In the Matter of the Arbitration between

International Ladies' Garment Workers' Union AFL-CIO

and

Jonathan Logan, Inc. (Butte Knitting Mills Div.):

The stipulated issue is:

Should the affected employees then classified as Sample Sewers have lost their seniority as of December 15, 1983? If so what shall be the remedy?

A hearing was held in Spartanburg, South Carolina, on October 16, 1984 at which time the "affected 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.

Because of the precipitate nature of the essential actions giving rise to the grievance in this case, and the evident confusion as a result among the affected employees, I conclude that this matter warrants a determination based on the particular facts and circumstances present. Therefore this decision is applicable only to this grievance and shall not be construed as an interpretation of the contract for any subsequent matter.
I find that when the eleven grievants who had been on layoff from the sample room, returned to active employment in the Sewing Department, they believed and/or had reasonable grounds to believe that their acceptance of the available but different jobs in the Sewing Department was "at the Employer's request" and was not their voluntary choice.

I conclude that under the apparent pressure to make an immediate decision to accept the Sewing Department production job or to remain on layoff, it was not made adequately clear to the grievants that their seasonal layoff status had been transformed into an "indefinite layoff" due to the Company's decision to permanently reduce the staff of the Sample Room. (Indeed, the record supports the view that for the grievants or many of them, the change from a seasonal layoff to a permanent layoff was not made known to them until the offer of Sewing Department jobs was made.) Consequently, I am not satisfied that the grievants fully understood or had proper notice that because of their changed layoff status, an acceptance of a Sewing Department job would be deemed by the Company as a voluntary choice, and that it would result in a seniority status for future layoffs as if they were new hires. Yet they were required by the Company to decide virtually forthwith on acceptance or rejection of the Sewing Department jobs.

Considering the experience of some of the grievants in 1968, 1975 and 1981 when they and other employees retained their accumulated seniority when transferred to or returned to active
employment in different jobs or departments after longer periods of layoff, and considering the "eleventh hour" change in their original layoff status from seasonal to indefinite, it does not surprise me that the grievants thought the instant circumstance to be the same as in those prior years; that they would retain their accumulated seniority and that the recall to jobs in the Sewing Department was at the Company's request.

The confusion was evidenced and compounded by Company statements to the grievants to the effect that they accept the Sewing Department jobs or "lose their seniority" or "lose their employment." Faced with such an ambiguous statement and the requirement to decide immediately because they "were needed the next day" it is not illogical for the grievants to think that the way to retain their accumulated seniority would be to take the jobs offered by the Company and that the Company was requesting that they do so. In short, I do not think that the Company afforded the grievants a full and fair opportunity to understand the import and consequences of the choice they were to make or to give them a chance to make a reasoned voluntary decision.

Applying these facts to the contract, I find a sound, reasonable and fair basis to hold that what happened should fall more properly within Paragraph 9 of the Supplemental Agreement entitled "Seniority", then under Article XXIII(4) of the contract. That being so, the circumstances here should be deemed a transfer "at the Employer's request..." within the meaning of Paragraph 9 of the Supplemental Agreement; and the grievants should have
retained their seniority when they accepted and were placed in the Sewing Department.

As I do not find that the Company violated the contract, but rather that the grievants were not adequately informed of the facts and their rights (or lack of rights), I shall confine the remedy to restoration of seniority.

Claims for retroactive damages, if any, are denied. However, any grievant since laid off from the Sewing Department because of the wrong seniority shall be restored to active employment in the Department if her correct seniority supports that entitlement.

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

The affected employees then classified as Sample Sewers shall not have lost their seniority as of December 15, 1983. They should have retained their seniority when they accepted and were placed in production jobs in the Sewing Department. Their seniority shall be restored and their present and future employment in the Sewing Department shall be based on that seniority.

DATED: January 29, 1985

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
Impartial Chairman
In the Matter of the Arbitration between:
International Ladies' Garment Workers' Union and:
Jonathan Logan, Inc. (Misty Harbor):

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

In resolution of all claims submitted to this Arbitration, the Company shall pay to the following persons the amount of money indicated:

James Glenn $4,410
William Harrison 4,165
Charles Perry 4,165
Arrie Black 3,920
James Vickers 3,675
George Oberg 3,675
Barbara Taylor 3,430
Caroline Blue 3,430
James Crawford 3,430
Gertrudis Byrd 3,185
Angela Balarezo 2,940
Israel Imel 2,450
Joyce Johnson 2,450
Jacqueline Phillips 2,450
Shirley Dowdy 2,450
John Aguiar 2,205
Lucy Schuyler 1,960
Cornelia Braxton 1,960
Edith Hynson 1,715
Herman Rifkind 1,715
Lillie Street 1,470
Patricia Walker 980

Dated: March 4, 1985

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
International Ladies' Garment Workers’
Union and
Jonathan Logan, Inc. (Misty Harbor)

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

In resolution of all claims submitted to this Arbitration, the Company shall pay to the following persons the amount of money indicated:

James Glenn $4,410
William Harrison 4,165
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Joyce Johnson 2,450
Jacqueline Phillips 2,450
Shirley Dowdy 2,450
John Aguiar 2,205
Lucy Schuyler 1,960
Cornelia Braxton 1,960
Edith Hynson 1,715
Herman Rifkind 1,715
Lillie Street 1,470
Patricia Walker 980
Marie Powell 245
Deanna Alexander 245
Rafael Serrano 245
Kimberly Preston 245
Keith Rogers 245

DATED: March 24, 1985
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.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration:
between
International Ladies' Garment Workers' Union
and
Jonathan Logan, Incorporated
(Modern Juniors)

In accordance with Article XLII of the collective bargaining agreement between the above named Union and Company the Undersigned, designated as the Arbitrator, held a hearing on June 4, 1984 in New York, New York on the Union's claims on behalf of certain employees for severance pay, length of service payments and holiday payment resulting from the shut-down of the Company's Modern Juniors Division. The Company thereafter closed its Andrew Knit, Margaret Fashions, Chambersburg and Aero Knit plants. The parties have agreed that the decision in this matter shall apply to the Union's claims on behalf of employees in these plants for severance pay, length of service payments and holiday pay.

Having considered the entire record before me, I make the following AWARD:

1. **Severance Pay**
   
   The Union's claim for severance pay is denied.

2. The Union's claim for length of service payments is granted as follows:
   
   a. In accordance with the terms of the applicable supplemental agreement effective June 1, 1982 the Company shall make contributions to the Health and Welfare Fund of 2% of the payroll of all employees who have been terminated in the calendar year 1984 or 1985, where applicable, in connection with the shut-down of a plant or facility, and who, but for such termination would have been employed three or more years on December 1, 1984 or December 1, 1985, where applicable.
3. **Holiday Pay**

The Union's claim for holiday pay is granted as follows:

a. Under Article XXII, Section 2b of the Master Agreement the Company shall grant to the employees holiday pay for all paid holidays which have occurred or will occur within ninety (90) days following the last day of work of said employees.

4. In full response to all the Union's claims in this matter, the foregoing Awards 1 through 3 shall apply to employees of the Company's plants referred to in the first paragraph herein and who are terminated in calendar year 1984 or 1985, where applicable, in connection with the shut-down of a plant or facility, provided such termination was neither voluntary nor for good and sufficient cause and provided further that such terminated employee is not and has not been offered other permanent employment with the Company.

DATED: April 17, 1985
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:

Whether Sharon Barnes was properly laid off from March 1, 1985 to June 3, 1985?
If not, what shall be the remedy?

A hearing was held in Baltimore, Maryland on July 22, 1985 at which time Ms. Barnes, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The Union contends that the grievant's layoff from the job of bagger was improper because at the time she should have been credited with the most seniority in that classification; that contrary to earlier assurances that she would be "the most senior bagger" two other employees were later, retroactively, but wrongly accorded greater seniority (and thereby retained at work when the grievant was laid off). That on other occasions the Company used plant-wide seniority for layoffs and that that procedure should have applied in the instant layoff, permitting the grievant to bump at least three junior employees in other classifications; and that shortly before the grievants' layoff, a junior employee was transferred from bagger to checker, "fortuitously" and wrongfully designed to "save" that employee from the layoff which, as a consequence and otherwise hit the grievant.
I do not dispute the Union's assertion that plant-wide seniority is the "most equitable way" to deal with the layoff and recalls to cover diminishing available work. If and so long as the parties, by joint agreement, or without Union objection utilize that method, no complaint would arise and the arrangement would not be actionable as inconsistent with the contract. But I do not find that a practice was or has been established which would work to change the specific contract provision that layoffs are based on seniority within the classification affected.

Section 10(b) of the applicable Supplemental Agreement provides in pertinent part:

**Layoff and recall**

Employees shall be laid off by seniority within each classification...

Absent the joint agreement of the parties otherwise, or circumstances where mutual agreement may be reasonably construed from their conduct, the Arbitrator is bound to the foregoing contract language. I find no mutual variations of that language in this case and no long standing, consistent contrary practice which would negate its effectiveness. Therefore the Union's claim that there were other junior employees in other classifications who should have been laid off before the grievant, cannot be supported.

In the instant case, the grievant was the junior employee with seniority in the bagger classification at the time of her layoff. I cannot conclude that two other employees were wrongfully accorded greater and retroactive seniority in that classification, because I find that the facts leading to that arrangement were initiated by the Union, and the arrangement itself was known to or should have been known to both the Union and the grievant, and neither objected. In short, I find that the Union and the grievant are estopped in this arbitration from complaining
about the Company's action, which, earlier, classified the two other employees as baggers, and gave them seniority in that classification superior to the grievant.

The facts concerning those two employees, Stewardie Bennett and Mary McKenzie, are clear. On their behalf the Union complained that though classified as examiners, they were performing in the higher bagger classification. As a result of that complaint by the Union, the Company reclassified them as baggers, increased their pay to the bagger rate prospectively, and accorded them seniority in the bagger classification, retroactive, presumably, to the date they began performing bagger duties.

One can question whether there is a proper consistency between increasing their pay prospectively and according classification seniority retroactively, but that question is no longer relevant or determinative. The fact is that I am persuaded that in response to its complaint on behalf of Bennett and McKenzie, the Union knew or should have known of the resolution of that complaint -- the reclassification, the pay increase, and the retroactive classification seniority. With that knowledge, actual or constructive, the Union cannot now protest the layoff consequences, of that seniority arrangement.

I am also satisfied that because of another circumstance the grievant and the Union knew of the greater classification seniority accorded Bennett and McKenzie. An earlier but short layoff in the bagger classification but after the aforesaid arrangement, affected the grievant who was laid off a day or two but did not affect the other two employees. Neither the Union nor the grievant complained then. No matter the reasons now advanced for not grieving, I must conclude that the failure to do so was based on a knowledge or recognition that the grievant no longer enjoyed top bagger seniority.
There is insufficient evidence to support the Union's claim that the transfer of Amelia Mathias from bagger to checker was designed to protect Mathias from the upcoming, instant layoff. The uncontroverted evidence established that Mathias was not "transferred" but rather "claimed" the checker job under Section 10(a) of the Supplemental Agreement. There is no evidence that the award of the job to her under Section 10(a) was other than in accordance with her contract right to claim that open job and in accordance with her qualifications and seniority.

I do not find support in the record for the balance of the Union's arguments - namely claims that Article XVIII ¶1, Article XXIII ¶5, Article XXV ¶1 and Article XXVI ¶1 were violated. Specifically I do not find that the available work was not "distributed...as equally and equitably as possible." The layoff took place because there was not enough bagger work to sustain all the employees of that classification. There was no probative showing that the grievant was denied a "temporary job opening," or indeed if there were any such openings available. Clearly her layoff was not a discharge or discipline. And finally, her layoff had nothing to do with the maintenance of "wages, piece rates, standards and working conditions." Those matters are subject to the Company's express contract and managerial right to reduce the work force to correspond to the quantity of available work.

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

Sharon Barnes was properly laid off from March 1, 1985 to June 3, 1985.

DATED: September 16, 1985
STATE OF New York ) ss.
COUNTY OF New York ) ss.

Eric J. Schmertz
Arbitrator
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

International Ladies' Garment:  
Workers' Union:  
and

Jonathan Logan, Inc.:  

The stipulated issue is:

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

A hearing was held on September 19, 1985 in Baltimore, 
Maryland at which time Mr. Jones, hereinafter referred to as the  
"grievant" and representatives of the above-named Union and  
Company appeared. All concerned were afforded full opportunity  
to offer evidence and argument and to examine and cross-examine  
Witnesses. The Arbitrator's Oath was waived.

I find that the Company did not follow the prescribed  
disciplinary procedures and steps of its Personnel Policies and  
Procedures (Policy No. 15.0106) but that that failure is not  
controlling in this case.

I further find that on May 31, 1985 when the grievant was  
discharged for excessive absenteeism, the Company had grounds for  
the discharge, but failed to effectuate the discharge definitively  
or effectively.

That the Company did not issue the warnings (and a suspen-
sion) pursuant to the sequence of Policy No. 15.010 is immaterial.  
The Policy was preempted and changed in this instance by the agree-
ment of the Union and Company in January 1985 to give the grievant  
a "final warning" and a "last chance." Hence though his excessive  
absentee record in January 1985 may have warranted a de novo re-
sumption of the progressive discipline cycle with a "first warning"  
following the earlier warnings of February and April 1984, (both  
of which would have been expunged by the Company's acknowledged
practice of doing so after six months), the agreement of January 1985 that the "grievant's next attendance infraction would result in his discharge" constituted a bi-lateral change in the warning procedure, and is the enforceable understanding that prevails in this particular case.

There is no question about the grievant's record of excessive absenteeism. It has been documented in the record and the Company has met its burden of showing its unsatisfactory nature. Therefore, pursuant to the special arrangement of January 1985, the grievant's attendance record as of May 31, 1985, especially the last three days of his employment when he did not show up for work or reported to the wrong location, constituted a "next attendance infraction" warranting dismissal.

But the Company, for whatever reason, did not discharge him upon that "infraction." Instead it told him that he "could not return to work without a doctor's excuse." That meant not that he was fired, but rather he could return to work with a doctor's statement or excuse. He was not told that he was fired because he did not produce a doctor's statement, but that he couldn't work without one. Implicit, to my mind, was the condition that if he produced a doctor's note, he'd be able to return to work, especially when he was not told that the opportunity to obtain a note was foreclosed or that it was too late to do so. Also, he was not told how much time he had to obtain the statement. So impliedly, he had reason to believe that he had a reasonable time to do so. He produced a doctor's statement within two days, which I deem to be a reasonable time. There is no probative evidence that the note or its substance were false.

Under this circumstance, the Company gave the grievant the right to return to work if he produced a doctor's excuse, even
though the Company had the right to discharge him. The right was thereby waived, and the Company's subsequent effort to exercise it is nullified.

However, I find no basis to return the grievant to work with back pay. Considering his poor attendance record, I do not know how many of the days since his discharge he would have worked, or whether, if his absentee record continued, he might not have been subsequently suspended or terminated, under the Company's Personnel Policies and Procedures.

I am persuaded that a suspension is the fair and equitable measure of damages and remedy under the specific facts of this case, particularly in view of the modifications in the warning procedure agreed to by the parties in January 1985.

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

The discharge of Michael Jones was not for just cause. He shall be reinstated but without back pay. The period between his discharge and his reinstatement shall be deemed a disciplinary suspension for excessive absenteeism.

DATED: October 15, 1985
STATE OF New York
COUNTY OF New York

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbiter that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration between
International Ladies' Garment Workers' Union
and
Jonathan Logan, Incorporated (Act III Division)

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above named Union and Company and having duly heard the proofs and arguments of said parties at hearings on September 4 and October 15, 1985 makes the following AWARD:

The Company's close down of the Act III Division did not violate the contract.
The manner by which whatever remaining work is handled does not violate the contract.
The benefits to which the affected employees are entitled are the same as set forth in my Award of April 17, 1985, International Ladies' Garment Workers' Union -and- Jonathan Logan, Incorporated (Modern Juniors).
The Company is directed to accord said benefits to said affected employees.

Eric J. Schmertz
Impartial Chairman

DATED: November 11, 1985
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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration between
Local 1049, International Brotherhood of Electrical Workers and
The Long Island Lighting Company

OPINION AND AWARD
Case No. 1730 0185 84

In accordance with Article XVII of the collective bargaining agreement dated July 1, 1982 between the above-named Union and Employer, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Was the discharge of Edward Holsey for just cause? If not, what shall be the remedy?

A hearing was held at the offices of the Employer in Hicksville, New York on January 4, 1985 at which time representatives of the Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The grievant attended the hearing. The Arbitrator's Oath was waived. A stenographic record was taken.

BACKGROUND

The grievant, Edward Holsey, began working for the Company on June 19, 1978 in the Building Operations Department. He exercised his seniority rights on several occasions that enabled him to receive lateral transfers to different locations of the Company. He most recently served as a Building Attendant at Brentwood where he worked from 4:00 P.M. to 12:30 A.M., performing janitorial duties along with six other persons.
The grievant received two written reprimands for poor attendance dated September 25, 1979 and April 10, 1980. He received three suspensions for poor attendance: a one-day suspension on June 16, 1981; a three-day suspension on May 27, May 28, and June 1, 1982; and a five-day suspension and final notice in December 1982. He also received a verbal reprimand on December 21, 1983 for poor performance. No grievances were filed regarding any of these disciplinary actions.

In 1983, the grievant took four emergency vacation days (i.e. unscheduled vacation days), thirteen sick days (as a result of seven occurrences that included four separate ½ days contiguous to a weekend), and two incidents of lateness. He was not paid for being late on March 14, 1983. In 1984, the grievant took an emergency vacation day on January 9, a floating holiday on January 16, and was denied a request for an emergency vacation day on January 24 which he took as an absence without pay. The grievant took five sick days from February 1 to February 7 during which time he worked at his part-time job as a Hall Monitor for the Amityville Union Free School District on two of the days. The Employer suspended the grievant beginning February 23, 1984. On March 2, the Employer converted the suspension into a termination.

Article XI of the collective bargaining agreement, provides for sick leave for 25 days full pay and 25 days half pay. The parties stipulated that the bona fides of the illnesses of the grievant are not in dispute and there is no dispute regarding medical documentation for such absences.

CONTENTIONS OF THE EMPLOYER

The Employer asserts that it discharged the grievant for
a severe pattern of absenteeism that did not change or improve since he began working on June 19, 1978. The Employer claims that it followed progressive discipline that included efforts to rehabilitate, counsel, and educate the grievant so that he would report to work regularly. The Employer maintains that though it also imposed written reprimands and three suspensions for unacceptable attendance, the grievant's pattern of repeated short absences continued. It notes that the grievant and the Union did not contest these disciplinary actions.

