data]

I am satisfied that the circumstances, have and would require to permit the [so] to return to their [to] and resume their positions as [part of the Board of Review and Spc.] and in view of the [so] December 1, 1983. The [W]s. [petition for the reissuance of the [so] to [the]] [E. S. F.], as granted.

[Signature]
In the Matter of the Arbitration

between

Local 100 Teamster

Union of America

and

New York Bus Service


In any Award of October 27, 1953

modifying guarantees Peter Speck and

William Speck I stated with all

[Copy last 3 lines]

Subsequent to that Award the

parties requested as part of their

new and current collective bargaining

agreement a provision which would

make the factual circumstances

of the original case applicable

difficult to be and as referred to

in my Award of October 27, 1953

guarantees for discharge and

winds which "the company and the

public may be protected from any

similar or subsequent use of any

by the guarantees for any other
In my Award of October 24, 1983 involving grievants Peter Spacek and William Spink I stated *inter alia*:

> I retain jurisdiction over the application and implementation of this case. The grievants are not barred forever from returning to bus driving. That question may be a matter for discussion by the parties in the upcoming contract negotiations. Also, after the passage of some time, and consistent with the provisions of the contract and any proper rules that may then be in effect, the Union may petition the Impartial Chairman to restore the grievants to jobs as regular bus drivers, and for rulings of how, if the petition is granted, the Company and the public may be protected from any similar or subsequent use by the grievants of marijuana or other prohibited substances.

Subsequent to that Award, the parties negotiated as part of their new and current collective bargaining agreement, a provision which would make the factual circumstances of the original case and as referred to in my Award of October 24, 1983, grounds for discharge and under which "the Company and the public may be protected from any similar or subsequent use by the grievants or any other driver (E.J.S.) of marijuana or other prohibited substances."
In support of the Union's petition on behalf of the grievants for their reinstatement as bus drivers, I have received duly signed letters from Messrs. Spacek and Spink, both dated December 1, 1983, and both reading:

"This is to advise that I wish to be reinstated in my former position as a bus operator with the New York Bus Company.

This shall further confirm that I agree not to use marijuana for any controlled substance at any time."

I am satisfied that the circumstances I would require to permit the grievants return to and resume their positions as bus drivers, are now met. Under the new contract provision and in view of the promises of the grievants in their letters of December 1, 1983, the Union's petition for the forthwith restoration of the grievants to positions as bus drivers, is granted.

Eric J. Schmertz
Impartial Chairman

DATED: March 12, 1984
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:

Did the Employer have just cause to discharge Ramon Regina? If not, what shall be the remedy?

A hearing was held on April 10, 1984 at which time Mr. Regina, hereinafter referred to as the "grievant" and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharge from his job as a bus driver because of a record of accidents.

I find that the grievant's accident record was excessive for the period of his employment; that his accident "contacts" were significantly greater than other drivers similarly situated; that the last in the series of accidents was serious, causing considerable damage; that discipline for the accident record, especially the last accident was warranted; but that the penalty of discharge was at this point, too severe.

The grievant was involved in a total of fifteen accidents over a two and one-half year period. All but the last were
minor in nature, with little or no damage. The Employer classifies four as "chargeable," four as "preventable" and seven as "non-chargeable." Undisputedly the last accident, in the "chargeable" category in which the grievant's bus struck a truck which had stopped ahead, was serious and resulted in over $13,000 in damage to the bus.

I do not hold that the Employer's right to discipline including ultimate discharge, is limited to "chargeable" and/or "preventable" accidents. (I find no need in this case to define these categories or to judge the accuracy or propriety of the Employer's definitions). Rather, I accept the general existence of a psychological, conscious or unconscious disposition or state of being "accident-prone." It appears to me that this condition may afflict the grievant in addition to his probable negligence or inattention in connection with a few of the accidents. As the Employer provides public transportation services to the community, it has a high duty of care and is required to take all reasonable and appropriate steps to insure the safety of its vehicles and drivers. Therefore, "accident proneness" as well as accident culpability are grounds for discipline, including ultimate discharge. However, on the other hand, a driver is not an "absolute insurer" that his driving will be totally accident free, and a single serious accident, like the grievant's last, even when joined by a series of other minor accidents is not, under the circumstances of this case,
grounds for summary dismissal.

Like any traditional condition of "poor or unsatisfactory work," a driver with an accident record is entitled to the disciplinary impact and the potentially rehabilitative effort and effect of progressive discipline, unless that record or a particular accident(s) is so obviously and egregiously negligence or wilfullness as to warrant summary dismissal. I am not persuaded that the grievant's record, including the last accident has yet risen to that latter level.

All but the last accident were minor. Most were not the grievant's fault in any respect. Commendably, the Employer acknowledged that it tried to rehabilitate the grievant with counseling and warnings. That being so, the Company should have utilized the next traditional step of progressive discipline, a suspension, before imposing the ultimate penalty of discharge.

It is well known and well settled, that a suspension is an effective tool of both warning and attempted rehabilitation. More than a warning alone, it puts the offending employee on specific and tangible notice by depriving him of working time and pay, that his record is unsatisfactory, that it will not be much longer tolerated, and that unless improved to a satisfactory level, will result in discharge.

Under the particular circumstances of this case, where the Employer properly warned the grievant in an effort to rehabilitate him; where the Employer conceeds that the grievant
was cooperative and exhibited a proper attitude, and where the seriousness of and degree of negligence or other culpability for the accidents are arguable, the Employer should have imposed a suspension as the next disciplinary step.

Also, the evidence indicates that other drivers who had been involved in accidents were formally "retrained." I think, for there to be a requisite even-handedness, the grievant should have been accorded a similar benefit.

In reducing the discipline to a suspension the grievant is expressly warned that a failure to bring his driving or accident record to a satisfactory level, will justify his discharge. The grievant's reinstatement shall be without back pay. The period between his discharge and reinstatement shall be deemed a disciplinary suspension. He is not entitled to any back pay for the further reason that he made no effort to find other employment during the relevant period.

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

The discharge of Ramon Regina is reduced to a disciplinary suspension. He shall be reinstated without back pay. Following reinstatement he shall be required to undergo retraining of a type and for a duration to be determined by the Employer.

DATED: April 17, 1984
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:

Did the Employer have just cause to discharge Ramon Regina? If not, what shall be the remedy?

A hearing was held on April 10, 1984 at which time Mr. Regina, hereinafter referred to as the "grievant" and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharge from his job as a bus driver because of a record of accidents.

I find that the grievant's accident record was excessive for the period of his employment; that his accident "contacts" were significantly greater than other drivers similarly situated; that the last in the series of accidents was serious, causing considerable damage; that discipline for the accident record, especially the last accident was warranted; but that the penalty of discharge was at this point, too severe.

The grievant was involved in a total of fifteen accidents over a two and one-half year period. All but the last were
minor in nature, with little or no damage. The Employer classifies four as "chargeable," four as "preventable" and seven as "non-chargeable." Undisputedly the last accident, in the "chargeable" category in which the grievant's bus struck a truck which had stopped ahead, was serious and resulted in over $13,000 in damage to the bus.

I do not hold that the Employer's right to discipline including ultimate discharge, is limited to "chargeable" and/or "preventable" accidents. (I find no need in this case to define these categories or to judge the accuracy or propriety of the Employer's definitions). Rather, I accept the general existence of a psychological, conscious or unconscious disposition or state of being "accident-prone." It appears to me that this condition may afflict the grievant in addition to his probable negligence or inattention in connection with a few of the accidents. As the Employer provides public transportation services to the community, it has a high duty of care and is required to take all reasonable and appropriate steps to insure the safety of its vehicles and drivers. Therefore, "accident proneness" as well as accident culpability are grounds for discipline, including ultimate discharge. However, on the other hand, a driver is not an "absolute insurer" that his driving will be totally accident free, and a single serious accident, like the grievant's last, even when joined by a series of other minor accidents is not, under the circumstances of this case,
grounds for summary dismissal.

Like any traditional condition of "poor or unsatisfactory work," a driver with an accident record is entitled to the disciplinary impact and the potentially rehabilitative effort and effect of progressive discipline, unless that record or a particular accident(s) is so obviously and egregiously negligence or wilfullness as to warrant summary dismissal. I am not persuaded that the grievant's record, including the last accident has yet risen to that latter level.

All but the last accident were minor. Most were not the grievant's fault in any respect. Commendably, the Employer acknowledged that it tried to rehabilitate the grievant with counseling and warnings. That being so, the Company should have utilized the next traditional step of progressive discipline, a suspension, before imposing the ultimate penalty of discharge.

It is well known and well settled, that a suspension is an effective tool of both warning and attempted rehabilitation. More than a warning alone, it puts the offending employee on specific and tangible notice by depriving him of working time and pay, that his record is unsatisfactory, that it will not be much longer tolerated, and that unless improved to a satisfactory level, will result in discharge.