In the opinion of the Employer, the grievant's record worsened in early 1984 insofar as he took two emergency vacation days after a scheduled vacation in early January and another emergency vacation day in late January, and five sick days on the work days between February 1 and February 7. It points to the fact that the grievant worked at a part-time job on February 6 and February 7 as evidence that the grievant did not recognize his obligation to maintain a regular attendance record with the Employer. The Employer underscores its position that there is no duty on its part to constantly make special requests of its employees to attend work. The Employer emphasizes that the repeated and unscheduled absences of the grievant adversely affect the planning and productivity of the Building Operations Department.

CONTENTIONS OF THE UNION

The Union insists that the discharge is not for just cause and seeks reinstatement for the grievant with backpay and benefits. The Union maintains that the bulk of the grievant's absences were medically related and frequently documented by a doctor's note. In this regard, the Union stresses that the bona fides of the absences are not disputed. The Union further relies upon the medical treatment and counseling that the grievant received from
the Veterans Administration as an indication that the grievant
has sought to improve his record.

The Union argues that the grievant has had a second job
since the Employer first employed him. This part-time job in
the Union's view never conflicted with his primary job. The Union
contends that the grievant worked at his part-time job in the
Amityville school system on February 6 and February 7 due to a
special request from the Assistant Principal of the school in-
volved. It is the claim of the Union that the nature of the
grievant's responsibilities as a hall monitor in the school en-
abled him to work there even though on the same days he was not
physically able to do the manual work involved in his position
with the Employer. This distinction is cited by the Union as an
explanation for the grievant working in the school but calling
in sick to the Employer. The Union reiterates that the grievant
worked at the part-time job only in response to the personal and
urgent request of the Assistant Principal after the grievant had
been sick for the first three work days of February.

The Union rejects the assertion of the Employer that an
inappropriate number of the absences surrounded weekends. In
this regard, the Union points out that 40 percent of all work-
days surround a weekend. The Union requests that the grievant
be reinstated in light of the extensive psychiatric help he has
received from the Veterans Administration.

The Union insists that the grievant's record of 13 absences
in 1983 is not excessive. Furthermore, the Union does not con-
sider 5½ hours of personal time in 1983 to be excessive. The
Union relies on the sick leave provision of the collective bar-
gaining agreement as support for its argument that the grievant's
record does not constitute excessive absenteeism. Thus the
Employer is precluded, in the Union's view, from claiming that
the sick leave record is excessive or that the emergency vacation days that were granted and charged against the grievant's contractual vacation benefits somehow furnish a basis for disciplinary action. Specifically, the Union challenges the Employer's argument that because the average sick leave experience in the Company is six or seven days per year, an employee with 13 sick days is considered excessively absent.

OPINION

The parties stipulated that there is no claim that the absences of the grievant were not bona fide. Thus the claim of the Employer that certain absences surrounded weekends or scheduled vacation days is rejected as irrelevant. Similarly, the grievant should not be charged for emergency vacation days that the Employer approved because such days, once approved, involved the exercise of a contractual benefit. If the grievant's use of such days posed a hardship for the Employer in terms of planning and scheduling work, the Employer did not have to and should not have approved those requests.

However, the foregoing notwithstanding there are certain well settled and well observed arbitral rules which are applicable to the facts in this case and dispositive of the issues.

One is that excessive absenteeism over an extended period of time is grounds for progressive discipline even if the absences are due to sickness or other reasons beyond the employee's control. This rule is based on the equally well settled principle that an employer, in order to maintain its schedules and perform its services, is entitled to the prompt and regular attendance of its employees. If an employee is unable to meet this obligation, for whatever reason, such an employee may be terminated in accordance with the rules of progressive discipline.

Another is that a contract sick leave maximum is not what
an employee is permitted to take with impunity year-in and year-out, or as a regular characteristic of his work history. Those maximums (here 25 days at full pay and 25 days at half pay) are intended to cover unusual periods of illness and unexpected disabilities, and are not licenses for that amount of absenteeism on a regular basis each year.

It is undisputed that the Employer imposed reprimands and suspensions for the grievant's poor attendance record between 1978 and 1982. Inasmuch as those disciplinary actions were not grieved, they are no longer contestable or rebuttable in this proceeding. Consequently, the issue before the Arbitrator narrows to whether the grievant's record in 1983 and 1984 warranted further discipline.

In view of this prior record, and the foregoing rules, the grievant had a special duty to improve his record to a point discernably better than the "average" and certainly better than a quantity which, as here, significantly exceeded the average. That the grievant's quantity of absences did not exceed the yearly contract maximum is not a defense available to him in view of his prior warnings and suspensions. He had a duty to do better than to continue a record which was on the high side of the average range.

The record is clear that the grievant knew that his attendance record did not conform to the expectations of the Employer. He sought counseling from the Veterans Administration that dealt, in part, with this problem. Notwithstanding this knowledge, the grievant further failed in his duty by working at his part-time job on February 6 and February 7, yet he called in sick to the Employer. His attempt to distinguish the nature of the work as a hall monitor from his responsibilities at the Employer does not excuse his conduct. By working on February 6 and February 7 at
the school, the grievant decreased, if not precluded, the possibility that he would be able to work for the Employer those days. Even though the Employer does not dispute that the grievant had the flu, the priority that the grievant afforded the part-time job compared to his job with the Employer was improper. When the school principal urged him to attend work because his mere presence would help maintain order in the hall, he should have recognized his primary obligation to the Employer by rejecting the request. He should have spent that time recuperating, so as to speed his return to his primary job with the Employer.

The record also reflects that the grievant requested January 24, 1984 as an emergency vacation day. Although the Employer denied this request, the grievant did not report for work and the Employer did not pay him for that day. This conduct is also evidence of the grievant's failure to meet his duty to improve his attendance record.

These actions by the grievant fell markedly short of his obligations, and, irrespective of reasons, warrant discipline. Added to his earlier, unchallenged disciplinary record convinces me that the grievant's overall record properly triggered his dismissal as the final and appropriate step in progressive discipline.

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

The discharge of Edward Holsey was for just cause.

DATED: March 21, 1985
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:

Has the Employer violated the collective bargaining agreement with respect to the Overload/Adjunct compensation schedule? If so, what shall be the remedy?

A hearing was held at the American Arbitration Association on July 2, 1985 at which time representatives of the Faculty Federation, hereinafter referred to as the "Union" and Long Island University, hereinafter referred to as the "Employer" or the "University" appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

I conclude that the Employer acted properly in increasing the adjunct rates of pay effective February 15, 1985 but violated the contract by failing to increase the overload compensation rates for full-time faculty by the same amounts effective February, 1985.

With regard to the adjunct rates of pay, the contract is clear and dispositive of that part of the issue. Article XXX Section 2 reads:

Adjunct Faculty

Section 2. The compensation and benefit schedule for adjunct faculty shall be revised to reflect any improvements resulting from any settlement negotiated with the C.W. Post AFA.

The C. W. Post Adjunct Faculty Association-LIU contract provides for 15 increases for adjunct faculty effective February 1,
1985 with a maximum cap of compensation at $450.

Consistent with the Post rates the Employer increased the adjunct compensation for Instructors, Assistant Professors and Associate Professors to $315, 365 and $415 respectively with no increase in the Professor rate which was already at the $450 maximum. The parties are not in disagreement over these increased rates. They disagree over when the new rate structure should have been effective. The Union claims the increases should have been retroactive to September 1, 1983, the beginning date of the current contract. The University asserts that the February 1, 1985 date is correct.

Section 2 as recited above, is a "me too" clause. It calls for precise parity between the Post contract and the instant contract covering the Brooklyn campus. It is clear and unambiguous. It calls for revision of the compensation schedule of the Brooklyn campus adjunct faculty "to reflect any improvements resulting from any settlement negotiationed with the C. W. Post AFA." The negotiated improvement was the respective $15 increases and its effective date of February 1, 1985. For the wage increase to be granted the Brooklyn adjunct faculty earlier, or retroactive to September 1, 1983, would be to accord an improvement obviously greater than what the Employer negotiated with the Post AFA, and instead of reflecting the latter improvements would substantially exceed them.

Section 2 grants and requires equality and precise comparability. It does not fix a different effective date for salary adjustments for the adjunct faculty covered by the instant contract, nor does any other part of the contract fix a different date. Moreover, it is undisputed that in negotiating Section 2 and in the contract negotiations generally, the parties did not agree on retroactivity for adjunct compensation improvements or to a different effective date than what was agreed to at Post.
That the Union may have agreed to the "me too" clause in 1983 because of the University's representation that it expected to conclude a contract at Post shortly, is not enough to constitute a promise of retroactivity or even to create an equitable basis for that conclusion. The Union took its chances. It was not promised retroactivity; it was not guaranteed a quick settlement at Post and it had ample opportunity to negotiate a fixed date for the application of the Post rates for adjuncts when Section 2 was accepted. That it did not do so, and was not given any promise or assurance of retroactivity leaves the parties bound to the unconditional and specific language of Section 2. Under that language the applicable improvements were the undisputed wage increases and perforce February 1, 1985 as the effective date.

With regard to the matter of overload compensation, the answer is not as clear. It is undisputed that by the language of Section 2, and by the facts, the University-C. W. Post AFA negotiations did not deal with overload compensation for either the full-time faculty at Post, or the full-time faculty at the Brooklyn campus. The Post AFA unit did not include full-time faculty; hence no issue of overload compensation for full-time faculty was included or within the jurisdiction of those negotiations. Moreover Section 2 speaks only of compensation and benefit schedules for adjunct faculty; so that the "me too" clause applies only to the Brooklyn campus adjuncts and not to the full-time faculty. Hence Section 2 standing alone is not relevant to or dispositive of the overload issue.

But Article XXX Section 3(a) deals with adjunct rates of compensation and overload rates. And it is undisputed that the schedule in 3(a) served two purposes. It set forth the compensation rates for adjunct faculty; and also the overload rates for the full-time faculty. Section 3(a) reads:
Section 3. Extra Workload Compensation

(a) Overload/Adjunct

Adjunct/overload teaching shall be compensated at the following rates:

<table>
<thead>
<tr>
<th>Position</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professors</td>
<td>$450</td>
</tr>
<tr>
<td>Associate Professors</td>
<td>$400</td>
</tr>
<tr>
<td>Assistant Professors</td>
<td>$350</td>
</tr>
<tr>
<td>Instructors</td>
<td>$300</td>
</tr>
</tbody>
</table>

Therein lies the ambiguity of Section 3(a). The University argues that with the C. W. Post AFA negotiations, the adjunct compensation rates and the overload rate became divided and different. The "me-too" provisions of Section 2 increased only the adjunct compensation rates, but the existing schedule for overload compensation remained the same. The University argues that as the Post contract had nothing to do with overload, and the overload compensation in the instant contract was negotiated in 1983 with the Union at the schedule fixed in Section 3(a) no change or increase is warranted in the overload compensation. Finally the University points out that its objective in both contract negotiations was to establish or maintain economic parity between the two campuses; that the overload rates at Post remained at the levels set forth in Section 3(a); and therefore no change in those levels should be accorded the Brooklyn campus full-time faculty.

But it can be argued with equal logic, as does the Union, that under Section 3(a) adjunct compensation and overload are inseparable and synonymous. The Union asserts and the University concedes that throughout the 1983 negotiations of the instant contract there was no discussion of differences between adjunct compensation and overload, and that the parties consistently referred to them jointly, as "overload/adjunct."

It is not a strained contract interpretation therefore to conclude that Section 3(a), by its terminology "overload/adjunct"
means that an increase in either would be an increase in both; that the schedule of rates should apply to both circumstances inseparably; and that therefore when the adjunct compensation was increased by operation of Section 2, the overload rate was increased equally by operation of Section 3(a).

I view either contract interpretation as plausible and supportable, and hence the ambiguity. In such circumstance the path to a decision is both well traveled and well settled. The Arbitrator looks to past practice for resolution.

Here the past practice is undisputed, and indeed stipulated. Historically, adjunct compensation rates and overload for full-time faculty were linked. The language of linkage of Section 3(a) supports that practice.

In my view the University knew of the linkage and the practice when it negotiated both contracts. It also knew of Article II Section 3 of the instant contract which expressly preserves and perpetuates past practices. That Section reads:

Section 3. Past Practices

All bona-fide past practices of the Brooklyn Center shall be continued and deemed a part of this agreement.

There is nothing in this record which would question the historical linkage and practice as other than a "bona fide past practice" within the meaning of Article II section 3.

Under these circumstances the University had the burden of doing more than negotiating a new adjunct rate at Post to bring about a severance of the linkage and practice. The increased adjunct rate at Post, adopted at the Brooklyn Campus by operation of Section 2, did not in and of itself vitiate the language linkage of Section 3(a) or the practice under the instant contract of using the same rate for adjunct compensation and for overload.
In short, the Union had the right to believe that under the practice and the language of Section 3(a), an increase only in the adjunct rate at Post would result in an increase under the current contract not just in the adjunct rates at the Brooklyn Campus, but also an increase in the overload rates at the Brooklyn Campus.

The University should have negotiated clear contract language resolving the ambiguity in a manner different from the practice, making clear thereby that the adjunct rates were to be increased but not the overload rates, and that the historical linkage had been ended. It did not do enough to achieve that result.

Accordingly as the adjunct compensation rates were properly increased not before February 1, 1985, the overload rates, which I have held remain linked thereto, should be increased and effective also as of February 1, 1985.

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

The Employer did not violate the collective bargaining agreement when it increased the adjunct faculty compensation rates effective February 1, 1985.

The Employer did violate the collective bargaining agreement when it did not increase the overload rates by the same amounts as the adjunct compensation rates. The Employer shall increase the overload compensation rates by those amounts effective February 1, 1985.

The Union's claim that the increases in adjunct compensation rates and overload rates should be made retroactive to September 1, 1983, is denied.

DATED: August 5, 1985

STATE OF New York )ss.
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration between
Local 702 Motion Picture Laboratory Technicians, I.A.T.S.E.
and
M & B Control Film Lab

The Undersigned, Permanent Arbitrator under the collective bargaining agreement between the above-named Union and Employer, and having duly heard the proofs and allegations of said parties at a hearing on December 3, 1985 makes the following AWARD:

As ruled and directed at the hearing, Ricardo Sali must become a member in good standing of the Union by no later than December 5, 1985 and shall remain a member in good standing of the Union thereafter as a condition of employment pursuant to the applicable law. This shall include payment of an initiation fee in the amount of $150 and the payment or tender of the required dues. If he fails to do so, the Employer shall discharge him forthwith.

The claims of Tom Moran and Farrell Beazer for severance pay are denied. They resigned their jobs and did not cease their employment with the Employer for the reasons or under the circumstance for which they would be eligible for severance pay under the terms of Section 11 of the contract. Resignation is not a reason or circumstance which carries with it an entitlement to severance pay.

However, I conclude that if the Employer's owner, John Rouw and his non-bargaining unit clerical employer, Dorothy Simmons had not performed bargaining unit work during the period of the short work week from August 27 to October 20, 1985, there would have been more than three days a week work for Moran and Beazer.

I further conclude that the letter of July 3, 1980 which gave the Union's consent to Rouw's and Simmon's performance of bargaining unit work, applied to conditions that obtained at the time the letter was written, namely and specifically when the bargaining unit employees were fully employed on a full work week basis. The Union's agreement that Rouw and Simmons could do bargaining unit
work was not intended to apply when and if bargaining unit employees were reduced to less than a full week's work because of the loss or reduction in available work. I am persuaded that the Union would accommodate the Employer and permit him to do bargaining unit work at variance from the contract prohibition only when the Union employees were employed full time and for a full work week. The Employer’s interpretation of the July 3rd, 1980 letter is inconsistent with the Union’s traditional and unvaried interest in job security and full employment for its members and those it represents. However, I cannot determine from the record whether Moran and Beazer would have been employed the full five days a week if they were assigned all the available work. The best I can determine is that they would have been able to work more than the three days a week they were scheduled. Additionally, I believe that Rouw believed that he had the right to continue doing bargaining unit work even during the short work week period. Though he was wrong in this belief, I do not believe that he violated the contract of the April 30, 1980 letter willfully in this regard.

Accordingly, Moran and Beazer are entitled to some monetary damages for the reduction in their work schedules during the short work week period, but are not entitled to be made entirely whole as if they had worked the full five days each week. The appropriate measure of damages is to accord to both Moran and Beazer one-half of the difference between what they earned working three days and what they would have earned on a straight time basis had they worked five days during the period August 27 to October 20, 1985. The Employer is directed to pay that amount to each.

DATED: December 8, 1985
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 New Jersey Employer-Employee Relations Act, (attached hereto and made a part hereof as Exhibit A), permits public employers and public employee unions to negotiate representation fee provisions in collective bargaining agreements. Under those provisions a public employer is permitted to withhold and the majority union may receive a representation or "agency" fee assessed against employees in the bargaining unit who choose not to become members of the union representing them.

The act was recently interpreted and held to be constitutional by the Third Circuit Court of Appeals in Robinson v. State of New Jersey, Docket No. 82-5698 (3rd Circ. 1984). The United States Supreme Court recently considered the agency fee charges permissible under the Railway Labor Act in Ellis v. B.R.A.C., Docket No. 82-1150 (April 25, 1984). The Ellis decision addressed the validity of various charges as a matter of statutory interpretation and constitutional propriety. In Ellis, the Court held that the standard for determining the propriety of the agency fee expenditures under the Railway Labor Act is;

"... whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling
grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. Ellis v. B.R.A.C., sl op. at p.11-12

As a matter of statutory interpretation, the Ellis decision only addresses chargeable expenditures under the Railway Labor Act. However, the Court in Robinson adopted the Ellis standard for purposes of determining chargeable expenditures under the New Jersey Act. Thus at p. 20 (sl. op.) the Robinson Court said as follows:

This past term, the Supreme Court reaffirmed the "germane to collective bargaining" standard for judging the use of mandatory fees over an employee's objection:

(T)he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.

Later in its opinion, in a discussion of the mechanics of the New Jersey Public Employer-Employee Relations Act, the Robinson Court twice (at p. 26) repeated the Ellis standard. Thus under the New Jersey Act, a majority representative may charge an agency fee for the costs of negotiating and administering a collective bargaining agreement, settling grievances and disputes, and also for the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employee in the bargaining unit.

1. This scope of permissible expenditures is limited by certain exceptions discussed later in this report.
As noted above, certain expenditures are excluded for agency fee purposes, i.e. they cannot be charged to nonmembers as an agency fee. In particular, the New Jersey Act, at NJSA 34:13A-5.5(c) mandates a return of any part of an agency fee paid by a nonmember attributable to expenditures either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment . . .

In Robinson the Court held that the Federal District Court had erred in restricting the use of agency fees to lobbying purposes only to secure agency or legislative action required to implement a collective bargaining agreement. The Robinson Court, at pps. 24-25, in analyzing the issue, recognized that a public employee union, to be effective, must seek its goals in other forums, beyond the bargaining table (i.e. administrative, judicial and legislative). The Robinson Court discussed the workings of the New Jersey Public Employer-Employee Relations Act, and the importance of lobbying in relation to the Act, stating as follows:

For New Jersey public employees, collective bargaining is inextricably intertwined with legislative change. An examination of the mechanics of New Jersey's public employee collective bargaining agreements reveals to what extent the standard terms and conditions of employment under the NLRA or the RIA are governed by state statute or regulation. Cf. Fiberboard Paper Products v. NLRB, 379 U.S. 203 (1964); R. Gorman, Basic Text on Labor Law, 496-523 (1976) (review of mandatory subjects of bargaining under NLRA). For example, an affidavit submitted by M. Don Sanchez, the New Jersey Area Director of the CWA, in the Olsen proceeding, listed no fewer than fifteen traditional subjects of bargaining that are governed by New Jersey statutes, civil service rules, administrative regulations, or executive
orders. Among these are pensions, overtime, subcontracting, employee transfers, safety and health, medical plans. App. at 101-15.

Since many of the essential terms and conditions of employment that are mandatory subjects of bargaining under Sections 8(d) and 9(a) of the NLRA are governed by state authorities in the public employment context, a public employee union unable to lobby the state authority would be severely handicapped in performing its duties as a bargaining representative.

The Robinson Court then concluded that charges for agency fees for lobbying are permissible "so long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union," and;

Under NJSA 34:13A-5.5, a union is allowed to charge against representation fees the costs of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer. (at p.26)

Accordingly, under the Act, as judicially interpreted, and consistent with the First Amendment of the United States Constitution, any portion of a non-member's agency fee used for a prescribed purpose is to be refunded to that non-member on demand.

To meet the foregoing requirements; to avoid the use or expenditure of any portion of a non-member agency fee for a prohibited purpose, to institutionalize an impartial determination of whether an agency fee has been used improperly; and to facilitate the process of making refunds if necessary, the New Jersey Education Association, hereinafter referred to as the "Association" or as "NJEA," receives from its local affiliates, hereinafter
referred to as "local association(s)" an amount equal to 85% of the dues normally charged members, times the number of agency fee payers, as the cumulative agency fee for non-members under collective bargaining agreements with agency fee provisions; and the "local associations" have promulgated Demand and Return Systems, attached hereto and made a part hereof as Exhibit B. These Systems were held to satisfy constitutional requirements in Robinson v. State of New Jersey, supra.

In accordance with Section A of said Demand and Return System, the Undersigned was selected to serve as the Representation Fee Umpire "to determine the percentage of the Association's dues income for the 1983-84 membership year that was expended for purposes related to negotiations, administering collective bargaining agreements, settling grievances and disputes involving activities or undertakings normally or reasonably employed to implement or effectuate the duties of the Union as exclusive representative of employees in the bargaining unit," and, per force conversely, the percentage, if any, of its expenditures used for purposes not related to those activities, which if supported or paid for by any portion of an agency fee would constitute an improper use of such fee, entitling the non-member to a refund in the amount so used.

In carrying out my assignment I have been guided by the aforesaid citations, and also by the decision of the United States Supreme Court in Abood v. Detroit Board of Education and other relevant court citations related thereto.
I met with representatives of the Association on January 8 and January 10, 1985. At my request I was provided with the Association's budget for the 1983-1984 membership year, the audited statement of its actual expenses for that year, underlying documents and other original material affirming and supportive of said expenses, its Reports to the Delegate Assembly dated January 19, 1985, detailed and extensive written and verbal statements of the activities and responsibilities of the various divisions of the Association for which there are budget allocations and expenditures, and examples of the "work product" or services of those divisions in the form of reports, publications, memoranda, programs and research.

Over the aforesaid period of time I interviewed Directors of the Association, or representatives of the divisions for which there were budget allocations and expenditures during the 1983-1984 membership year. I am satisfied that with regard to budgetary expenditures, my discussions with those persons, and my examinations of the records and activities for which they are responsible, were comprehensive, searching and thorough.

FINDINGS OF FACT

During the 1983-1984 membership year the Association's total expenditures (for the purposes of this report overwhelmingly and materially from dues), was $17,360,450. That amount was apportioned among and accounted for by the following nine divisions with the amounts spent by each division as follows:
UniServ  $4,492,234
Legal Services  2,556,317
Research & Economic Services  822,542
Communications  1,644,098
Government Relations  408,433
Instruction and Training  996,229
Business Division  2,889,092
Governance and Administration  1,570,446
Fringe Benefits  1,981,059

A description of the responsibilities and activities of the foregoing divisions and my determinations of which of said activities and the expenditures thereof fall within the category for which the use of funds from an agency fee is proscribed, are as follows:

UNI-SERV DIVISION

UNISERV HEADQUARTERS' OFFICE
Provides for personnel costs for headquarters' based staff.

ACTIVE SUPPORTIVE
This category provides for promotion, organizing efforts, leadership training and a newsletter for active supportive members. This appropriation supplements the funds presently included in other accounts for service to active supportive members.

MEMBERSHIP MEETINGS
To cover the cost of postage, travel, meals, promotion, and materials to aid membership orientation and information exchange.

MEMBERSHIP PROMOTION
To provide for forms, promotional materials, postage, and other expenses for conducting the annual membership campaign.

NEGOTIATION CONSULTANTS
NJEA negotiation consultants assist UniServ representatives in actively representing teachers and other school personnel in negotiations with school boards and in processing of grievances. The requested amount is for earnings, expenses, and employer's share of state and federal taxes.

1. Except, for reasons later explained, the Division of Governance and Administration and 'Fringe Benefits.'
STRENGTHEN LOCALS
To provide emergency financial assistance to local associations experiencing exceptional problems and challenges and to defeat attempts by other membership organizations to raid the membership. (See Revenue page for NEA supplement under "Organizing Support.")

HIGHER EDUCATION
To provide for materials, postage, newsletters, conferences, periodicals, and leadership training for the Higher Education Unit.

REGIONAL OFFICES PERSONNEL
Provides for staffing of eighteen (18) UniServ offices, including the Higher Education office.

REGIONAL OFFICES OPERATING COSTS
Provides for office materials and supplies, travel and meal expenses, telephone, postage, and various miscellaneous items.

REGIONAL OFFICES RENT
Provides for the rentals of eighteen (18) UniServ offices and for related custodial and utilities requirements.

REGIONAL OFFICES FURNITURE & EQUIPMENT
Provides for the replacement and amortization of typewriters, copiers, and other business machines and office furniture.

Based on the entire record before me I conclude that the foregoing activities and expenditures are related to collective bargaining, contract administration or grievance handling within the controlling statutory and judicially determined meaning thereof except the following:

Uni-Serv Headquarters Office
That portion of the costs and expenditures devoted to NJEA and NEA convention staffing, PTA and School Board Association activities and out-of-state meetings and workshops,

in the amount of....................$56,373

Active Supportive
That portion of costs and expenditures devoted to members only benefits and organizing or political activity,

in the amount of....................$61,921
Membership Meetings
That portion of those meetings devoted to member-only benefits and political activities,
in the amount of.................$26,478

Membership Promotion
That portion of expenditures devoted to materials which promote members-only benefits, i.e., attorney referral program, supplemental economic services, etc.,
in the amount of...................$17,900

Negotiations Consultants
That portion of these expenditures was used for the NEA Unification campaign during 1983-1984 and for the Woodbridge representation election,
in the amount of.....................$ 8,864

Strengthening Locals
That portion of these expenditures was used for organizing purposes in Woodbridge and Newark,
in the amount of.....................$36,675

1. Higher Education
That portion of meetings and materials devoted to member-only benefits and organizing or political in the State Colleges or activity,
in the amount of......................$ 3,759

2. Uni-Serv Regional Office Personnel
That portion of staff activities devoted to NJEA Convention Staffing, PSA/NSO, GSA activities, pension consultations, travel inquiries, attorney referral program, out-of-state meetings and workshops,
in the amount of.....................$212,492

3. Regional Operating Costs
That portion of expenditures and costs devoted to member-only benefits and political activity,
in the amount of..................$19,838

4. **Regional Offices Rent**
   That portion of rental space devoted to member-only benefits and political activity,
   in the amount of..................$15,145

5. **Regional Offices Furniture & Equipment**
   That portion of furniture and equipment devoted or allocatable to member-only benefits
   and political activity,
   in the amount of..................$ 2,213

**TOTAL**..........................$461,657

**NOTE:** 1, 2, 3, 4 and 5 - For purposes of calculating that part of the NEA UNISERV grant used for proscribed activities, I calculate that 8.13% of the cost of these activities were so expended.

**LEGAL SERVICES DIVISION**

Maintains legal protection and support for bargaining unit members and local Associations in cases involving job security, employee discipline, breaches of law or contract by school boards. Pays one-half cost of local arbitrations service maintained through 16 retained law firms and headquarters staff in executive office.

Promotes and protects professional rights of members and affiliates through the Professional Rights and Responsibilities Committees. Financial assistance is granted for affirmative action in such diverse areas of concern as non-tenure teacher rights, academic freedom, court suits, negotiations, tenure protection, withholding of increments, hardship cases, restraining
orders, suspensions unilateral board actions, pension appeals, assault and battery charges, fact-finding inquiries, and arbitration hearings.

I conclude that a portion of the cases and legal matters handled by the Division of Legal Services falls within the area of prescribed activities. These activities are, agency shop litigation expenses, legal costs of bargaining elections, umpire's fees, Moment of Silence amicus, agency shop arbitration, and the attendant staff costs...

in the amount of $110,910

RESEARCH AND ECONOMIC SERVICES DIVISION

Responsible for analyzing contracts and publishing periodic studies of the various provisions in current collective bargaining contracts; consults with and assists field staff and local associations with school district budget analysis, fact-finding, salary guide construction and other financial aspects of collective bargaining; coordinates research segment of annual training conference designed to assist local negotiators; analyzes proposed legislation in order to identify bills which would be damaging to local bargaining efforts and other NJEA activities; answers occasional questions dealing with unemployment insurance. Provides sample survey research services primarily relative to the Association's collective bargaining stance; performs general research projects primarily directed at responding to requests from local association leaders and field staff for information necessary for collective bargaining or grievance arbitration.

Maintains the Research Library with duties of analyzing
legal decisions, arbitration awards, Public Employment Relation
Commission rulings, and individual legal opinions; creates indexes
of the aforementioned materials in order that they will be accessible
to field representatives, local negotiators and grievance
chair persons; provides full text of such materials upon request
from field representatives, local negotiators and grievance chair
persons; distributes NJEA statistical bulletins for collective
bargaining upon request.

Collects information from local school districts and state
agencies and prepares statistical bulletins and circulars based
upon such information for collective bargaining.

Conducts individual consultations to and with members in the areas of pensions, fringe benefits; conducts workshops for
members concerning pensions and fringe benefit programs. Responsible for NJEA Special Services program which consists of a
variety of offerings for members' benefits including the
Washington National Group Income Protection Plan, the Magic Kingdom Club, the TSO loan program and the Travel Service.

I conclude that the costs and expenditures allocated to Special Services for members only (except the Travel Service), a portion
of salaries of two employees dealing with research on matters unrelated to collective bargaining, contract administration or grievance
processing, a portion of the costs of the Library and a portion of certain materials and supplies, should be excluded from costs and
expenditures related to collective bargaining, contract administration and grievance processing. The costs and expenditures of the Travel
Service are not among those prohibited. No dues or agency fees are used for that purpose. The
costs are covered by revenues earned by the Travel Service. I calculate the total prescribed costs to be $152,540.

COMMUNICATIONS

COMMUNICATIONS OFFICE
Provides for personnel cost for the Communications Division.

AUDIO-VISUAL PROGRAMS
Provides for the purchase of materials and equipment to be used by the Media Center for the production of audio-visual and training films.

PRESS RELATIONS
Provides for materials, postage, and supplies used for press releases and relations. The amount includes funds for the President's column to appear in the Sunday Star Ledger and Philadelphia Inquirer, N.J. Supplement.

PUBLIC MEDIA
To provide printed, visual, and audio materials, billboards for public consumption in connection with NJEA campaigns and positions (i.e. tenure, school finance and taxes, reduction in force). Also, to provide to locals materials for community relations activities.

LOCAL LEADER
Provides for thirty-five (35) weekly mailings and ten (10) monthly mailings to leaders of 1700 local and county affiliates and ten (10) mailings to 6800 association representatives.

REVIEW MAGAZINE
Provides for the cost of printing, mailing, and art work for the production of NJEA's magazine, the REVIEW.

REPORTER
Provides for the cost of printing, mailing, and art work for the REPORTER.

I conclude that the following activities and the expenditures related thereto as indicated below are not related to collective bargaining, contract administration and grievance processing.
Audio-Visual
Small percentage of radio tapes and video tapes used to support political action programs,
in the amount of.............$ 9,770.07

Press Relations
News media staff gives support to notify public of recommendations of political action committee and of other member activities on behalf of "educator for" committees,
in the amount of.............$36,589.44

Public Media Projects
Portion of local community relations training and organizing funds used to assist local affiliates that wish to be active on behalf of budgets and/or candidates in local school elections. Most of this account is for paid newspaper, magazine, billboard and radio ads -- none of which is used other than to enhance image of members represented and to support members' bargaining efforts. A portion of this budget (8%) in Campaign and Organizing and in Materials covers training, building posters, and special promotions designed to get out a "YES" vote for local school budgets in April, as well as assist local committees working on behalf of the election of board members,
in the amount of.............$37,814.09

Review
Monthly magazine carries articles on education developments in general and by State agencies that impact on work of members represented. Very small portion of magazine deals with political action activities. Occasional magazine articles deal with controversial social issues outside the realm of education work of members represented,
in the amount of.............$64,782.75
Local Leader
Special weekly mailings to affiliate presidents and monthly mailings to association representatives in each building deal mostly with leadership material in support of bargaining and representational issues. Occasional information is carried on political action efforts,
in the amount of.................$ 8,581.26

Reporter
Monthly newspaper is main vehicle for informing membership when political activities do take place. However, this is mainly done in October endorsement issue. Last year 15% of the Reporter's pages were used specifically for reporting on Political Action endorsements. Special October issue prints distributes organization's annual convention program. This includes a small portion of programming on controversial social issues outside the realm of education work of members represented,
in the amount of.................$ 33,301.34

Service to Other Divisions
Publications and media support is provided for programs operated by other divisions, some of which is beyond normal representational activity,
in the amount of.................$ 13,512.77
For a total of.................$204,351.71

GOVERNMENT RELATIONS
The activity of Government Relations centers around three major responsibilities:
1) lobbying
2) political action
3) regulatory aspects of State agencies

LOBBYING
This includes extraordinary contact with internal bodies (e.g., Executive Committee, Delegate Assembly, Government Relations Committee); regular contact with corporate legal counsel; daily contact with officials of government including Secretary of State, Attorney General, Department of Banking,
Department of Civil Service, Department of Community Affairs, Department of Education, Department of Higher Education, Department of Human Services, Department of Insurance, Department of Labor & Industry, Department of the Treasury, and Chief Counsel; 40 members of the N.J. Senate; 80 members of the N.J. General Assembly; approximately 240 government aides; 2 U.S. Senators; 14 members of the U.S. House of Representatives. Also, contact with a couple of hundred people in N.J. public affairs, including lobbyists, journalists, coalitions such as N.J. Citizen Action, labor unions, drinking age, etc., with local affiliate presidents as requested by the NJEA UniServ offices; and with the NEA Government Relations staff on federal legislative matters.

Activities of this Division which fall in the proscribed categories as unrelated to collective bargaining, contract administration and grievance handling, as defined by statute and court decisions, can be best quantified by percentages of the Division Budget in the three areas of:

- Legislative Conference
- Legislative Field Project
- Legislative Publications

Included in the foregoing are the following lobbying activities not related to permissible activities:

A-1825 - To establish the State Council on the Arts in the Department of State; increases the public membership.

S-1745 - Transfers the State Council on the Arts to the Department of State; increases the public membership.

A-258 - Permits the continued use of certain school buses for 12 years.

A-1785 - Establishes an Education Testing Program, eliminates the minimum Basic Skills Testing Program; appropriates $911,000.

A-3318 - Designated the "Worker & Community Right to Know Act" concerning certain hazardous substances in the workplace and the community; appropriates $1,700,000.
A-2061 - Designated the "Infrastructure Bank Act,"
A-2143 - creates the infrastructure bank; appropri-
ates $95,000.
A-1064 - Permits students of public schools to partici-
pate in a one-minute period of silence be-
fore the opening of each school day.
A-167 - Provides procedures for standardized testing.
S-1962 - Requires every board of education to adopt
a course of study in science and mathematics
in elementary grades and in high school.
A-2249 - Provides for health care benefits for certain
retired employees of local board of education
and institutions of higher education.
SCR-30 - Proposes an amendment to the Constitution to
provide for constitutional amendments by
initiative petition.

And lobbying on legislation concerned with Child Abuse,
Urban Economic Development, Divestiture of Pension Funds in
Companies that do business in or with South Africa, Equal Rights
Amendment and Age Discrimination.

POLITICAL ACTION
The authority for NJEA PAC is found in the NJEA
PAC Guidelines: "History." A Political Action
Study Committee was established by the NJEA Dele-
gate Assembly in November 1971 to explore the
feasibility of political action by NJEA members
to the extent of endorsing candidates and
participating in political campaigns for their
election to office. Reaching the conclusion
that the NJEA should establish a political action
committee closely allied to the NJEA structure,
the Study Committee recommended an information
program for the membership which was adopted by
the NJEA Delegate Assembly in May 1972. NJEA
Delegate Assembly approval at its November 1972
meeting signaled the beginning of organized
political action for the teachers of New Jersey.
In February 1973, the NJEA Executive Committee
adopted general guiding principles and estab-
lished the NJEA PAC fund.

As with lobbying, there is a tremendous amount
of internal contact which must be maintained in
the political action field. Many of the comments
on people contact, the work done and information-
al writing are similar in political action. The
Division deals with:

-- offices of the Democratic and Republican parties
-- county chairpersons of the Democratic and Republican parties
-- 240 party candidates plus independents
-- campaign managers
-- work with coalitions on certain candidates
-- media people
-- NJEA member volunteers to approximately 50-60 campaigns
-- NJEA PAC Operating Committee (comprised of the NJEA Executive Committee, County Presidents, and NJEA Government Relations Committee)
-- NJEA PAC Board of Trustees (comprised of the NJEA Executive Committee)
-- Federal Elections Commission
-- Clerk of the U.S. Senate
-- Clerk of the U.S. House of Representatives
-- N.J. Election Law Enforcement Commission
-- Attorney General's office
-- NEA-PAC staff

AGENCY MONITORING

Agency monitoring became a responsibility of the NJEA Government Relations Division by NJEA Executive Committee approval of a staff reorganization plan in August 1981.