Under the particular circumstances of this case, where the Employer properly warned the grievant in an effort to rehabilitate him; where the Employer concedes that the grievant
was cooperative and exhibited a proper attitude, and where the seriousness of and degree of negligence or other culpability for the accidents are arguable, the Employer should have imposed a suspension as the next disciplinary step.

Also, the evidence indicates that other drivers who had been involved in accidents were formally "retrained." I think, for there to be a requisite even-handedness, the grievant should have been accorded a similar benefit.

In reducing the discipline to a suspension the grievant is expressly warned that a failure to bring his driving or accident record to a satisfactory level, will justify his discharge. The grievant's reinstatement shall be without back pay. The period between his discharge and reinstatement shall be deemed a disciplinary suspension. He is not entitled to any back pay for the further reason that he made no effort to find other employment during the relevant period.

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

The discharge of Ramon Regina is reduced to a disciplinary suspension. He shall be reinstated without back pay. Following reinstatement he shall be required to undergo retraining of a type and for a duration to be determined by the Employer.

DATED: April 17, 1984
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
Transport Workers Union of America, Local 100
and
New York Bus Service

The issue involves the grievance of Joseph Fenchak for vacation pay.

A hearing was held on June 4, 1984 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.

When the Company granted vacation benefits to certain employees following their return to work after the strike, it accorded a benefit greater than required by the contract.

Under the contract and consistent practice, to be eligible for vacation pay, an employee must complete the twelve month period between his anniversary dates. No pro rata vacation is paid an employee who leaves the Company's employ before completing the full twelve month period and before reaching his anniversary date.

Here the Company gave vacation benefits effective as of the employee's anniversary date though at the time the anniversary dates were reached the affected employees were not working, but were on strike, (less a pro rata amount for the period of the strike). In other words, those employees who would have been at work on their anniversary dates but for the strike were
accorded vacation benefits essentially as if the strike had not occurred and as if they were at work at and during the critical period.

By creating conditions for vacation benefits that varied and exceeded what was required under the contract, the Company had the right to attach a condition. The condition it attached was that the employee accorded the benefit had to return to work following the strike. The grievant did not meet this condition. He did not and has not returned to the Company's employ after the strike and therefore he was not and is not similarly situated to those employees who did return and who received vacation pay retroactively effective on their anniversary dates. Accordingly it cannot be successfully argued that the grievant was either dealt with discriminatorily or improperly denied a benefit accorded others similarly situated or to which he was entitled under the contract.

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 grievance of Joseph Fenchak for vacation pay is denied.

DATED: June 25, 1984
STATE OF New York ) ss.:  
COUNTY OF New York )

Eric J. Schmertz  
Impartial Chairman
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 issues are:

1) Was there just cause for the discharge of Wilfred Rodriguez?

2) The grievance of Joseph Fenchak for "tool allowance."

A hearing was held on June 26, 1984, at which time Mr. Rodriguez and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Discharge of Wilfred Rodriguez

Mr. Rodriguez was discharged for excessive absenteeism. Prior to his dismissal he was twice formally warned. The last warning, identified as a "final warning" replaced a planned suspension, when the Union on behalf of Rodriguez requested that the Employer impose a lesser penalty.

The Union does not dispute the excessive nature of Rodriguez's absenteeism nor the lack of improvement in that record following the "final warning." Instead, the Union asserts that Rodriguez should be excused because the absences were due primarily to illness.

Rodriguez's health is immaterial. It is well settled that excessive absenteeism, for whatever reason and even if beyond
the employee's fault or control, warrants dismissal, after the imposition of lesser progressive discipline penalties. An employer has the right to insist on reliable and regular attendance by employees and need not retain an employee who cannot meet that requirement. This is especially true where, as here, the Employer provides scheduled transportation services to the public.

The Employer has met the requirement of progressive discipline. Rodriguez was previously warned. He would have been suspended also had the Union not requested that that penalty be waived in favor of a second warning. I deem the second or final warning under that circumstance to be the equivalent of a suspension. When Rodriguez's attendance failed to improve thereafter the situation was ripe for discharge.

"Tool Allowance" of Fenchak

The "tool allowance" grievance of Joseph Fenchak is limited to the claim by the Union that the Employer had no right to require Fenchak to return a certain wrench, which the Employer had issued to Fenchak, when Fenchak left his job following the strike. The Union asks that the Employer return the wrench to Fenchak or pay him its value.