As in lobbying and political action, there is considerable and external contact with people and public bodies, for example:

-- members of the Certification, Evaluation and Tenure Committee
-- Commissioner of Education
-- approximately 20 members of the State Department of Education staff bureaucracy
-- State Board of Education
-- State Board of Higher Education
-- State Board of Examiners
-- State Department of Education-related commissions, councils, advisory committees, on which some 30 NJEA members and staff serve
-- 3 Regional Curriculum Service Units

I find that 4% of the expenditures of the budget for Legislative Conference involved proscribed activities, in the amount of $917.13
7% of the expenditures of the budget for Legislative Field Project involved proscribed activities,
in the amount of $22,699.47

12% of the expenditures of the budget for Legislative Publications involved proscribed activities,
in the amount of $7,347.20

For a total amount of $30,963.80

INSTRUCTION AND TRAINING

INSTRUCTION AND TRAINING OFFICE
Provides for personnel costs of the Instruction and Training Division, including the Professional Development Institute.

PROFESSIONAL ACTIVITIES
To provide funds for the protection and enhancement of professional rights; i.e., teacher evaluation, compensatory education, tenure, certification, and assistance to local associations.

INSTRUCTIONAL ACTIVITIES
To provide funds for activities related to furtherance of educational quality, i.e., human relations, high school graduation requirements, violence and vandalism, migrant education, environmental education, gifted talented standards, exceptional children, Good Ideas Conference, etc.

PROFESSIONAL DEVELOPMENT & IN-SERVICE
To provide funds for television in-service series, cooperative projects with colleges and other organizations and professional development project feasibility study.

PROGRAM DEVELOPMENT
To provide funds for addressing emerging critical issues and special activities; i.e., recertification, monitoring State Board of Education, EIC's and teacher centers.

PROFESSIONAL DEVELOPMENT INSTITUTE
Provides funds for establishing the components of the Institute (transcript service, directory, endorsement of programs, registry, certificates of attendance, etc.) as operating services.

LEADERSHIP WORKSHOPS
To provide for speakers, facilities, postage,
travel, meals promotion and materials at various local leader conferences during the year.

LEADERSHIP OPERATIONS
This is the basic training account. It provides for materials, supplies, and expenses for leadership training at the local level. Included are the cost of handbooks, new teacher kits, and cost of providing the A/R Handbook.

SUMMER LEADERSHIP CONFERENCE
To provide for speakers, facilities, postage, travel, meals, promotion and materials for Workshops I and II at Montclair State College. Funds are also included for grants to aid locals in sending Association Representatives to the Workshop.

TRAINING CONSULTANTS
Provides for part-time training consultants to assist locals in workshops of a professional nature.

CONVENTION PROGRAMS
Provides funds for programmatic expenses, staff accommodations and meals, promotional activities and materials, group meetings, dances and other functions, printing and distribution of the program and directory and aid to affiliated groups.

I conclude that the following costs and expenditures are not related to collective bargaining, contract administration or grievance processing.

The job location service and the Impaired School Employee Program,
in the amount of.................$ 21,995

The costs of training on how to conform to state regulations on record keeping,
in the amount of.................$ 33,455

The costs of the specialized services and materials relating to the performance and working conditions of the employee at the worksite, which are available for members only,
in the amount of.................$ 25,188

About 10% of the costs of the Summer Leadership Conference devoted to political activity,
in the amount of $4,900

The total cost of programmatic expenses related to the annual NJEA convention (for members only),
in the amount of $72,488
For a total of $158,026

BUSINESS DIVISION

BUSINESS OFFICE
Provides for personnel costs for the business office, as well as for temporary and contracted help for total operations.

ACCOUNTING OFFICE
Provides for personnel, materials, supplies and equipment costs for the accounting office.

COMPUTER CENTER
Provides for personnel, materials, supplies and computer equipment and software amortization costs. Also included are funds for the replacement of fully depreciated air conditioning equipment.

MEMBERSHIP PROCESSING
Provides for personnel, contracted services, membership processing reimbursement to locals, supplies, materials, and postage for this unit. The proposed amount includes funds for improving the dues accounting system.

HEADQUARTERS' OPERATIONS
Provides for personnel, supplies and materials, taxes, mortgage amortization, maintenance, building repairs and renovations, equipment replacement and rentals custodial services, utilities and insurance for NJEA headquarters.

CAPITOL STREET OPERATIONS
Provides for personnel, supplies and materials, taxes, maintenance, equipment rental and replacement and servicing, utilities for the mailroom, storage room and space for NJEA Travel Service.

ORGANIZATION MANAGEMENT
To provide kits and materials to be used for the improvement of local organizational management. Funds are also requested to cover workshops for local officers; i.e., Presidents' and Treasurers' Workshops.

CONVENTION EXPOSITION
Provides for Convention Hall rental, decorating and drayage services, exhibit kits, security and
other facility related costs in Atlantic City.

CAPITAL CONSTRUCTION
Provides for the renovation and rehabilitation of the NJEA Headquarters building. The lower level is completed. The funds requested are to begin work on the upper levels. It is anticipated that this will be a two year project with additional funding needed from next year's budget.

NEA CONVENTION
The amount proposed is based upon full funding for up to 450 state delegates, in addition to funds for operating, administrative, and function expenses while at the Convention.

OFFICE AUTOMATION
Provides funds for the first phase of a three phase computer network with NJEA Headquarters and regional offices.

I conclude that the following costs and expenditures, calculated primarily in the amount of time spent by staff of this Division on matters unrelated to collective bargaining, contract administration and grievance handling are:

2.8% of the time of the Director's office,
in the amount of..................$ 7,434

4.9% of the time of the staff of Data Processing/Computer Center/Office Automation (for political campaign purposes),
in the amount of..................$ 33,943

11.4% of the time of the staff of the accounting office (for political oriented transactions),
in the amount of..................$ 14,194

4.5% of the time of the staff of Membership Processing, (for political campaign purposes),
in the amount of..................$ 16,377

8.6% of the time of Capitol Street Operations (for political activities),
in the amount of..................$ 31,457
Plus the net cost and expenses of the NJEA Convention (for members only),
in the amount of..................$117,864

Plus overhead costs related to the foregoing,
in the amount of..................$100,397

For a total of..................$321,666

The total foregoing excluded costs and expenditures during the 1983-1984 membership year total, $1,440,115 or 10.4% of the total NJEA budget and expenditures for that year.

I consider it logical and appropriate therefore to conclude that 10.4% of Governance and Administration division expenses is attributable to excluded activities, in the amount of..................$163,326 and that 10.4% of the Fringe Benefit account be treated similarly, in the amount of..................$162,160.

Accordingly, the total amount of expenditures during the 1983-1984 membership year that were unrelated to the statutory and/or judicially determined matters of collective bargaining, contract administration or grievance processing is

.................................$1,765,601.

This amount constitutes 10.17% of the total NJEA expenditures for the 1983-1984 membership year.

DETERMINATION

10.17% of the total NJEA budget and expenditures for the 1983-1984 membership year were for activities statutorily or judicially determined to be unrelated to collective bargaining, contract administration or grievance processing, and may not be financed from represent-
ative or "agency" fees paid by non-members. Conversely, 89.83% of the total budget and expenditures were used for permitted activities on behalf of non-members as well as members. As the non-member paid an "agency" fee only 85% of what a member paid in dues, I conclude that the NJEA spent more for permitted activities on behalf of non-members (as well as members) than non-members contributed toward those activities. Inasmuch as the representative or "agency" fee of a non-member was 15% less than the dues paid by a member, it would appear that none of the proscribed activities were paid for out of an agency fee. Accordingly, non-members are not entitled to refunds from the NJEA portion of the representation fee.

Eric J. Schmertz
Representation Fee Umpire

DATED: February 11, 1985
STATE OF New York ) ss.: 
COUNTY OF New York 

I, Eric J. Schmertz do hereby affirm upon my Oath as Umpire that I am the individual described in and who executed this instrument, which is my AWARD.
The New Jersey Education Association, hereinafter referred to as the "Association," 

as "A.F.E.A." derives from its local affiliates, hereinafter referred to as "Local Associations," the local associations' 
in an amount equal to 85% 
of the dues normally charged members, times the number of 
agency fee payers, as the 
cumulative agency fee for 
non-members under collective 

bargaining agreements with agency fee payers, and the "Local Associations" have 

monologued "Demand to Return" 
Systems.
The New Jersey Employer-Employee Relations Act, (attached hereto and made a part hereof as Exhibit A), permits public employers and public employee unions to negotiate representation fee provisions in collective bargaining agreements. Under those provisions a public employer is permitted to withhold and the majority union may receive a representation or "agency" fee assessed against employees in the bargaining unit who choose not to become members of the union representing them.

However, the Act as interpreted in Paul H. Robinson, et al v. State of New Jersey and Joseph W. Antonacci, et al v. State of New Jersey (attached hereto and made a part hereof as Exhibit B) prohibits the use of any part of an "agency" fee for purposes not related to collective bargaining, contract administration and grievance processing (including the prohibited use of any portion of "agency" fee for lobbying purposes other than lobbying specifically to secure agency or legislative action required to implement a collective bargaining agreement).

Under the Act, as judicially interpreted, and consistent with the First Amendment of the United States Constitution, any portion of a non-member's agency fee used for a proscribed purpose is to be refunded to that non-member on demand.
To meet the foregoing requirements; to avoid the use or expenditure of any portion of a non-member agency fee for a prohibited purpose; to institutionalize an impartial determination of whether an agency fee has been used improperly; and to facilitate the process of making refunds if necessary, the New Jersey Education Association, hereinafter referred to as the "Association" or as "NJEAA," assessed an agency fee on non-members it represents under collective bargaining agree-
ments with agency fee provisions that is 15% less than the dues charged members; and has promulgated a Demand and Return System (attached hereto and made a part hereof as Exhibit C.)

In accordance with Section A of said Demand and Return System, the Undersigned was selected to serve as the Representa-
tion Fee Umpire "to determine the percentage of the Association's dues income for the 1982-83 membership year that was expended for purposes related to collective bargaining, contract admin-
istration and grievance processing," and, per force conversely, the percentage, if any, of its expenditures used for purposes not related to those activities, which if supported or paid for by any portion of an agency fee would constitute an improper use of such fee, entitling the non-member to a refund in the amount so used.

In carrying out my assignment I have been guided by the aforesaid citations, by the decision of the United States Supreme Court in Abood v. Detroit Board of Education (attached
hereto and made part hereof as Exhibit D) and the other relevant federal court citations related thereto.

I met with representatives of the Association on October 10, October 19, November 4 and November 23, 1983. At my request I was provided with the Association's budget for the 1982-83 membership year, the audited statement of its actual expenses for that year, underlying documents and other original material affirming and supportive of said expenses, its Reports to the Delegate Assembly dated March 14, 1983, detailed and extensive written and verbal statements of the activities and responsibilities of the various divisions of the Association for which there are budget allocations and expenditures, and examples of the "work product" or services of those divisions in the form of reports, publications, memoranda, programs and research.

Over the aforesaid period of time I interviewed officers of the Association, its financial and accounting personnel and the heads or representatives of the divisions for which there were budget allocations and expenditures during the 1982-83 membership year. I am satisfied that with regard to budgetary expenditures, my discussions with those persons, and my examinations of the records and activities for which they are responsible, were comprehensive, searching and thorough.
FINDINGS OF FACT

During the 1982-83 membership year the Association's total expenditures (for the purposes of this report overwhelmingly and materially from dues), was $16,146,600. That amount, including an appropriation to Reserves, was apportioned among and accounted for by the following eight divisions with the amounts spent by each division as follows:

- Uni-Serv: $5,017,440
- Legal Services: $2,212,423
- Research, Economics & Service: $996,764
- Communications: $1,646,200
- Government Relations: $534,554
- Instruction and Training: $1,235,331
- Business Division: $2,353,091
- Governance and Administration: $1,516,230

Apportioned to Reserves was the amount of $634,567.

A description of the responsibilities and activities of the foregoing divisions and my determinations of which of said activities and the expenditures thereof fall within the category for which the use of funds from an agency fee is proscribed, are as follows:

**UNI-SERV DIVISION**

**UNISERV HEADQUARTERS' OFFICE**
Provides for personnel costs for headquarters' based staff.

**ACTIVE SUPPORTIVE**
This category provides for promotion, organizing efforts, leadership training and a newsletter for active supportive members. The appropriation supplements the funds presently included in other accounts for service to active supportive members.

**MEMBERSHIP MEETINGS**
To cover the cost of postage, travel, meals, promotion, and materials to aid membership orientation and information exchange.
MEMBERSHIP PROMOTION
To provide for forms, promotional materials, postage, and other expenses for conducting the annual membership campaign.

NEGOTIATION CONSULTANTS
NJEA negotiations consultants assist UniServ representatives in actively representing teachers and other school personnel in negotiations with school boards and in processing of grievances. The requested amount is for earnings, expenses, and employer's share of state and federal taxes.

STRENGTHEN LOCALS
To provide emergency financial assistance to local associations experiencing exceptional problems and challenges and to defeat attempts by other membership organizations to raid the membership. (See Revenue page for NEA supplement under "Organizing Support.")

HIGHER EDUCATION
To provide for materials, postage, newsletters, conferences, periodicals, and leadership training for the Higher Education Unit.

REGIONAL OFFICES PERSONNEL
Provides for staffing of eighteen (18) UniServ offices, including the Higher Education office.

REGIONAL OFFICES OPERATING COSTS
Provides for office materials and supplies, travel and meal expenses, telephone, postage, and various miscellaneous items.

REGIONAL OFFICES RENT
Provides for the rentals of eighteen (18) UniServ offices and for related custodial and utilities requirements.

REGIONAL OFFICES FURNITURE & EQUIPMENT
Provides for the replacement and amortization of typewriters, copiers, and other business machines and office furniture.

Based on the entire record before me I conclude that the following activities and expenditures are related to collective bargaining, contract administration or grievance handling within the controlling statutory and judicially determined meaning thereof, except the following
Uni-Serv Headquarters Office

That portion of the costs and expenditures devoted to NJEA and NEA convention staffing, lobbying activities, PTA and School Board Association activities and out-of-state meetings and workshops,

in the amount of..................$31,350

Active Supportive

That portion of costs and expenditures devoted to members only benefits and legislative and political activity,

in the amount of..................$2,050

Membership Meetings

That portion of those meetings devoted to member-only benefits and legislative or political activities,

in the amount of..................$14,700

Membership Promotion

That portion of expenditures devoted to materials which promote members-only benefits, i.e., attorney referral program, supplemental economic services, etc.,

in the amount of..................$11,500
Higher Education

That portion of meetings and materials devoted to member-only benefits and political or legislative activity,
in the amount of...............$ 945

Uni-Serv Regional Office Personnel

That portion of staff activities devoted to NJEA Convention Staffing, PSA/NSO, GSA activities, pension consultations, travel inquiries, attorney referral program, out-of-state meetings and workshops,
in the amount of...............$149,035

Regional Operating Costs

That portion of expenditures and costs devoted to member-only benefits and political or legislative activity,
in the amount of...............$ 19,920

Regional Offices Rent

That portion of rental space devoted to member-only benefits and political or legislative activity,
in the amount of...............$ 13,250

Regional Offices Furniture & Equipment

That portion of furniture and equipment devoted or allocatable to member-only benefits and political or legislative activity,
in the amount of...............$ 4,150

TOTAL...........................$246,900

LEGAL SERVICES DIVISION

Maintains legal protection and support for bargaining unit members and local Associations in cases involving job security, employee discipline, breaches of law or contract by
school boards. Pays one-half cost of local arbitrations service maintained through 16 retained law firms and headquarters staff in executive office.

Promotes and protects professional rights of members and affiliates through the Professional Rights and Responsibilities Committees. Financial assistance is granted for affirmative action in such diverse areas of concern as non-tenure teacher rights, academic freedom, court suits, negotiations, tenure protection, withholding of increments, hardship cases, restraining orders, suspensions, unilateral board actions, pension appeals, assault and battery charges, fact-finding inquiries, and arbitration hearings.

I conclude that a small portion of the cases and legal matters handled by the Division of Legal Services such as the costs of an amicus brief in the Moment of Silence case and costs involved in writing and analyzing legislation are not related to collective bargaining contract administration or grievance processing. I calculate the costs and expenditures thereof to have been..........................$ 46,600

RESEARCH AND ECONOMIC SERVICES DIVISION

Responsible for analyzing contracts and publishing periodic studies of the various provisions in current collective bargaining contracts; consults with and assists field staff and local associations with school district budget analysis, fact-finding, salary guide construction and other financial aspects of collective bargaining; coordinates research segment of annual training conference designed to assist local negotiators; analyzes proposed legislation in order to identify bills which would be
damaging to local bargaining efforts and other NJEA activities; answers occasional questions dealing with unemployment insurance. Provides sample survey research services primarily relative to the Association's collective bargaining stance; performs general research projects primarily directed at responding to requests from local association leaders and field staff for information necessary for collective bargaining or grievance arbitration.

Maintains the Research Library with duties of analyzing legal decisions, arbitration awards, Public Employment Relation Commission rulings, and individual legal opinions; creates indexes of the aforementioned materials in order that they will be accessible to field representatives, local negotiators and grievance chair persons; provides full text of such materials upon request from field representatives, local negotiators and grievance chair persons; distributes NJEA statistical bulletins for collective bargaining upon request.

Collects information from local school districts and state agencies and prepares statistical bulletins and circulars based upon such information for collective bargaining.

Conducts individual consultations to and with members in the areas of pensions, fringe benefits; conducts workshops for members concerning pensions and fringe benefit programs. Responsible for NJEA Special Services program which consists of a variety of offerings for members' benefits including the Washington National Group Income Protection Plan, the Magic Kingdom Club, the TSO loan program and the Travel Service.
I conclude that the costs and expenditures allocated to Special Services for members only (except the Travel Service), a portion (19%) of salaries of two employees dealing with research on matters unrelated to collective bargaining, contract administration or grievance processing, a portion (10%) of the costs of the Library and a portion (70%) of certain materials and supplies, should be excluded from costs and expenditures related to collective bargaining, contract administration and grievance processing. The costs and expenditures of the Travel Service are not among those prohibited. No dues or agency fees are used for that purpose. The costs are covered by revenues earned by the Travel Service. I calculate the total prescribed costs to be $161,731.

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**COMMUNICATIONS**

**COMMUNICATIONS OFFICE**
Provides for personnel cost for the Communications Division.

**AUDIO-VISUAL PROGRAMS**
Provides for the purchase of materials and equipment to be used by the Media Center for the production of audio-visual and training films.

**PRESS RELATIONS**
Provides for materials, postage, and supplies used for press releases and relations. The amount includes funds for the President's column to appear in the Sunday Star Ledger and Philadelphia Inquirer, N.J. Supplement.

**PUBLIC MEDIA**
To provide printed, visual, and audio materials, billboards for public consumption in connection with NJEA campaigns and positions (i.e. tenure, school finance and taxes, reduction in force). Also, to provide to locals materials for community relations activities.

**LOCAL LEADER**
Provides for thirty-five (35) weekly mailings and ten (10) monthly mailings to leaders of 1700 local and county affiliates and ten (10) mailings to 6800 association representatives.

**REVIEW MAGAZINE**
Provides for the cost of printing, mailing, and art work for the production of NJEA's magazine, the REVIEW.
REPORTER

Provides for the cost of printing, mailing, and art work for the REPORTER.

I conclude that the following activities and the expenditures related thereto as indicated below are not related to collective bargaining, contract administration and grievance processing.

Audio-Visual

Small percentage of radio tapes and video tapes used to support political action programs,

in the amount of...................$ 9,430.02

Press Relations

News media staff gives support to notify public of recommendations of political action committee and of other member activities on behalf of "educator for" committees,

in the amount of...................$ 23,642.62

Public Media Projects

Portion of local community relations training and organizing funds used to assist local affiliates that wish to be active on behalf of budgets and/or candidates in local school elections. Most of this account is for paid newspaper, magazine, billboard, and radio ads -- none of which is used other than to enhance image of members represented and to support members' bargaining efforts. A portion of this budget (8%) in Campaign and Organizing and in Materials covers training, building posters, and special promotions designed to get out a "YES" vote for local school budgets in April, as well as assist local committees working on behalf of the election of board members,

in the amount of...................$ 34,887.02

Review

Monthly magazine carries articles on education
developments in general and by State agencies that impact on work of members represented. Very small portion of magazine deals with political action activities. Occasional magazine articles deal with controversial social issues outside the realm of education work of members represented,
in the amount of $ 22,753.60

Local Leader
Special weekly mailings to affiliate presidents and monthly mailings to association representatives in each building deal mostly with leadership material in support of bargaining and representational issues. Occasional information is carried on political action efforts,
in the amount of $ 9,295.23

Reporter
Monthly newspaper is main vehicle for informing membership when political action activities do take place. However, this is mainly done in October endorsement issue. Last year 9.3 out of a total of 156 pages (6%) was used specifically for reporting on Political Action endorsements. Special October issue prints distributes organization’s annual convention program. This includes a small portion of programming on controversial social issues outside the realm of education work of members represented,
in the amount of $ 16,965.16

Service to Other Divisions
Publications and media support is provided for programs operated by other divisions, some of which is beyond normal representational activity,
in the amount of $ 10,838.04
For a total of $ 118,381.67
I find that I need not recite the activities of the Government Relations Division because all the activities of that division consist of political activity, proscribed lobbying and government relations for which no part of an agency fee may be used.

Therefore the full budget allocation and expenditures of the Government Relations Division are not related to collective bargaining, contract administration or grievance handling,

in the amount of .................. $534,554

INSTRUCTION AND TRAINING

INSTRUCTION AND TRAINING OFFICE
Provides for personnel costs of the Instruction and Training Division, including the Professional Development Institute.

PROFESSIONAL ACTIVITIES
To provide funds for the protection and enhancement of professional rights; i.e. teacher evaluation, compensatory education, affirmative action, minority involvement, tenure, certification, and assistance to local associations.

INSTRUCTIONAL ACTIVITIES
To provide funds for activities related to furtherance of educational quality, i.e., human relations, high school graduation requirements, violence and vandalism, migrant education, environmental education, gifted talented standards, exceptional children, Good Ideas Conference, etc.

PROFESSIONAL DEVELOPMENT & IN-SERVICE
To provide funds for television in-service series, cooperative projects with colleges and other organizations and professional development project feasibility study.

PROGRAM DEVELOPMENT
To provide funds for addressing emerging critical issues and special activities; i.e., recertification, monitoring State Board of Education, EIC's, and teacher centers.
PROFESSIONAL DEVELOPMENT INSTITUTE
Provides funds for establishing the components of the Institute (transcript service, directory, endorsement of programs, registry, certificates of attendance, etc.) as operating services.

LEADERSHIP WORKSHOPS
To provide for speakers, facilities, postage, travel, meals, promotion, and materials at various local leader conferences during the year.

LEADERSHIP OPERATIONS
This is the basic training account. It provides for materials, supplies, and expenses for leadership training at the local level. Included are the cost of handbooks, new teacher kits, and cost of providing the A/R Handbook.

SUMMER LEADERSHIP CONFERENCE
To provide for speakers, facilities, postage, travel, meals, promotion, and materials for Workshops I and II at Montclair State College. Funds are also included for grants to aid locals in sending Association representatives to the Workshop.

TRAINING CONSULTANTS
Provides for part-time training consultants to assist locals in workshops of a professional nature.

CONVENTION PROGRAMS
Provides funds for programmatic expenses, staff accommodations and meals, promotional activities and materials, group meetings, dances and other functions, printing and distribution of the program and directory and aid to affiliated groups.

I conclude that the following costs and expenditures are not related to collective bargaining, contract administration or grievance processing.

The job location service and the Impaired School Employee Program,
in the amount of.................$ 25,876

The costs of training on how to conform to state regulations on record keeping,
in the amount of.................$ 31,505
The costs of the specialized services and materials relating to the performance and working conditions of the employee at the worksite, which are available for members only,

in the amount of .................. $ 27,888

One-third of the costs of meetings and materials relating to performance and working conditions of the employee at the worksite as imposed by State law and regulation (available to members only),

in the amount of .................. $ 16,884

About 10% of the costs of the Summer Leadership Conference devoted to political activity,

in the amount of .................. $ 6,000

The total cost of programmatic expenses related to the annual NJEA convention (for members only),

in the amount of .................. $ 58,600

TOTAL $166,753

BUSINESS DIVISION

BUSINESS OFFICE
Provides for personnel costs for the business office, as well as for temporary and contracted help for total operations.

ACCOUNTING OFFICE
Provides for personnel, materials, supplies and equipment costs for the accounting office.

COMPUTER CENTER
Provides for personnel, materials, supplies and computer equipment and software amortization costs. Also included are funds for the replacement of fully depreciated air conditioning equipment.

MEMBERSHIP PROCESSING
Provides for personnel, contracted services, membership processing reimbursement to locals, supplies, materials, and postage for this unit. The proposed amount includes funds for improving the dues accounting system.

HEADQUARTERS' OPERATIONS
Provides for personnel, supplies and materials, taxes, mortgage amortization,
maintenance, building repairs and renova-
tions, equipment replacement, repairs and 
rentals, custodial services, utilities, 
and insurance for NJEA headquarters.

CAPITOL STREET OPERATIONS
Provides for personnel, supplies, and ma-
terials, taxes, maintenance, equipment 
rental and replacement and servicing, util-
ities for the mail room, storage room and 
space for NJEA Travel Service.

ORGANIZATION MANAGEMENT
To provide kits and materials to be used 
for the improvement of local organizational 
management. Funds are also requested to 
cover workshops for local officers; i.e., 
Presidents' and Treasurers' Workshops.

CONVENTION EXPOSITION
Provides for Convention Hall rental, decor-
at ing and drayage services, exhibit kits, 
security and other facility related costs 
in Atlantic City.

CAPITAL CONSTRUCTION
Provides for the renovation and rehabilita-
tion of the NJEA Headquarters building. The 
lower level is completed. The funds request-
ed are to begin work on the upper levels. It 
is anticipated that this will be a two year 
project with additional funding needed from 
next year's budget.

NEA CONVENTION
The amount proposed is based upon full fund-
ing for up to 450 state delegates, in addi-
tion to funds for operating, administrative, 
and function expenses while at the Convention.

OFFICE AUTOMATION
Provides funds for the first phase of a three 
phase computer network with NJEA Headquarters 
and regional offices.

I conclude that the following costs and expenditures, 
calculated primarily in the amount of time spent by staff of 
this Division on matters unrelated to collective bargaining, 
contract administration and grievance handling are:

2.8% of the time of the Director's office, 
in the amount of........................$ 9,321
4.9% of the time of the staff of Data Processing/Computer Center/Office Automation (for political campaign purposes),
in the amount of..................$ 30,062
11.4% of the time of the staff of the accounting office (for political oriented transactions),
in the amount of..................$ 15,481
4.5% of the time of the staff of Membership Processing, (for political campaign purposes),
in the amount of..................$ 15,530
8.6% of the time of Capitol Street Operations (for political activities),
in the amount of..................$ 28,449

Plus the net cost and expenses of the NJEA Convention (for members only),
in the amount of..................$106,400

Plus overhead costs related to the foregoing,
in the amount of..................$ 42,637

TOTAL $246,880

The total foregoing excluded costs and expenditures during the 1982-83 membership year total $1,522,800 or 9.43% of the total NJEA budget and expenditures for that year.

I consider it logical and appropriate therefore to conclude that 9.43% of Governance and Administration division budget is attributable to excluded activities, in the amount of.................$142,980, and that 9.43% of the Reserve account be treated similarly, in the amount of.................$59,840.

Accordingly, the total amount of expenditures during the
1982-93 membership year that were unrelated to the statutory and/or judicially determined matters of collective bargaining, contract administration or grievance handling is $1,725,620.

This amount constitutes 10.68% of the total NJEA budget and expenditures for the 1982-83 membership year.

**DETERMINATION**

10.68% of the total NJEA budget and expenditures for the 1982-83 membership year were for activities statutorily or judicially determined to be unrelated to collective bargaining, contract administration or grievance processing, and may not be financed from representative or "agency" fees paid by non-members.

Conversely, 89.32% of the total budget and expenditures were used for permitted activities on behalf of non-members as well as members. As the non-member paid an "agency" fee only 85% of what a member paid in dues, I conclude that the NJEA spent more for permitted activities on behalf of non-members (as well as members) than non-members contributed toward those activities.

Inasmuch as the representative or "agency" fee of a non-member was 15% less than the dues paid by a member, it would appear that none of the proscribed activities were paid for out of an
agency fee. Accordingly, non-members are not entitled to refunds from the NJEA party

Eric J. Schmertz
Representative Fee Umpire

DATED: January, 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

Local 100 Transport Workers Union of America

and

New York Bus Service

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 at a hearing on January 8, 1985, makes the following AWARD:

The unsatisfactory nature of the attendance record of George Sotomayor is incontestable. He was previously counseled, warned and suspended, and those actions were not challenged by Mr. Sotomayor or by the Union.

I reiterate the standards and rules regarding absenteeism and attendance violations which I enunciated in the Rodriguez case.

Within the foregoing frame I shall accord Mr. Sotomayor one final chance to achieve and maintain a satisfactory attendance record. In the instant case he was discharged following his first violation of the attendance rules subsequent to his one day suspension. Under the facts of this case I think his explanation of what happened is believable and that as a consequence he was unable to call in within the prescribed time before the start of his shift. I shall give him one more chance. However, if he fails or is unable to maintain a satisfactory attendance record or fails or is unable to comply with the attendance rules within the requirements set forth in Rodriguez, he will be subject to summary discharge.

Accordingly, Mr. Sotomayor shall be reinstated but without back pay. The period between his discharge and his reinstatement shall be deemed a disciplinary suspension and notice of his final chance referred to herein.

Eric J. Schmertz
Impartial Chairman
DATED: January 12, 1985
STATE of NEW YORK ) ss.: 
COUNTY of BRONX )

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 issue is:

Was there just cause for the discharge of Ivan Belfone? If not what shall be the remedy?

Hearings were held on August 20 and December 3, 1984 at which time Mr. Belfone, 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 Union and Employer filed post-hearing statements and data.

The grievant is charged with having used marijuana "in close proximity to his working hours" in violation of Appendix A of the contract. The pertinent part of Appendix A provides that:

"If it is determined through appropriate medical test that the employee ... used marijuana ... during or in close proximity to his ... working hours, such employee shall be subject to immediate discharge."

The medical test disclosed 3 nanograms of THC/ML in the grievant's blood about 2½ hours after he started his tour as a bus driver.

The Employer asserts that that quantity of marijuana in his blood is unrefutable evidence of having used the drug "in close proximity" to his working hours.
The Union contends that that quantity is insignificant; that in that quantity it has no adverse physical or mental effect; that the small quantity shows that the grievant's use of the marijuana was earlier than in close proximity to his working hours; and hence not violative of the contract proscription.

After my Award of October 24, 1983 regarding Peter Spacek and William Spink, I frankly hoped that the parties, in the then upcoming contract negotiations would agree on a contract provision which totally prohibited the use of marijuana by bus drivers employed by the Employer, as a condition of employment.

In that Award I stated:

"For two employees whose jobs were to drive school buses with school children aboard, the use of marijuana is indefensible and reprehensible ... their gross irresponsibility when entrusted with the safety of school children presently disqualifies them from driving buses which transport school children or any member of the riding public." (emphasis added)

I went on to say:

"Indeed, if there was a promulgated rule in this employment relationship totally prohibiting the use of marijuana or other controlled substances as a condition of employment or continued employment, I would unhesitatingly enforce that rule."

I further said:

"...this arbitrator will not now restore them to that assignment" (i.e. driving buses with passengers).

As the parties know I accepted a later formula in that case which allowed the ultimate return of Spacek and Spink to bus driving assignments, but in doing so I conditioned any such arrangement and my granting of any such petition for restoration on the requirement that:

"The public may be protected from any similar or subsequent use by the grievants of marijuana or other prohibited substances" (emphasis added).
By later negotiations the parties reached an agreement under which Spacek and Spink could be restored to driving. I granted the petition for restoration because that arrangement foreclosed the subsequent use of marijuana by Spacek and Spink. They were subject to physical examination and both signed statements that they would not again use marijuana.

Hence the dicta of my Award and my view as Impartial Chairman of what the safety of the riding public required, were met.

But the parties did not do all that I hoped in the negotiations leading to the current contract. They negotiated a clause which, inter alia does not prohibit the use of marijuana at all times but only prohibits its use "in close proximity to working hours."

Of course the parties have the absolute right to negotiate whatever they wish and can agree upon, and there is no need that they follow the recommendations or urgings of the Impartial Chairman. Indeed, whatever they do agree upon is to what the Chairman is bound and what he must enforce, regardless of his own views. But, just as the arbitrator should not substitute his judgment for that of the parties on substantive provisions of the contract, the arbitrator should not legislate contract provisions to which the parties have not mutually agreed and should not do so under the guise of contract interpretation or application.

The responsibility for negotiating clear and enforceable contract terms is for the parties. The arbitrator enforces, applies and interprets those terms. But where it is apparent that a term did not have an agreed meaning when negotiated, and where the absence of an agreement on meaning is the heart of the arbitrable dispute, for the arbitrator to supply a meaning, application or interpretation favorable to one side, would be to
legislate a contract term never mutually agreed to or jointly understood. In short, I do not think that an arbitrator can legitimately apply a contract term when there was no meeting of the minds of the parties or reasonable evidence of a meeting of the minds, on the meaning of the term when negotiated.

That is what we have in the instant case, and it is especially acute here, because an application or interpretation of the phrase "in close proximity to working hours" has a direct effect on the safety of the riding public.

The parties did not have a mutually agreed to understanding of what "close proximity to working hours" meant. Their respective cases and the sharply divergent testimony and documentation of and by their experts makes it apparent that they agree to contract language which meant different things to each side. The fact is, in my view, that the parties did not complete their contract negotiations in that respect, because they had not reached (and still have not reached) an agreement on the meaning of what they wrote in the contract.

I conclude that the parties have a continuing duty to complete their negotiations by agreeing on contract terms that represent a meeting of the minds, especially where as here a third party interpretation in the form of a legislated answer, bears on the public interest and safety.

With the expert testimony so divergent, I do not know whether some or any quantity of marijuana found in the blood during working hours means that the drug was used "in close proximity to working hours" or whether the answer to that question turns on the quantity of marijuana found. Wherever the answer lies I deem it the responsibility of the parties in the first instance to fix the formula and degree. Where the experts disagree, and where the parties did not have anything approaching
a mutual understand when the imprecise language "in close proximity" was negotiated, the responsibility to the public interest and safety still resides with the parties and not the arbitrator.

This is not to say that I will not interpret and apply the language "in close proximity." Rather it is to say that I will consider doing so only after the parties have made a better, more complete and good faith effort to negotiate a jointly agreed to meaning or a mutually understood substitute, and are unable to do so. Then and only then should the Impartial Chairman consider doing for the parties what they were unable to do for themselves. Here however, I conclude not that the parties were unable to reach agreement on the meaning when the clause was negotiated, but rather that they did not try, agreeing instead to disagree.

Accordingly I remand to the parties the matter of the meaning of "in close proximity to working hours." Pending negotiations on the meaning, the language is just not subject to enforcement, because any present enforcement would not reflect an agreed upon or negotiated meaning, and standing alone, the language has no settled or commonly accepted meaning.

What then is to be done about the grievant? Under these circumstances I find that he is entitled to no more or less than Spacek and Spink, and that all three are sufficiently similarly situated to be treated alike. Therefore the grievant

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1. This is distinguished from the prior contract which used the well known phrase "under the influence" for both alcohol and drugs. That phrase is and has been subject to interpretation and application, because it is discernible by physical symptoms and settled medical and chemical analysis. Not so with the phrase "close proximity" as applied to marijuana. (Indeed what is its application to alcohol use?)
shall be reinstated without back pay to a non-driving job or assignment, and shall be paid the rate of any such job or assignment. After he has been off driving for at least a period of time equal to the time that Spacek and Spink were removed from driving, the Union on his behalf may petition me to restore him to driving, provided he accepts and follows the same arrangement that applied to Spacek and Spink, or another arrangement that I consider achieves the same result.

My handling of Spacek, Spink and the grievant shall not be construed in any respect as a precedent for any subsequent situation or case.

DATED: March 18, 1985
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 Ivan Belfone properly paid as a shop employee for the period April 2, 1985 to April 25, 1985 pursuant to the Award of March 18, 1985?

A hearing was held on July 29, 1985 at which time representatives of the parties appeared and were afforded full opportunity to present their respective cases.

Based on the record before me I render the following AWARD:

Ivan Belfone was not improperly paid as a shop employee for the period April 2, 1985 to April 25, 1985 pursuant to the Award of March 18, 1985. The grievance is denied.

Dated: July 30, 1985
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 issue is whether there was just cause for the discharges of Peter Spacek and William Spink.