I find no need to recite or interpret the contract provisions dealing with the "tool allowance." Rather, the instant dispute can be resolved on the basis of the evidence and testimony of past practice in similar or relevant situations.

The Employer stated that the practice has been to permit employees to keep the tools given them by the Employer (or for
which the Employer has provided reimbursement) when the employee quits the job if he "is in good standing and gives notice." Only one other former employee was not allowed to keep the tools, and that was a man who was fired "for stealing."

I hardly think Fenchak fell into the latter category. He did not return to work following the strike. He was not guilty of any misconduct and indeed though apparently he first indicated he would return to work after the strike, he later called and said he would not because he had another job.

Under these particular circumstances I find that Fenchak was in "good standing" when he left; that he notified the Employer when he found another job; and that under the Employer's practice and standards, he had not disqualified himself from retaining the wrench.

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

1) The discharge of Wilfred Rodriguez was for just cause.

2) Joseph Fenchak was entitled to retain the particular wrench in question. The Employer shall give him that wrench or pay him its monetary value.

DATED: July 2, 1984
STATE OF New York )
COUNTY OF New York )ss.: 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.
The stipulated issue is:

Did the Employer violate Section 26 as amended by the February 27th Memorandum of Agreement of the collective bargaining agreement when it unilaterally terminated Blue Cross coverage for its employees and substituted therefor a self-insured program? If so, what shall be the remedy?

Hearings were duly held at which time representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

Under the aforementioned contract provision the Employer has the right to change the carriers or the methods of insuring the Hospital Coverage, Basic Medical Protection, Dental Protection, Major Medical Insurance, Prescription Drug and Optical Plan provided that the plans utilized insure benefits equivalent to the Hospitalization and Welfare Benefits in effect on November 30, 1983. (As enumerated in the contract).

The Employer changed from Blue Cross (which was in effect as of November 30, 1983) to a self insured hospital program. The
issue is whether the self insured plan is "equivalent" to the prior Blue Cross plan for the same coverage and benefits.

At the hearing I ruled that the Employer had the burden of proof regarding equivalency. The Union does not challenge substantive equivalency. That is, it does not contend that the eligibility, entitlements, or payments for the enumerated services and coverage are not equivalent under the self-insured plan to what was provided under Blue Cross. Indeed, it appears from the record that no claims under the self-insured plan have gone unpaid, and there are no claims that employees (or their families) were denied the payment or scope of medical services under the self-insured plan to which they would have been entitled under Blue Cross.

Rather, the Union's contention is that access to hospitalization (and hospital treatment) under the self-insured plan is more difficult and more time consuming than under Blue Cross and in one alleged incident, was denied.

I have decided not to disturb the present status quo of the self-insured plan, but to reserve my decision and retain jurisdiction of this issue pending further experience and evidence of the application of the self-insured plan.

I agree with the Union that access to a hospital and hospital services are relevant to and a factor in equivalency, and that delays or denials in gaining admission to a hospital under the self-insured plan which would not take place under Blue Cross, would create a condition of non-equivalency. In short, equivalency
is not limited to the nature of the actual medical coverage or to the amount of medical payment but includes the ease or facility attendant to gaining admission to the hospital.

I conclude that the evidence in the record thus far is primarily speculative and opinion. As the self-insured plan is relatively new, the paucity of actual experience is not surprising. It remains to be seen, for example, whether the Employer's 24 hour telephone service for hospital inquiry is an adequate and equivalent substitute for the well known Blue Cross card. It may be or it may not be, depending on incidents and experiences yet to take place.

In view of the Employer's citation of the legal duties of hospitals throughout the United States to admit patients; and the wording on its self-insured medical card facilitating a hospital call to the Employer at any hour to check coverage and eligibility; and in view of the fact that there are no unpaid or denied claims outstanding, I am not prepared to conclude that the Employer has not met its burden of showing equivalency. The Union's testimony of an employee who allegedly had trouble gaining hospital treatment for a child, and the opinions of an employee of Blue Cross are probative, but not sufficient to conclusively show non-equivalency. The latter, as indicated, is the opinion of one with a possible partisan interest, and the former was unclear and indeterminative on the facts.

However, my present views on what the record before me shows regarding the Employer's burden to establish equivalency,
is not conclusive. It is based on the weight and balance of the evidence thus far, at the early stages of the new plan.

Accordingly, based on the present sparse record, I shall deny the Union's grievance without prejudice to its right to renew its complaint upon further evidence or experience purporting to show non-equivalency.