Hearings were held on June 30, July 22, August 5 and August 19, 1983 at which time Messrs. Spacek and Spink, 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. A stenographic record was taken; the Arbitrator's Oath was waived; and both sides filed a post-hearing brief.

The Company has proved to my satisfaction that both grievants actively used marijuana during or in close proximity to the time of their regularly scheduled runs as drivers of school buses.

For two employees whose jobs were to drive school buses with school children aboard, the use of marijuana is indefensible and reprehensible. Indeed, their gross irresponsibility when entrusted with the safety of school children presently disqualifies them from driving buses which transport school children or any member of the riding public.
Though denying the instant charge, both grievants do admit their prior and at least casual use of marijuana. My view is that there is a reasonable probability that their use may have exceeded what they have admitted (including my finding that they used it in the instant situation as alleged by the Company). I think it not unreasonable for the Company to guard against the possibility that they may be addicted and hence capable of using larger doses of marijuana, again at times during or prohibitively close to their work schedules, if permitted to return to their jobs as bus drivers.

The Company, which provides franchised bus service for the public had reasonable grounds to believe that the grievants may have been "under the influence" of marijuana and therefore had reasonable grounds to remove them from bus driving. And it follows therefore that the Company should not be required to run the risk of presently continuing the grievants as bus drivers.

Indeed, if there was a promulgated rule in this employment relationship totally prohibiting the use of marijuana or other controlled substances as a condition of employment or continued employment, I would unhesitatingly enforce that rule.

But there is no such rule or contractual provision, and that is the problem with the Company's decision to discharge the grievants.

The Company has the burden in this case of establishing cause, not for the removal of the grievants from bus driving, but for their discharge.
My interpretation of Section 33 of the contract gives the Company the right to discharge or suspend an employee "for being under the influence of .... narcotics ...." If a medical examination finds the employee "to not have been under the influence of ... narcotics" he is made whole for wages lost and no discipline is imposed.

In the instant case, though the Company has proved that the grievants used marijuana, it has not proved clearly and convincingy that they were under "the influence of marijuana" within the well settled meaning of that phrase. "Under the influence" means to me a use of marijuana in sufficient quantity to impair senses, reflexes, alertness and judgment or to alter ones physical or psychological demeanor thereby adversely affecting the normal ability to drive a bus safely.

In the instant case, this contract proscription has not been shown.

The expert testimony and authoritative writings submitted into evidence regarding the effect on reflexes, demeanor, senses, and judgment from the two nanograms of THC per milliliter and the

1. One can debate endlessly whether marijuana is a "narcotic." I am satisfied that when that word was negotiated into Section 33 of the contract the parties meant and intended to include marijuana, the differing scientific and medical views not withstanding.
six nanograms of THC per milliliter of serum found respectively in Spacek's and Spink's blood are conflicting, indeterminate and hence inconclusive. Like an alcohol content of less than statutorily recognized level of impairment, I cannot conclude that the foregoing levels of active marijuana ingredients in the grievants' blood were sufficient to cause "impairment" or "being under the influence."

Moreover there is no evidence in the record of objective symptoms of "impairment." Aside from the blood samples, there is no probative evidence of the physical condition of the grievants or any outward symptoms (such as condition of eyes, speech, gait or demeanor) which could be deemed associated with the use of marijuana. Indeed the only testimony on this point was that the grievants appeared physically normal.

The question then is, under the particular circumstances of this case, and especially the language of Section 33 of the contract, what shall be the appropriate decision, penalty and/or remedy?

I have already held that the Company and the riding public should not bear the risk of the return of the grievants to driving buses with passengers. Put another way this Arbitrator will not now restore them to that assignment.

However, as also indicated, I cannot find that the Company had a contractual right to discharge the grievants in view of the failure to prove "impairment" and the explicit conditions of Section 33.

2. Under those circumstances I do not find a statutory basis that is controlling or which preempts the contract application and interpretation.
Obviously, under the foregoing findings, the grievants are entitled to reemployment, but are not entitled to drive a bus carrying passengers. A resolution or reconciliation of these circumstances is found in what I regularly did when I was the disciplinary Hearing Officer at the New York City Transit Authority in similar situations involving bus drivers and motormen.

The grievants are to be restored to the Company's employ without back pay. Back pay is denied because of their gross irresponsibility and disregard for the safety aspects of their jobs. They shall be assigned by the Company to jobs that do not involve driving the public and shall be paid, from the date of their reemployment, at the rate of the job to which they are assigned.

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.

Eric J. Schmertz
Impartial Chairman

DATED: October 24, 1983
February 18, 1985

Bernard M. Byrne, Esq.
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036

John Keefe, Esq.
Communications Workers of America
80 Pine Street
New York, New York 10005

Re: CWA-and-New York Telephone
Combined Grievances
Suspension and Final Warning of
E. Dressler
N.Y. Telco Case No. A-83-176 & 177

Gentlemen:

I enclose to you each herewith, two duly executed copies
of my Award and Opinion in the above matter, together with my bill
for services and expenses.

Very truly yours,

Eric J. Schmertz
Arbitrator

EJS:hls
Encl.
In the Matter of the Arbitration:

between

Communication Workers of America:

and

New York Telephone Company

The stipulated issue is:

Whether James Harris was suspended for just cause?

A hearing was held on December 14, 1984 at which time Mr. Harris, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was suspended for three days for "unsatisfactory job performance." Specifically he is charged with a failure to pressure test and bootstrap the cables in a manhole at 65th Street and Madison Avenue. He was assigned that work; he reported its completion on the evening of August 13, 1982 and the manhole was closed at that time.

On Monday August 16th, a cable failure and outage occurred. It was traced to a cracked cable in the 65th Street-Madison Avenue manhole.

It is the Company's claim that the cable would not have cracked on August 16th had the grievant pressure tested every cable and properly racked them on August 13th as direct. Pressure testing would have uncovered any leak or defect, and the failure
and outage would not have taken place. The Company concludes that the grievant did not do his job properly or completely.

The grievant claims he did everything required; that he pressure tested and bootstrapped every cable; that his assignment was completed when he closed the manhole and left on August 13th; that the cable crack must have resulted from some work or activity in the manhole between August 13th and August 16th; and that therefore he is not responsible for the cable failure.

There is no official record of any Company or other authorized work having been done in that manhole between August 13th and August 16th. However a Union witness testified that he saw from a distance an unmarked white truck at the hole and believed it was a cable TV truck. The Union suggests that this or some other authorized or unauthorized work carried out in the manhole after the grievant completed his assignment is responsible for the cable crack.

The assertion that someone else was in the manhole between August 13th and August 16th is not persuasively established. The "white truck" was not identified and the witness who observed it did not go close enough to see what, if anything was being done or even if it involved opening that manhole at all. The official records show no activity in that manhole by any authorized source, during the critical period.

If there had been no intervening factors during the period August 13th to August 16th, then, as a disciplinary matter, I
would find that the Company had the reasonable right to draw a proximate cause and effect conclusion between what the grievant was supposed to do on August 13th and the cable failure on August 16th. And I would consider it logical and reasonable for the Company to conclude that the failure would not have happened and the cable defect would have been discovered had the grievant pressure tested all the cables as he was instructed to do.

But, while I am doubtful that there is adequate probative proof of some other work in or entry into that manhole after the grievant finished his job, I need not authoritatively resolve that question. Rather, I conclude that the issue is determined by what the grievant said during the Company's investigation.

It is the testimony of the Company's Manager of Cable Maintenance that when asked whether he had pressure tested and re-racked all the cables, the grievant responded first that he "did not," and then stated that he "didn't remember if I did or did not."

At the arbitration hearing the grievant testified, and though he claimed that he did pressure test and re-rack the cables he did not deny that he gave the foregoing answers to his manager.

I find no reason why the manager would falsify what the grievant told him at the scene of the cable failure on August 16th, and I conclude that the grievant's failure to deny any such answers when he testified at the arbitration, leaves those answers standing as "admissions against interest" and probatively
reflective of what actually happened.

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

James Harris was suspended for just cause.

Eric J. Schmertz
Arbitrator

DATED: January 11, 1985
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 suspension and final warning of Eric Dressler for proper reason?

The grievant is charged with falsification of work records, more particularly a "false and mischevious" report to supervision that he had not been issued certain trouble tickets - causing the reissuance of those tickets - when in fact his log showed he had received them at initial issuance and had worked on them; and insubordination by his failure to comply with a directive of his foreman to call at 1 PM for an additional work assignment.

The Company cites the grievant's prior disciplinary record, which includes work infractions in May and June of 1982, and argues that the instant suspension of two days and two hours and the final warning were justified.

The Company characterizes the grievant as a "wise guy," "disruptive," and "unimpressed...with the need to employ candor and fairness in dealing with his employer." This may be so with regard to the grievant's prior disciplinary record, but the Company's evidence in the instant case falls short of the clear and convincing standard required in disciplinary matters. The grievant's explanation of his conversation with his foreman regarding the trouble tickets is plausible. At least it leaves a reasonable inference that the grievant misunderstood what was being asked of him. He testified that when asked about
progress on the trouble tickets he replied "what tickets" because the specific tickets were not identified by number in the inquiry. He denies that he said that he "never received the tickets." The grievant testified under oath that he has a hearing loss. My observations of him tend to support that testimony. While he presented no medical proof of a hearing impairment, the Company offered nothing in rebuttal. I think it entirely possible, and probatively so in a discipline case, for the grievant not to have fully heard or understood what was asked of him on the phone by his foreman regarding work progress on certain trouble tickets.

Indeed I see no reason why the grievant would verbally falsify the work records when his own work logs would show otherwise. Frankly, a failure of communication is as much a probable explanation as anything else.

With regard to the 1 PM phone call he was to make, the grievant denies he was so instructed. Again, the hearing impairment may have been the cause. Also, based on the foreman's own testimony, I cannot conclude that the grievant was given "instructions" or a "directive" to call at 1 PM. Foreman Colabella testified that he asked the grievant "to please call back the dispatcher at 1 PM and pick up a ticket." Whether or not that wording is an order demanding strict compliance at 1 PM is questionable. Of course, a work instruction can be prefaced by "please" and still be binding, but, it is also ambiguous as to its mandatory nature and hence equivocal as a basis for discipline. Here I cannot find unquestionably, that the grievant received and understood an order to call the dispatcher at precisely 1 PM.

When he did not call, supervision paged him. When he didn't respond until 1:30 PM, the Company concluded that he was
improperly away from his work place (and probably had over-stayed his lunch break.) The evidence does not support this supposition. The grievant testified that he was "pulling wires;" a fellow employee testified that he was working with the grievant pulling wires at the time; and there is credible evidence in the record that the paging system in that area cannot be well heard or understood.

All of the foregoing is not to say that the grievant did not act (or fail to act) as alleged by the Company, but rather that the evidence in support of any such conclusion falls short of the requisite persuasiveness to sustain the discipline.

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

The suspension and final warning of Eric Dressler were not for proper reasons.

DATED: February 18, 1985
STATE OF New York ss:
COUNTY OF New York

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

In the Matter of the Arbitration:
between:
Communications Workers of America:
AFL-CIO:
and:
New York Telephone Company:

On November 20, 1984, the Union filed an unfair labor practice charge with the NLRB involving the facts which are the subject of this arbitration. The Board administratively deferred the charge to arbitration pursuant to its policy under Collyer Insulated Wire, 192 NLRB 837 (1971). As a consequence of the deferral, this arbitration proceeding was held pursuant to the collective bargaining agreement between Communications Workers of America, AFL-CIO and New York Telephone Company, effective August 7, 1983.

A hearing was held before the Undersigned, on June 11, 1985, 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 taken, and both sides filed post-hearing briefs.

THE ISSUE

The parties failed to agree on the precise wording of the issue. Based on the record I deem the issue to be:

Did the Company violate the collective bargaining agreement between the parties when it refused to process a grievance presented by Local 1153 of the Union on behalf of Company employee members of Local 1153 who worked in Westchester County insisting instead that it need process such grievances only if presented by Local 1103? If so what shall be the remedy?

THE FACTS

The facts in this case are straightforward and essentially
undisputed. The legal significance of those facts under the terms of the collective bargaining agreement is the core question.

In the spring of 1984, Local 1153 filed a grievance on behalf of one of its members employed by the Company in Westchester County. A grievance number was issued by the Company, which reflected the fact the grievance was filed by Local 1153. The first step of the grievance procedure under section 11.02 of the collective bargaining agreement was completed by the participation of a foreman on behalf of the Company and a Local 1153 shop steward. The grievance was not resolved at the Step 1 level, and when Local 1153 sought to continue the contractual grievance process at Step 2, the Company refused to entertain the grievance on the grounds that it was not contractually obligated to consider a grievance filed by Local 1153. Rather, the Company claimed, Local 1103 was the appropriate Local under the contract to file a grievance on behalf of employees working in Westchester regardless of the local in which the employees held membership. The facts concerning the grievance were not in evidence at the hearing and both sides agreed they were not material to the determination of this proceeding.

DISCUSSION

Both sides agree that the Communications Workers of America is the sole and exclusive representative for the unit which includes the employee involved in this grievance. Conversely, they agree that the CWA locals are not parties to the collective bargaining agreement and that the decision in this arbitration, whether for the Union or the Company, will not change the identity of the bargaining representative. It will continue to be the Communications Workers of America.

Section 11.02 of the collective bargaining agreement provides:

All grievances shall be presented by the appropriate authorized representative of the parties to this Agreement at a time
and place mutually agreeable to the parties in accordance with the steps outlined below:

1st Step--The grievance shall be initially presented to the appropriate authorized representative of the parties or their alternates at the immediate supervisory level of the Company and the steward level of the Union. The grievance review shall be held promptly after appropriate investigation of the facts, and a reply given within seven (7) calendar days from the time of its initial presentation. The management spokesman shall be the person at the immediate supervisory level. A management representative at the second supervisory level (subdistrict) may be in attendance at these reviews and at those times he shall be the management spokesman. The parties will seek in good faith to resolve the grievance at this step, and to this end the review will be informal. Both the presentation of the grievance and the reply will be verbal.

If a grievance involves a discharge, a demotion, or a suspension of an employee for five (5) days or more, the 1st Step shall be waived at the request of the Local Union and the grievance presented initially at the 2nd Step.

The Company will submit to each Local Union a monthly summary of all first step grievances, filed by each such Local Union, showing for each grievance the grievance number, the subject, the grievant, the date heard, the Company supervisor who heard the grievance and the disposition of each such grievance.

2nd Step--If not satisfactorily settled at the first step, the grievance may be appealed in writing to the designated authorized representative of the parties within seven (7) days after receiving the reply in the first step. The appeal shall set forth the act or occurrence complained of and, if the grievance involves a claimed contract violation, the Article alleged to have been violated.

If a grievance involves a discharge, a demotion, or a suspension of an employee for five (5) days or more, the grievance shall be reviewed at the district or division level of the Company with a representative in the field at the district level of the Company or his alternate being present, and with the Local President or his designated alternate above the steward level of the Union.

All other grievances shall be reviewed at the district or division level of the Company with a Company representative in the field present, and with the Local President or his designated alternate above the steward level of the Union. The review of
all grievances shall be held within nine (9) calendar days from the time the written appeal is received. The Company shall mail or deliver a written reply giving the reason for its decision, by the seventh (7th) calendar day following the review of the grievance.

3rd Step-If not satisfactorily settled at the 2nd Step, the grievance may be appealed in writing to the authorized representative of the parties within ten (10) days after the reply in the 2nd Step is received. The grievance review shall be at the Assistant Vice President-Labor Relations level of the Company and the Area Director level of the Union or their designated representatives. If a grievance involves a discharge, a demotion or a suspension of an employee for five (5) days or more, the Company representative in the field at the division level of the Company or his alternate shall be present at the grievance review. A review of all grievances shall be held within fourteen (14) calendar days from the time the written appeal is received. The Company shall mail or deliver a written reply giving the reason for its decision, by the seventh (7th) calendar day following the review of the grievance.

The Company claims that under the contract it is obligated to process grievances only if they are filed by Local 1103 and not by Local 1153 for Company employees working in Westchester. The Agreement between the parties designates the "geographic jurisdiction" of CWA locals for various purposes, including the processing of grievances. The grievance in this case involves an employee in Westchester County and 1103 is the appropriate Local under the contract to file a grievance. The Company relies on a chart appended to the Agreement (Jt. Exh. No. 1, pp. 235-237) which is entitled, "CWA LOCALS CHARTER JURISDICTION." The chart contains two columns. The first column is designated, "Locals," and the second, "Jurisdiction." Local 1103 appears on the chart in the first column and "Westchester County, Greenwich, Connecticut and the portion of Putnam County falling in the Company's downstate area" appears in the jurisdiction column opposite Local 1103. Local 1153 does not appear on the chart at all. During the arbitration the parties agreed that the chart was included at the
Union's request. The Company argues that the "list of Locals that the parties agreed to pursuant to the Union's demand in bargaining constitutes the only authorized representatives whom the Company is required to deal with in matters involving administration of the Agreement absent a modification in writing signed by the parties pursuant to Article 30," (Co. Brief p. 12) and concludes that it need only process a grievance by 1103 for this employee. It states it would process a grievance from 1153 if 1153 was designated an agent of 1103 and acted in that capacity.

Article 30 precludes effective waiver or modification of the contract except by a writing signed by the parties. The Company contends that adopting the Union's view would constitute a modification that does not comply with Article 30 and thereby affords the Union a benefit which it has not achieved through negotiation.

The Company denies any purpose to interfere with the internal local affairs of the Union but claims the concept of "geographic jurisdiction" for the processing of grievances is part and parcel of the contract. The Company argues that the Communications Workers of America (CWA) itself has recognized a distinction between an employee's membership in a Local for internal Union purposes and the "geographic jurisdiction" of a Local for purposes of administration of the collective bargaining agreement. In this connection, the Company relies on a letter to the Company by Mr. Larry Mancino, Area Director of the CWA, dated May 18, 1984. (Co. Exhibit 2A). The letter is concerned with the Company's refusal to follow the Local 1153 schedule for deduction of dues for Local 1153 members working in Westchester and the Union's position that the Local 1153 dues deduction schedule should be followed and not that for Local 1103. The Company, in response, denied any obligation other than to follow the dues deduction schedule certified
for 1103. (Co. Exhbit 2-B). The specific issue of the proper dues deduction on schedule is not involved in this proceeding. However, the Company points to the following language in the Mancino letter as evidence of the Union's recognition of the concept of "geographic jurisdiction." "They [the 1153 employees transferred from AT&T to New York Telephone by virtue of divestiture] are presently within the geographical jurisdiction of Local 1103. However, they are still members of Local 1153."

In further support of its construction of the contract, the Company points to possible consequences of a requirement that it process grievances from Local 1153. It expresses concern over the impact of such a ruling on dues collection, the problem of knowing which Local to notify in the event of a discharge (Article 10.01), provisions concerned with overtime and a list of other matters involved in the administration of the contract which "involve interaction with the Local" (Co. Brief p.5; Tr. pp.23-25). While conceding that only Article 11 is involved in this proceeding, the Company argues that the "havoc" that a ruling favorable to the Union could create in these other areas provides a basis for adopting the Company's position. As for Article 11 itself, the Company claims that a ruling favorable to the Union would mean that the Company "would be faced with the prospect of acquiescing to any other Union Local (in processing grievances) not listed in the agreement."

The Company also relies on Article 4 of the agreement which it claims requires the Company be provided with written advice of names of representatives of the Union Locals (Article 4.03). The Company states that it only had written notice of the 1103 shop steward and no written notice with respect to Local 1153.

The Company also argues that past practice has been to have the Union Local listed in the chart represent employees transferred from other Bell System Companies. The Company points to
the fact that the Union was aware there would be transfers due to the divestiture and failed to negotiate with respect to those transfers and the concept of a geographic jurisdiction.

The Union, for its part, resists the claim that 1153 can act only as an agent of 1103 for the purpose of processing grievances. The Union points out that the term "geographic jurisdiction" does not appear in the contract and no similar term or its equivalent appears in Article 11. Indeed, the body of the contract nowhere refers to the chart. In addition, the Union asserts that where geographic boundaries are material to rights and obligations under the contract there are provisions which specifically deal with those boundaries, (e.g. Articles 8.02, 14.03, 2.02). In contrast, Article 11 does not refer to geographic boundaries at all. Further, the Company previously has processed grievances from Local 1101 for its members working in Westchester and not as an agent for 1103, and it has processed grievances from Local 1102 (Staten Island) for its members transferred to Brooklyn (Local 1109).

OPINION

I conclude that Article 11 does not incorporate a concept of "geographic jurisdiction" which permits the Company to refuse to process a grievance by a Local on behalf of its members working in an area unless that Local appears on the chart appended to the contract with the applicable geographic jurisdiction. Article 11, by its terms, contains no such limitations and in the absence of a contractual limitation on the power of the Union to designate who will file grievances, the Company's position would not prevail. The fact is that the Recognition Clause (Preamble and Article 1) accords recognition to the Communications Workers of America and does not specify particular local unions. It is un-
disputed that Local 1153 is a chartered Local of the parent Union, and therefore, at best from the Company's position, there is a possible ambiguity if the chart relied on by the Company is taken into account. Considering the importance of the matter to the Union's internal affairs, i.e., who may require the Company to process a grievance, and the Recognition Clause, the evidence should be more compelling than it is that the Union surrendered this usual and important power to designate representatives in the grievance process before it is concluded the Union's power has been so circumscribed.

I do not hold there is an ambiguity. However, if there is, the following factors militate in favor of the Union's position:

(1) There are provisions which specifically address and define geographic boundaries. Article II is not one of those provisions.

(2) There are examples, albeit limited, in which the Company did and does process grievances by Locals outside the so-called "geographic jurisdiction." Here, I rely on these practices not as waiver or estoppel of the Company or as modification of the agreement, but rather as evidence of the parties' view of the meaning of an ambiguity, if there is an ambiguity. The Company argues that those instances differ from the instant one because Locals 1101, 1103, 1102 and 1109 were listed on the Chart and 1153 is not listed. This is not persuasive. It does not address the issue of limiting geographic jurisdiction at all but imposes a further limit, that the Union Local must appear on the list. This would or could mean a Local could not be abolished, merged or its charter otherwise modified insofar as administration of the contract is concerned. Surely, so slim a basis cannot support so drastic a limitation. I do not rely on the NYNEX practice cited
by the Union which involves a different contract with different terms.

(3) The chart relied on by the Union merely describes the charter jurisdiction of the listed Locals. The reference to "geographic jurisdiction" in the Mancino letter relied on by the Company is a clear reference to the charter jurisdiction, an internal union matter, and not "geographic jurisdiction" for the purposes of administering the contract.

(4) As for the Company's practice of processing grievances by the local with so-called "geographic jurisdiction" and not the employee's own local involving other Bell System employees transferred to the Company, the record is sparse. However, it does appear that the issue was not raised with respect to those employees and that the respective Union charters may have required or permitted this to occur as an internal Union matter. In contrast, in a case where the issue was raised as in the 1103/1101 situation, the charter required 1101 to file the grievance and the Company processed it. The testimony of record is that the relevant charters give 1153 and not 1103 the authority to process grievances for its members.

(5) Administrative difficulties in permitting 1153 to process grievances are not that burdensome and in no significant way prejudicial despite the Company's expression of concern. An expression of "concern" is not material to the contract determination of this proceeding.

Article 4 deals with "Promotion and Transfers of Union Representatives." It restricts the Company's power to promote or transfer certain designated Union officials in a manner which will affect that status without the Union's consent and requires the Union be given notice of such promotion and transfer. The
provision relied on by the Company appears in Article 4 and obviously is designed to protect the Company should it promote or transfer a Union official without having adequate notice of the official's status. It is not applicable to the situation involved in this proceeding and, in any event, the absence of written notice has had no effect on the Company's action because it claims that even written notice would not require it to process grievances from 1153. Moreover the evidence indicates that the Company representatives knew who the Local 1153 steward was and indeed dealt with him at Step 1.

In sum, then, I conclude that Article 11 by its terms determines the organizational level of the participants in grievances and is not modified by the chart so as to impose a further limit of "geographic jurisdiction" on the identity of the Union representatives in the grievance process. Consequently, the Company violated the collective bargaining agreement when it refused to proceed with Step 2 of the grievance procedure initiated by Local 1153 for its members working in Westchester County.

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

New York Telephone Company violated Article II of the collective bargaining agreement between the parties by its refusal to process the grievance filed by Local 1153. The Company is directed to process the grievance at Step 2 and thereafter, in accordance with the contract grievance procedure.

DATED: October 14, 1985
STATE OF New York ss:
COUNTY OF New York

I, Eric J. Schmertz to hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with Article V of the collective bargaining agreement effective May 1, 1983 between the above-named Union and Employer, the Undersigned was designated as the Arbitrator to hear and decide a dispute concerning the propriety of the discharge of the grievant, William Kearney.

A hearing was held at the offices of the Employer in Newark, New Jersey on January 24, 1985 at which time representatives of the Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The grievant attended the hearing. The Arbitrator's Oath was waived. A stenographic record was taken. The parties waived the use of a tripartite arbitration board. The parties filed post-hearing briefs.

BACKGROUND

The Company employed the grievant, William Kearney, as a steamfitter since May 15, 1968. The Company discharged him on June 28, 1983 for an assault involving another employee on June 19, 1983. The Company converted the discharge into a disciplinary suspension pursuant to a Memorandum of Agreement dated August 12, 1983. The Memorandum of Agreement accepted by the Union and the grievant, contained the following provisions regarding the reemployment of the grievant:
1. He will accordingly adhere to the contract regarding rest and lunch periods.

2. He will not be involved in any assaults, fights, threats, coercive or intimidating conduct towards any employee.

3. He will abide by the rules and regulations of the Company.

On the morning of October 2, 1984, the grievant's foreman, Edward F. Carolan, directed the grievant to check the heating system on certain floors in Building Six, including the fifth floor. John Ehrmann, the General Plant Manager for the Newark Division, inspecting certain areas of the warehouse saw the grievant, who had been alone on the fifth floor, get up from a pallet located among rows of packaging materials. Following an investigation of this incident, the Company discharged the grievant on October 19, 1984.

CONTENTIONS OF THE COMPANY

The Company asserts that the grievant violated the terms of the Memorandum of Agreement and that the discharge therefore was proper. The Company characterizes the Memorandum of Agreement as a "last chance" reinstatement that the Company agreed to because of the grievant's length of service. It is the position of the Company that the grievant took an unauthorized rest break on October 2, 1984 by lying down on two low stacks of pallets in a secluded area of the plant. The Company relies upon the testimony of the General Plant Manager that the grievant admitted his guilt by reacting as if he had been "caught in the act." The Company asserts that the grievant offered a series of excuses that are unbelievable, including that he had taken diet pills; that he had not slept properly at night; and that he was listening for calls. The Company also claims that the grievant requested Ehrmann to overlook the incident. The Company insists that the discharge should be sustained on this independent ground because the
grievant's conduct constituted a specific breach of the provision of the Memorandum of Agreement dealing with unauthorized rest periods.

However, the Company further contends that the grievant's poor attendance record provides another independent basis for sustaining the discharge. In this regard the Company maintains that the grievant abused Plant Rule E.8 (excessive absenteeism and tardiness) by a record of 16 absences, 28 early departures, and 24 latenesses over a 14 month period. The Company points to the grievant's failure to change this pattern after a verbal warning from Armond La Rocca, the Assistant Plant Engineer and Maintenance Engineer, in mid-September 1984 concerning the grievant's attendance record—which constituted the worst one of the steamfitters.

In addition, the Company argues that the grievant's admission that he had taken a prescription drug without notifying the Medical Department violated Company Rule F.7.c. and therefore provided an additional independent basis for the discharge.

**CONTENTIONS OF THE UNION**

The Union asserts that the grievant did not violate any rules regarding absenteeism. The Union notes that the normal attendance rules did not apply to steamfitters because their work schedule covered six to seven days of work each week. According to the Union, the records introduced as Company Exhibit 7 do not confirm a record of excessive absenteeism insofar as they indicate eight absences from January 1, 1984 through October 7, 1984 which is within the seven to ten absences that the Company recognizes as being normal. Thus the Union insists that a discharge for excessive absenteeism was unwarranted. The Union also contends that the grievant's record of early leaving was a common and accepted practice for steamfitters and that the grievant sought
and obtained permission each time before leaving early. With respect to tardiness, it is the opinion of the Union that the grievant's record does not reveal a tardiness problem and that the Company failed to notify the grievant of a tardiness problem before the October 2, 1984 incident.

The Union insists that the grievant did not take an unauthorized rest period on October 2, 1984. It claims that he located a valve on the fifth floor that he could not check without using a ladder; that he went to the elevator to go to the floor from where a ladder could be obtained; that someone was using the elevator; that he decided to get a drink of water from a water fountain while he waited for the elevator to arrive; and that he did not feel well at that point so he sat on the pallets for a moment. According to the Union the grievant planned to wait for the elevator for five minutes and, if it did not arrive, to walk down to the floor to obtain the ladder. The Union stresses that the grievant sat on the pallet for only two or three minutes and therefore the "incident" was very minor. In fact, the Union suggests that the Company was motivated by a desire to "get" the grievant due to ongoing animosity that stemmed from the incident that culminated with the Memorandum of Agreement. For all of these reasons, the Union contends that the discharge was not justified.

OPINION

The parties failed to stipulate a precise issue to be resolved in the instant case. Based on the record, I deem the issue to be:

Was the discharge of William Kearney for just cause? If not, what shall be the remedy?

It is undisputed that the parties and the grievant bound themselves to the Memorandum of Agreement dated August 12, 1983. All parties signed it. Pursuant to that Agreement the grievant
pledged, inter alia, that: "He will accordingly adhere to the contract regarding rest and lunch periods." That this provision was a material part of the Agreement is clear due to the prior sentence, namely, that: "Upon his [the grievant's] return to work, he will be conditionally employed under the following terms." A breach of the condition would therefore abrogate the Agreement and the grievant would revert to his status of, or be subject to discharge.

Thus the issue in the instant case narrows at the outset to whether the October 2, 1984 incident furnishes a basis for the discharge. Based upon the evidence it is my judgment that it does. The grievant admitted that he sat down at the pallets at a location some 40 feet from the elevator. He was not on an authorized rest period.

I find nothing in the record which would suggest the view that Plant Manager Ehrmann falsified his testimony. Therefore, I accept as truthful and accurate Ehrmann's testimony that the grievant asked him to ignore the incident. That is not the request of an employee who has done nothing wrong; nor is it consistent with the grievant's defense of illness.

With his prior disciplinary record, and particularly in view of the express conditions of the Memorandum, the grievant had a special duty of prudence and care, to comply precisely with the terms of his prior reinstatement. He should not have put himself in a position where a logical and reasonable interpretation of his acts and conduct would be the conclusion that he violated the Memorandum. If, as he claims, he was waiting for the elevator to get a ladder, he should not have located himself some distance from the elevator, relying on the questionable noise or "clicks" of the elevator to tell him when it had arrived at the fifth floor. He should have been at the elevator location tending to his job.
If he felt ill, he should not have sat down on the pallets nor placed himself in an out of the way location. Instead he should have immediately reported his illness to supervision and requested assistance or relief. If he was on medication this too should have been reported to the Company, at least when he felt ill. In short, the grievant's version of the events is inconsistent with his plea for leniency; is inconsistent with what an employee would and should do if there was truth to his version; and most significantly, is contrary to the care and responsibility imposed on the grievant by virtue of the mitigation of his earlier discharge and the strict conditions of his reemployment. I conclude that the grievant was loafing on the job, took an unauthorized break from his duties and thereby violated the rules which he had agreed to.

On balance, I am persuaded, with that conclusion, that the Company has met the burden required of it in a discharge case. The balance of the allegations against the grievant need not be addressed.

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 William Kearney was for just cause.

DATED: April 17, 1985
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.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Local 702, I.A.T.S.E. and
Precision Film Labs, Inc.

The Undersigned, duly designated as the Permanent Arbitrator 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:

As of August 31, 1983 Precision Film Labs, Inc. owes the Local 702 Pension Fund the sum of FOUR HUNDRED AND TWO DOLLARS AND FIFTY CENTS...($402.50).

As of August 31, 1983 Precision Film Labs, Inc. owes the Local 702 Welfare Fund the sum of TWO THOUSAND FIVE HUNDRED AND SIX DOLLARS AND SEVENTY TWO CENTS...($2,506.72).

Eric J. Schmertz
Permanent Arbitrator

DATED: February 11, 1985
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 Undersigned, duly designated as the Arbitrators, and having duly heard the proofs and allegations of the above named parties make the following AWARD:

1. The Employer wrongfully refused to accept the instant grievance dated May 9, 1983.

2. The Employer did not violate the collective bargaining agreement by assigning employees of its Harrison Gas Plant to perform work at the West End Gas Plant.

DATED: January 9, 1985
STATE OF New York
COUNTY OF New York

Eric J. Schmertz
Chairman

On this ninth day of January, 1985 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DATED: January 1985
STATE OF
COUNTY OF

W. Kenneth Huggler
Concurring

I, W. Kenneth Huggler 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: January 1985
State of
County of

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

In the Matter of the Arbitration between

Local 450, Gas Manufacturing Workers and

Public Service Electric and Gas Company:

The stipulated issues are:

Did the Employer wrongfully refuse to accept the instant grievance dated May 9, 1983?

Did the Employer violate the collective bargaining agreement by assigning employees of its Harrison Gas Plant to perform work at the West End Gas Plant? If so, what shall be the remedy?

A hearing was held on June 22, 1984 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Undersigned was selected as Chairman of the Board of Arbitration. Messrs. John Welsek and W. Kenneth Huggler served respectively as the Union and Employer designees on said Board. The Arbitrators' Oath was waived.

A stenographic record of the hearing was taken; the Union gave a verbal summation; the Employer filed a post-hearing brief. The Board of Arbitration met in executive session on November 19, 1984.

The Employer refused to accept the grievance because the Union did not cite the contract provisions allegedly breached. The Employer points to Section 1 of Article XI which defines a
a grievance as a dispute or difference "as to the interpretation, application, or operation of any provision of this Agreement..." (emphasis added) and argues that that language requires citation of the contract provisions which the Union claims are violated. Absent such citations, the grievance fails to meet the contract definition, is not arbitrable, and need not be accepted in the grievance procedure. I find the Employer's position on this point too technical. Arbitrators have repeatedly held that the grievance procedure is not comparable to common-law pleadings. Every particular of the dispute need not be cited at the outset, especially in view of the fact that the steps of the grievance procedure will require the Union to disclose the contract clauses involved and the substantive theory of its case. So in terms of a lack of information, the Employer is not prejudiced simply by accepting the grievance for processing. Also, the grievance here did supply some identification of the nature of the dispute and thereby complied substantially with the intent if not the precise letter of the grievance procedure.

Also, it is well settled that acceptance of a grievance within the grievance procedure does not mean that the Employer admits or concedes the arbitrability of that grievance. Indeed while reserving its position on the non-arbitrability of a grievance, an employer may accept, process and discuss a grievance, without prejudice. So, under the instant circumstances, I find and rule that the Employer wrongfully refused to accept the grievance dated May 9, 1983.
On the merits, the employees of the Harrison Gas Plant referred to in the stipulated issue are employees of the Employer, but in a different bargaining unit than those at the West End Gas Plant covered by the contract in this case.

The Union's case on behalf of its members at the West End Gas Plant is that the work performed by those assigned from Harrison is the work of the West End bargaining unit; that for employees of another unit to be transferred over to perform that work side by side with the grievants is prejudicial to the job security, employment rights, upgrading, and overtime rights of the unit covered by this contract and violative of Article I (Recognition and Coverage) thereof. To permit the Employer to make the disputed assignments could lead to the erosion and destruction of the West End bargaining unit and would permit the Employer to assign bargaining unit work to non-bargaining unit employees under conditions of employment less favorable than mandated by the instant contract.

The Employer explains that its action was necessary to handle temporary or seasonal increases in the demand or use of produced gas; that to maintain a permanent crew sufficient for this temporary purpose would be economically unsound and operationally unnecessary; that the "remote reporting" provisions of the contract were negotiated with an express understanding that it would encompass this particular practice of increasing employees at a gas plant at those infrequent times when needed and that the additional employees would come from other Employer locations and
could be employees of other bargaining units. The alternative, asserts the Employer would have been to close the plants involved, do away with gas production and rely solely on the increased supply of less expensive natural gas. That is what other utilities did. But the Employer maintained the West End Plant to handle what is referred to as "peak sharing," i.e. the production of gas over a few days in the winter to supplement the supply of natural gas. By doing so, the Employer argues, the grievants retained their employment; but in the absence of a right to transfer other employees into the operation during the "peak" days, the continued year-round employment of the basic crew at West End would be prejudiced.

If this case was confined to Article I of the contract, I would agree with the Union and sustain the grievance. Section 2(b) of Article I clearly and explicitly requires that "all employees" (other than those excluded in (a)) shall come under the terms and conditions of this Agreement..." The employees transferred from Harrison to West End were "employees" and they were at the West End Gas Plant by virtue of the temporary transfer. It is a logical interpretation of Section 2(a) and (b) that the employees, and hence the work performed by employees at the West End plant belonged in the Union's jurisdiction and should be assigned only to members of this bargaining unit. That would preclude the assignments complained of in this proceeding.