Eric J. Schmertz
Impartial Chairman

DATED: November 5, 1984
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.
The stipulated issue is:

Did the Employer have just cause to discharge Ramon Regina? If not, what shall be the remedy?

A hearing was held on October 24, 1984 at which time Mr. Regina, hereinafter referred to as the "grievant," and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Employer has now established the grievant's "accident proneness" within the meaning of my Award of April 17, 1984.

Considering the Employer's special duty of care to the public, and its application of "progressive discipline" to the grievant (effectuated as a result of the suspension imposed by my Award of April 17th), it need not await a serious chargeable accident by the grievant before removing him from his job as a bus operator.
Nor need it any longer run that risk by continuing the grievant's employment in that capacity.

As the grievant has no rights, under the circumstances, to any other position, his discharge was for just cause.

Eric J. Schmertz
Impartial Chairman

DATED: November 5, 1984
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.
IMPARTIAL CHAIRMAN, LOCAL 100 TWU and NEW YORK BUS SERVICE

In the Matter of the Arbitration:

between

Local 100 Transport Workers Union: OPINION and AWARD

of America:

and

New York Bus Service:


The stipulated issue is:

Did the Company violate Articles 23 and 38 of the contract when it prorated employee vacations?

Hearings were duly held and the above named parties were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

For the affected employees the Union seeks full vacation pay. To support its position, the Union claims vacation benefit credits for the period of the recent strike. The Union's case is primarily based on assertions of past practice, namely other, earlier examples of strikes, layoffs, leaves of absence and absences due to illness during which employees continued to accrue vacation credits and where those employees received full vacation pay for the year involved.

The Company disputes the alleged past practice regarding other strikes, and argues that illnesses, leaves of absence and layoffs are materially different from a strike, particularly where as here, the employees seeking the vacation credit for the strike period were the very employees engaged in the strike. The Company
asserts that it is axiomatic that employees do not get vacation credits, as if they had worked for the period of their strike unless there is an explicit contract understanding or other agreement according that unusual right, and that there is no such agreement in this case.

I need not resolve the disputed testimony regarding prior strikes, nor am I required to consider the similarity of or differences between strikes and other interruptions of active employment. The fact is, as I see it, that this issue is determined by the Strike Settlement Agreement.

That Agreement expressly provides that the contract and the terms and conditions of employment shall "commenc(e) with the date on which the employees return to work and bus service is resumed..."

It goes on to specify that the terms and conditions of the "contract ... dated August 5, 1981 shall be continued except as modified by this memorandum ..."

I conclude that the foregoing provisions mean that the expired contract of August 5, 1981, as modified by and together with the new terms and conditions agreed to, merged into a new contract beginning with the return to work.

I am persuaded therefore that the parties agreed upon a settlement of the strike which "continued" and began the contract terms when the strike ended and did not make the terms and conditions of the new contract retroactive to include the period of
of the strike.

To grant the Union's grievance in this case would be to give retroactive vacation benefit credits for the period of the strike. (The Company's vacation pay in this case was prorated because it excluded from that payment any credit for the strike period.)

The result that the Union seeks is expressly contrary to the terms of the Strike Settlement, and I find no other explicit or unambiguous contract language which would permit a different conclusion.

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

The Company did not violate Articles 23 and 38 of the contract when it prorated employee vacations.

DATED: December 17, 1984
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.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Professional Staff Association and

New York State United Teachers

The stipulated issue is:

Did New York State United Teachers (NYSUT) violate Articles IC and XIA of the PSA-NYSUT agreement by its November 2, 1983 memorandum regarding "dress"? If so, what shall be the remedy?

A hearing was held on July 23, 1984 at which time representatives of the above named Association (PSA) and NYSUT appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The November 2, 1983 memorandum regarding "dress" reads:

The officers and the Executive Board take pride in the fact that we have an exemplary and competent staff. This competence and expertise is not always evident to the public or our constituency.

NYSUT is at the forefront of an effort to seek excellence and equality in public education and to promote a positive image in and of the union movement.

Our mission requires that, at all times, we conduct ourselves in a courteous and professional manner. This pertains to personal behavior as well as appearance. Our appearance has an impact. We should not inadvertently embarrass or offend our membership nor project negative impressions. We should and would like to project a positive professional image. We believe this to be in the best interests of our membership.
There have been an increasing number of comments relating to the appearance of our employees, enough to be of concern. We believe that the image we portray is an important and legitimate concern. We want to project to the public and to our constituents a well attired, clean, neat and appealing type of individual.

Dress that meets the standard of current business practice of all men and women should be worn to the office and in the public forums where we represent our members and the organization.

We desire your cooperation in being sensitive about the image we project to the public and to our membership.

Article 1C of the contract reads:

NYSUT agrees that it will fully comply with the law with respect to the personal and organization rights of its employees. It is further agreed that this Agreement shall be applied by both parties without regard to race, creed, color, religion, natural origin, age, or sex.

Article XIA of the contract reads:

FULL COMMITMENT OF PARTIES

This Agreement shall constitute the full and complete commitments between both parties and may be altered, changed, added to, deleted from, or modified only through the voluntary, mutual consent of the parties in a written and signed amendment to this Agreement.

The Association claims that a "dress code" is a mandatory subject of collective bargaining and must be bilaterally agreed to presumably under Article XIA of the contract. It argues that as the "full and complete commitments" of the Agreement as referred to in Article XIA do not contain references to required dress of employees, NYSUT had no contractual right to unilaterally promulgate or implement the November 2, 1983 memorandum.

Also the Association contends that the memorandum is ambiguous; has been unreasonably implemented; and interferes with the long
standing practice of the exercise of individual discretion in
dress by the staff.

NYSUT asserts that its memorandum is an exercise of its
managerial authority to issue work rules; that the memorandum
and particularly the instructions of the fifth paragraph thereof
are reasonable and related to the nature of the work involved;
and that NYSUT has a clear interest in having its staff dressing
in proper attire in the office, in the field and in public forums
and settings.

I am satisfied that the majority view on the matter of
"dress codes" is that it falls within the managerial right to
promulgate and enforce reasonable work rules. The majority view
is that it is not a condition of employment requiring mandatorily,
bilateral negotiations and agreement.

I am in agreement with what I consider to be this majority
view. That being so, I do not find that NYSUT was prohibited per
se from promulgation of a rule regarding "dress" by the provisions
of Article IC. Nor can I find that the November 2, 1983 memoran-
dum and the "dress code" set forth therein failed to comply with
the"law with respect to the personal or organizational rights of
...employees," or that its application was discriminatory as to
"race, creed, color, religion, natural (sic) origin, age or sex."

Rather, I conclude that NYSUT had the bare right to promul-
gate the memorandum and the rule therein under its reserved
managerial authority. The well settled restrictions on that
right are that the rule must be clear, reasonable, related to a
legitimate need, relevant to the employment setting, adequately
publicized and consistently and evenhandedly implemented and enforced.

I agree with the Association that its instant grievance is not limited to the bare promulgation of the dress requirements of the November 2, 1983 memorandum. If it was so limited I would find no fault with the memorandum reserving the rights of the parties to later challenge and defend the particular case by case implementation of the dress standards. But the grievance goes further. It protests certain examples of implementation, taking issue for example over the apparent standardization of dress both in the office, where there are no dealings with the public, officials or members, and in other more formal and/or official settings. Again by example, the Association claims that to require jackets and possibly ties in the informal setting of the office is unnecessary and unreasonable, and challenges actual instances when staff members were required to so comply.

Clearly, any dress code of this type must be applied with a "rule of reason." In some informal settings (but not so informal as a recreational setting) sport shirts without ties or jackets may be quite proper. Other situations, such as meetings with school officials, govermental agents or even with member locals, more formal attire may be properly required. The same rule of reason would apply to footwear and outer garments. (For example, I am inclined to agree that sneakers, running shoes or sandals would not be proper in any setting other than recreational, but the instant "dress code" does not expressly deal with that circumstance.)
In this particular employment arrangement, I am persuaded that there are a variety of settings which could dictate different appropriate dress. Among those settings are: (1) in the office, but without dealings with the public, officials or the membership; (2) formal meetings, arbitrations, PERB proceedings and negotiations; (3) meetings with local unions and their membership; and (4) recreational or social activities which are part of the job.

NYSUT's memorandum requires a standard of dress consistent with "current business practice" for "the office and in public forums..." While I do not find that to be unreasonable or devoid of necessity, I do not find it to be sufficiently clear as to be unambiguous or adequately instructional or directional for compliance without raising disagreements over interpretation in one or more of the above four settings (or in any other employment setting I may have overlooked). In short, I do not think that the rule or the memorandum makes sufficiently clear what "current business practices" are, and while I may have my own views on what that means, I do not think that such clarification or delineation should be legislated by the arbitrator, particularly when, as here, the Employer is capable of spelling out the details.

I do not think it too burdensome or irregular to require NYSUT to be more specific in its dress requirements, and to reissue the rule with more specificity and more explicit examples of how it expects the staff to dress (or not dress) in the principal employment settings. This may require some thought and
details, but a "dress code" is not so complicated or unusual to make the task difficult.

Accordingly, while upholding NYSUT's managerial right to promulgate and implement a rule on "dress" and while I find the rule set forth in the November 2, 1983 memorandum to be reasonable and legitimately related to the work involved, I do not find it to be sufficiently clear or unambiguous to facilitate compliance without further disagreement and dispute. Therefore I find the instant rule too vague for enforcement and direct NYSUT, before it can enforce the rule, to re-issue it in a form that better and more specifically delineates what is required of staff.

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

NYSUT's memorandum of November 2, 1983 and the dress rule therein was a proper exercise of its managerial rule making authority. However the terms of the rule on dress are too vague and ambiguous to be adequately understood and complied with. It is presently unenforceable on those grounds. But NYSUT has the right to re-issue the rule with specific instructions related to the different employment settings in which the staff works. The rights of the parties are reserved on the substance of any re-issued rule and/or its case by case implementation thereafter.

DATE: December 3, 1984
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 threshold question requiring a ruling is whether this case is confined to the grievance of J. Manley, or whether the grievances of R. Barbarelli, D. Burney, R. Valenzuela and J. Salimbene should be joined with the Manley grievance and heard in this proceeding by this Arbitrator.

The rule which I think is applicable in this situation was enumerated years ago by the late David Cole, one of the most respected arbitrators in the history of the profession. He ruled that absent an explicit contract provision limiting an arbitration case to a single grievance or explicitly barring multiple grievances in the same case, joinder of grievances is contractually proper and a motion for joinder should be granted.

I agree with this rule, especially where as here, there is no such express and limiting contract language and the grievances appear to be related to the same or similar circumstances. Additionally the contract permits either side to submit terminal grievances to the arbitration forum, again without limiting any arbitration to only one such grievance.
Accordingly the Company's motion to join the five grievances in this case is granted. I assure the Union that in this case each grievant will be given his "day in court;" that each will be accorded due process; and that the burden is on the Company to prove that as to each grievant its discipline was for just cause.

DATED: December 14, 1983

[Signature]

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

between:

Communication Workers of America:

and:

New York Telephone Company:

RULING

The threshold question requiring a ruling is whether this case is confined to the grievance of J. Manley, or whether the grievances of R. Barbarelli, D. Burney, R. Valenzuela and J. Salimbene should be joined with the Manley grievance and heard in this proceeding by this Arbitrator.

The rule which I think is applicable in this situation was enumerated years ago by the late David Cole, one of the most respected arbitrators in the history of the profession. He ruled that absent an explicit contract provision limiting an arbitration case to a single grievance or explicitly barring multiple grievances in the same case, joinder of grievances is contractually proper and a motion for joinder should be granted.

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Accordingly the Company's motion to join the five grievances in this case is granted. I assure the Union that in this case each grievant will be given his "day in court;" that each will be accorded due process; and that the burden is on the Company to prove that as to each grievant its discipline was for just cause.

DATED: December 14, 1983
In the Matter of the Arbitration between Communication Workers of America and New York Telephone Company

OPINION and AWARD

The stipulated issue is:

Whether the suspensions of M. Glennon and R. Thomson were for just cause?

A hearing was held on May 18, 1984 at which time Messrs. Glennon and Thomson, hereinafter referred to as the "grievants" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievants were suspended two days and seven hours each for "poor work performance." They also received accompanying warnings.

The Company claims that the grievants were expressly instructed by their foreman to pressure test all the cables in a particular manhole; make repairs of all leaks; and "black strap" all the cables; that the grievants failed to perform the work as instructed; and that as a consequence a cable failure occurred the next day, interrupting customer service.

I accept the Company's testimony that the grievants were given the specific responsibility to test the cables and repair the leaks. That another cable splicer (Mr. O'Shea) may have tested the cable that subsequently failed is immaterial on two grounds.
First, work by O'Shea on cable testing exclusively and expressly assigned to the grievants by the foreman was thus unauthorized, and the burden or responsibility for doing that work cannot thereby be shifted from the grievants to O'Shea, nor can the propriety of its performance by O'Shea be imputed to the foreman or to the Company. In short any re-arrangement of the work assignments by the cable splicers themselves was done at the grievants peril, if, as here, the work they were to perform turned out to be faulty or not done. It follows then that in view of these specific work instructions and assignments, a rule, if it exists, that the last man out of the manhole is responsible for the condition of the hole is inapplicable here.

Secondly, and significantly, there is no probative evidence in the record that O'Shea was the one who tested the cable that later failed. None of the witnesses who were called could testify to that fact, and O'Shea was not present at the hearing and did not testify. Instead the unrefuted testimony by the Company, and admitted by one of the grievants, is that both grievants conceded to the Company that they had not tested the cable that failed. That concession together with an absence of any evidence that O'Shea tested that cable leaves the record fatally prejudicial to the grievants. They admit or do not dispute that they did not test that cable and yet are unable to show that O'Shea did the testing. Indeed, the further unrefuted testimony of the foreman is that he specifically assigned O'Shea totally different work, namely truck driving and delivery and removal of supplies and
Under that circumstance there is no evidence to impute to the foreman any knowledge that O'Shea did the testing, even if the foreman saw him in the manhole. Instead the logical and reasonable conclusion is not only that the grievants did not do what they were told to do but had no reason to believe or rely on a belief that O'Shea did the work.

For disciplinary purposes, where the standards of proof are less than in criminal cases, I do not find it illogical or unreasonable for the Company to conclude that the cable break the next day was the proximate result of the grievants' failure to test it for leaks. Under that circumstance a disciplinary penalty is warranted. I do not find the issuance of warnings and suspensions of two days and seven hours to be improper.

The prior arbitration cases cited by the Union are factually distinguished from the instant case and therefore I do not believe the instant decision is contrary or inconsistent.

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 warnings and suspensions of M. Glennon and R. Thomson were for just cause.

DATED: May 21, 1984
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:

Whether the suspensions of M. Glennon and R. Thomson were for just cause?

A hearing was held on May 18, 1984 at which time Messrs. Glennon and Thomson, hereinafter referred to as the "grievants" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievants were suspended two days and seven hours each for "poor work performance." They also received accompanying warnings.

The Company claims that the grievants were expressly instructed by their foreman to pressure test all the cables in a particular manhole; make repairs of all leaks; and "black strap" all the cables; that the grievants failed to perform the work as instructed; and that as a consequence a cable failure occurred the next day interrupting customer service.

I accept the Company's testimony that the grievants were given the specific responsibility to test the cables and repair the leaks. That another cable splicer (Mr. O'Shea) may have tested the cable that subsequently failed is immaterial on two grounds.
First, work by O'Shea on cable testing exclusively and expressly assigned to the grievants by the foreman was thus unauthorized, and the burden or responsibility for doing that work cannot thereby be shifted from the grievants to O'Shea, nor can the propriety of its performance by O'Shea be imputed to the foreman or to the Company. In short any re-arrangement of the work assignments by the cable splicers themselves was done at the grievants peril, if, as here, the work they were to perform turned out to be faulty or not done. It follows then that in view of these specific work instructions and assignments, a rule, if it exists, that the last man out of the manhole is responsible for the condition of the hole is inapplicable here.

Secondly, and significantly, there is no probative evidence in the record that O'Shea was the one who tested the cable that later failed. None of the witnesses who were called could testify to that fact, and O'Shea was not present at the hearing and did not testify. Instead the unrefuted testimony by the Company, and admitted by one of the grievants, is that both grievants conceded to the Company that they had not tested the cable that failed. That concession together with an absence of any evidence that O'Shea tested that cable leaves the record fatally prejudicial to the grievants. They admit or do not dispute that they did not test that cable and yet are unable to show that O'Shea did the testing. Indeed, the further unrefuted testimony of the foreman is that he specifically assigned O'Shea totally different work, namely truck driving and delivery and removal of supplies and
equipment.

Under that circumstance there is no evidence to impute to
the foreman any knowledge that O'Shea did the testing, even if
the foreman saw him in the manhole. Instead the logical and
reasonable conclusion is not only that the grievants did not do
what they were told to do but had no reason to believe or rely
on a belief that O'Shea did the work.

For disciplinary purposes, where the standards of proof
are less than in criminal cases, I do not find it illogical or
unreasonable for the Company to conclude that the cable break
the next day was the proximate result of the grievants' failure
to test it for leaks. Under that circumstance a disciplinary
penalty is warranted. I do not find the issuance of warnings and
 suspensions of two days and seven hours to be improper.

The prior arbitration cases cited by the Union are factually
distinguished from the instant case and therefore I do not believe
the instant decision is contrary or inconsistent.

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 warnings and suspensions of M. Glennon
and R. Thomson were for just cause.

DATED: May 21, 1984
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.