But it is clear that such general jurisdictional provisions may be varied by mutual agreement and for special circumstances.
I am persuaded that the 1982 negotiations over expanded remote reporting payments included express discussions between the parties and a resultant understanding that the remote reporting pay arrangements would be used to cover the occasional circumstances present in the instant case, and not just for "training purposes."

The Employer's testimony on this point was specific, detailed, unequivocal and though denied by Union's witnesses, basically unrefuted by evidentiary standards.

I conclude therefore that under the special circumstances involved in "peak" demand for gas production over a few days in the winter, the Employer gained the right to transfer into the gas plants employees from other locations and from different bargaining units in exchange for and pursuant to improved remote reporting payments.

Indeed, I do not think that the parties engaged in negotiations over the remote reporting provisions and pay, simply for training purposes. The pay and the remote reporting arrangements must have been intended to cover other activities, and I am persuaded that the parties mutually discussed and understood that it would apply to fleshing out the work force at a gas plant like the West End Plant, during the few days of the "peak" period.

The present use of remote reporting for this purpose does not constitute an abuse. I agree with the Union that there is potential for abuse. I am sure if I or any other arbitrator saw that the Employer exercised the right of transfer for the purpose
or effect of damaging this or any other bargaining unit, or if the employment rights of an affected bargaining unit were prejudiced, we would identify it as an abuse of authority and enjoin that particular use. But the present set of facts do not rise to that level.

Finally, but significantly, and again as an accepted or agreed to variation from Article I, the Union concedes that the Employer could have subcontracted the disputed assignments and that if it had done so the Union would not have grieved. To my mind I see no contractual distinction in the instant circumstances, between subcontracting and the transfer of employees of other bargaining units from Harrison to West End. Both involve the taking over of West End bargaining unit jobs by non-bargaining unit personnel. Both contain the potential of depriving the West End bargaining unit of job security, upgrades, and overtime. Both are equally inconsistent with the Union's interpretation of Article I of the contract. Indeed, if employees at the West End Gas Plant "come under the terms and conditions of this Agreement" that would apply as much to outside contractors as to employees of the Employer from other bargaining units. In short, with this concession, the Union argues fatally against its own case.

For the foregoing reasons, and under the particular circumstances of this case, the Union's grievance is denied.

DATED: January 9, 1985

Eric J. Schmertz
Chairman
IN THE MATTER OF THE ARBITRATION

Between

LOCAL 144, SEIU

and

SILVER LAKE NURSING HOME

(Registered Nurse Coverage)

I, the undersigned, being the Arbitrator designated by the parties pursuant to a Memorandum of Agreement entered into on September 22, 1981 by and between Silver Lake Nursing Home (the "Employer"), Local 144 Hotel, Hospital, Nursing Home and Allied Services Union, SEIU, AFL-CIO (the "Union") and the Greater New York Health Care Facilities Association, Inc. (the "Association"), to whom was submitted the matter in controversy between them, and having duly heard their proofs and arguments, AWARD as follows:

1. Effective April 1, 1978, all registered nurses holding the titles of Director of Nursing Service, Assistant Director of Nursing Service, In-Service Coordinator and Nursing Supervisor, their relief, replacements and/or successors, are supervisory and/or managerial employees of the Employer and, as such, are excluded from the bargaining unit covered by the Registered Nurses Master Agreement by and between the Association and the Union as renewed and extended by Agreement dated June 27, 1984.

2. The Employer shall have no obligation to make contributions to the Union's Benefit Funds for and upon the employees encompassed within
paragraph "1", supra, retroactive to April 1, 1978, and shall be entitled to a refund or credit for any such contributions made after April 1, 1978, together with interest thereon.

Dated: New York, New York
March 15, 1985

Eric J. Schmertz
ARBITRATOR

STATE OF NEW YORK
COUNTY OF NEW YORK

On this 15th day of March, 1985, before me personally appeared ERIC J. SCHMERTZ, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

GABRIEL V. BONADIE
Notary Public, State of New York
No. 01B04653405
Qualified in Kings County
Commission Expires March 30, 1986
In the Matter of the Arbitration:

between

District 1199E, National Union of Hospital and Health Care Employees

and

Sinai Hospital of Baltimore, Inc.

OPINION AND AWARD

The stipulated issue is:

Did the Hospital violate Section 1.2(a) or 3.1 of the agreement when it refused to place the position of Transportation Specialist in the bargaining unit on February 15, 1983? If so, what shall be the remedy, if any?

A hearing was held on May 16, 1985 at which time representatives of the above named Union and Hospital 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 Hospital established the job of Transportation Specialist as a non-bargaining unit job because it concluded that some of the duties of the job were complex and required levels of skills and independent judgment beyond the scope of jobs within the bargaining unit. Therefore it assigned the job non-bargaining status and filled it with a non-bargaining unit incumbent.

In my view, the answer to the stipulated issue is found in Section 1.2(a) of the contract. That Section which defines the bargaining unit reads:

Employee Defined: Whenever used in this Agreement the term "employee" shall mean all full-time and regular part-time service and maintenance employees who work regularly twenty (20) or more hours in the week, including food production and service employees, laundry and linen workers, housekeeping employees, nursing assistants, radiology aides, autopsy assistants, laboratory aides, motor service employees, animal caretakers, grounds and maintenance employees, central material service employees, receiving and stores employees, ward clerks, physical and occupational therapy aides and attendants, nursing technicians
other than O.R. Technicians, excluding all cashiers, communication employees, patient hostesses, central duplicating service employees, office clerical employees, physicians, dentists, registered nurses, licensed practical nurses, technical and professional employees, temporary employees, guards, confidential employees, supervisory employees, administrative employees, executive employees, maintenance inspectors, O.R. Technicians and all other employees.

The jobs included in the unit are prima facie more related to the disputed position than those excluded from the unit. For example, the unit classifications include "motor service employees, nursing assistants, physical and occupational Therapists" (covering apparently the job of rehabilitation aide, referred to at the hearing), and "attendants." The job of Transportation Specialist involves driving a van, transporting out-patients to and from the hospital, with attention to the ailments, disabilities, dress and physical equipment of those patients at pick-up and during the period of transportation. Based on the record before me, those duties are prima facie similar to employees of motor services, to the duties and independent responsibility of physical and occupational therapy aides (and rehabilitation aides), to nursing assistants and technicians.

By contrast, I can find no such relationship or similarities between the job of Transportation Specialist and the jobs expressly excluded from the unit. Indeed, a review of the enumerated excluded jobs does not reveal one into which the Transportation Specialist would logically or substantively fit. Clearly, the Transportation Specialist does not qualify as a professional or licensed employee as do physicians, dentists, and nurses. Nor does it fit within the enumerated cashier, communication, hostesses, duplicating or clerical employees. Also, there is nothing about the job that qualifies it as professional, confidential, temporary, executive, supervisory, administrative, maintenance, inspec-
tional or as an operating room technician. Nor does it fall within the "catch-all" phrase "and all other employees." Well settled contract law accords to that phrase the meaning of other jobs similar to those enumerated. The Transportation Specialist does not so qualify.

Based on the foregoing, I find that the Hospital has the burden of showing that the job of Transportation Specialist requires such special skills, capabilities and independent judgment as to set it apart from the bargaining unit jobs which appear to have related tasks and responsibilities, to justify its exclusion from the unit. The Hospital has not met this burden.

The Position Description of the job of Transportation Specialist reads:

A. SUMMARY:
Under limited supervision, applies knowledge of rehabilitation equipment and patient care techniques to assist patients in transferring to and from vehicle and to assure their safety and comfort during transport; drives vehicle to pick up and deliver patients to and from the Hospital.

B. TYPICAL DUTIES AND RESPONSIBILITIES:
(This enumeration is representative rather than inclusive.)

1. Assists patients in getting in and out of van, using knowledge of proper patient transportation techniques such as side angle entry, rear entry transfer, etc. based on diagnosis and condition of patient.

2. Ensures that patients are attired in or are in possession of appropriate rehabilitation equipment such as braces, splints, ADL training equipment, etc. necessary for transport and/or treatment.

3. Confers with patient, family members, nurses, etc. to determine transportability of patient to rehabilitation center for treatment; may seek advice of Hospital professional staff based on condition of patient.

4. Applies, removes, inspects, and adjusts patient rehabilitation equipment as needed in connection with transportation process.
5. Drives Hospital van or other vehicle to transport patients to and from the Hospital, Levindale, patient homes, other hospitals, treatment facilities, et.

6. Observes passengers and responds to patients' needs during transportation, noting significant changes in condition or complaints from patients; may apply basic First Aid or life support techniques as necessary; notifies physicians, nurses, therapists, etc. of any problems incurred during transport.

7. Loads and unloads wheelchairs, walkers, or other equipment into vehicle as necessary.

8. Maintains logs and records of services performed including number and names of patients transported, points of origin and destination, mileage, driving time, etc.

9. Maintains the appearance and proper operation of the vehicle by performing periodic cleaning of interior and exterior, checking fluid levels, recording routine maintenance performed; notifying supervisor of mechanical problems or service needs, etc.

10. May transport supplies, prescriptions, or other materials as necessary.

11. Reads and follows maps as required to determine most efficient routes to use.

12. Performs related duties as required or assigned.

The Hospital concedes that items B 5, 7, 8, 9 and 10 are "simple" and could be performed by a bargaining unit employee.

With regard to the remaining duties and responsibilities, which the Hospital characterizes as "complex," I find no probative reason why they could not be satisfactorily performed by a properly trained member of the bargaining unit. Indeed the Position Description states that a worker would become "proficient" within "six months." That period to achieve proficiency is not lengthy, and casts doubt on the Hospital's assertion that duties and responsibilities B 1, 2, 3, 4, 6, and 11 are too "complex" for a bargaining unit employee.

Significant however is that the Transportation specialist
job, and especially the so-called "complex" duties, involve activities, responsibilities and procedures not so far removed from the rehabilitation aide, the unit driver, the unit nursing aide or the unit physical therapy aide to disqualify the job from bargaining unit production.

The Position Description defines the required ability as:

"possess[ing] the knowledge, skill, physical ability and mental capacity to perform the typical duties and responsibilities enumerated above or implicit therein."

The Hospital's case on the "typical duties and responsibilities," as set forth in the record before me, falls short of persuading me that they are materially different from those of some bargaining unit jobs, or that only a non-bargaining unit employee can qualify. As such, the Hospital violated Section 1.2(a) of the contract. I need not therefore deal with the allegations regarding Section 3.

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 Hospital violated Section 1.2(a) of the Agreement when it refused to place the position of Transportation Specialist in the bargaining unit on February 15, 1983.

The Hospital shall place that job within the jurisdiction of the bargaining unit and it shall be filled by a qualified bargaining unit employee in accordance with the terms and procedures of the Agreement.

DATED: August 22, 1985
STATE OF New York ) ss.: 
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration
between
Local 144 S.E.I.U.

and
Southern New York Residential Health Care Facilities Association, Inc.

and on behalf of its members

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 document entitled Local 144 - Southern New York Residential Health Care Facilities Welfare Fund and marked Joint Exhibit #1 in the record, shall be the Agreement and Declaration of Trust of said Welfare Fund, with the following determinations on those provisions thereof which were in dispute and which were the subject of the hearing of April 17, 1985:

A. At the end of Article I, Section 1 (page 2) there shall be added:

"The term Employer shall also mean for the purpose of this Agreement, the Fund, and any affiliated Fund of this Fund, so long as said Fund or Funds, make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees."

The last sentence of Article I, Section 6 (page 3) shall be deleted. In its place shall be the provision:

"The Trustees shall determine the amount of such benefits as required by the collective bargaining agreement."

B. Under Article IV, Section 2 (page 6), the final words thereof:

"subject to the provisions of Article VI Section 8" shall be deleted.

C. Under Article V, Section 1 (page 6) there shall be added to the first sentence after the word "agreement" the following language:

"and if the Collective Bargaining Agreement is silent, as the Trustees shall direct."
Under Article V there shall be a Section 3(a) which shall read:

"In addition to all other remedies, if the Trustees, shall complain that any Employer has not made full payment to the Trustees as required under the provision of any collective bargaining agreement, such complaint may be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies."

Section 3(b) of Article V shall read:

"The Trustees are hereby given the right, in their capacity as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy, for the purpose of effectuating the collection of Contributions due to the Fund from any Employer under the provisions of an applicable collective bargaining agreement or the Act. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages (as provided in the Act), interest at such rates as the Trustees shall from time to time determine, and the costs and legal fees incurred in such proceeding, to which the Fund is or may be entitled."

D. There shall be in Article IX a Section 10 (page 23) which shall read:

"With regard to every Article and Section of this Agreement and Declaration of Trust, it is expressly understood that the rights of individual fiduciaries under ERISA are not waived."

E. Section 1(e) of Article VI (pages 8/9) shall read:

"Receive, purchase or subscribe for any securities or other property of any kind, nature or description, whatsoever that they deem to be acceptable, and to retain such securities or other property in the Trust Fund; and"

Under Article VI, Section 4 the words "or without" in the second line of the second sentence, shall be deleted.

Article VI, Section 5 shall read:

"Notices given to or by the Trustees, the Southern Association, the Union or the Employers shall be deemed duly given and sufficient if in writing and delivered by messenger with
a receipt obtained therefor, or sent by prepaid first class mail return receipt requested. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Southern Association, Union or Employers shall be sufficient if delivered by messenger with a receipt obtained therefore or if sent by prepaid first class mail."

Article VI, Section 6 (page 15) shall read:

"The expenses incurred in the collection of Contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. The Trustees may utilize facilities offered to them by the Union to collect Employer Contributions."

There shall be a Section 7 as part of Article VI which shall read as set forth on page 15.

Section 8 as set forth on page 15 shall be deleted.

Section 8 set forth on page 16 and top of page 17 shall be deleted in its entirety, but shall be agreed to and made the subject of a side document.

Article VI, Section 9 (page 15) shall read:

"Any fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant and may receive reimbursement of expenses properly and actually incurred in the performance of his duties with respect to the Trust or the Plan upon presentation of receipts and like evidence for such expenses. Such reasonable expenses shall include the cost incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However, no fiduciary shall receive compensation from the Trust or the Plan other than for reimbursement of expenses actually and properly incurred.

F. Article VII, Section 3 (page 18) shall conclude with the words:

"and the eligibility for benefits of employees."

The final sentence of Article VII, Section 4 shall read:

"The Employer shall pay any delinquent amount mutually agreed upon in such a conference or
the amount claimed by the Trustees to be delinquent if mutual agreement is not reached, within thirty (30) days from the date the conference is ended or within fifteen (15) days from receipt of the report if no conference is requested, with interest from the date payment was due at rates to be set from time to time by the Trustees, at published prevailing rates."

The present final sentence beginning "In no event..." shall be deleted.

Article VII, Section 5 (page 19) shall read:

"The expense of the first audit of an Employer's records whenever performed by the representatives of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Fund. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Fund unless a delinquency is established in an amount in excess of $500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit.

G. Article X, Section 10 (page 27) shall provide that the Union President and the Association President shall alternate as Chairperson and Secretary of the Trust Fund, annually. The Union President shall assume the Welfare Trust Fund Chair initially and the Association President shall assume the Welfare Trust Fund Secretaryship initially. The reverse shall be the procedure in the Pension Trust Fund.

Under Article X, Section 11 the second sentence thereof (page 27) shall include provision for meetings to be held at the offices of the Fund as well as at other locations listed.

Under Article X, Section 12, the last sentence thereof (on pages 27 and 28) shall read:

"A judgment confirming the decision may be entered in any court of competent jurisdiction."

H. The last sentence of Article XI, Section 2 (pages 28 and 29) shall read:

"Any assets of the Trust remaining after the satisfaction of all liabilities under the Plan to Participants and Other Beneficiaries as required by the Act and payment or provision of the payment of the aforesaid obligation of the Trust shall be distributed in accordance with applicable law."

I. In Article XIV, the references in the first and
second lines on page 32 to "Executive Board of the Union" and "the Board of Directors of the Association" shall be changed respectively to "The Union" and "The Association."

J. All the foregoing A through I shall apply to the Pension Fund Agreement and Declaration of Trust.

With regard to the outstanding disputes arising out of Article II, Section S of the collective bargaining agreement, I make the following determinations:

1. As the parties agreed at the hearing, the consultants and actuaries for the Local 144 - Southern Funds, shall be the firm of Touche-Ross.

2. The carriers of said Funds shall be selected by the parties from among those carriers who have filed bids with Touche-Ross and who are referred to the parties for selection by Touche-Ross.

3. There shall be a single Administrator. The selection of the administrator and staff shall be made by the parties following advice and recommendations on said matters to the parties from the consultant.

4. The office space for the Funds shall be at an agreed upon neutral location in New York County of the City of New York. The size of the office space shall be made upon the recommendations and advice of the consultant and the administrator. The same shall apply to any other "administrative details."

5. The foregoing rulings, 1 through 4 shall be implemented and put into effect within thirty-five calendar days from the date of this Award. In the event that said implementation and effectiveness is not achieved within said thirty-five days, I will make forthwith and binding rulings to bring about said implementation and effectiveness.

For the foregoing purposes and for the general application and interpretation of this entire Award, I shall retain jurisdiction.

Eric J. Schmertz
Arbitrator

DATED: April 22, 1985
STATE OF New York ) ss.
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration between
Local 144 S.E.I.U. and
Southern New York Residential Health Care Facilities Association, Inc. and on behalf of its members

AWARD

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

The document entitled Local 144 - Southern New York Residential Health Care Facilities Welfare Fund and marked Joint Exhibit #1 in the record, shall be the Agreement and Declaration of Trust of said Welfare Fund, with the following determinations on those provisions thereof which were in dispute and which were the subject of the hearing of April 17, 1985:

A. At the end of Article I, Section 1 (page 2) there shall be added:

"The term Employer shall also mean for the purpose of this Agreement, the Fund, and any affiliated Fund of this Fund, so long as said Fund or Funds, make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees."

The last sentence of Article I, Section 6 (page 3) shall be deleted. In its place shall be the provision:

"The Trustees shall determine the amount of such benefits as required by the collective bargaining agreement."

B. Under Article IV, Section 2 (page 6), the final words thereof:

"subject to the provisions of Article VI Section 8" shall be deleted.

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"In addition to all other remedies, if the Trustees, shall complain that any Employer has not made full payment to the Trustees as required under the provision of any collective bargaining agreement, such complaint may be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies."

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D. There shall be in Article IX a Section 10 (page 23) which shall read:

"With regard to every Article and Section of this Agreement and Declaration of Trust, it is expressly understood that the rights of individual fiduciaries under ERISA are not waived."

E. Section 1(e) of Article VI (pages 8/9) shall read:

"Receive, purchase or subscribe for any securities or other property of any kind, nature or description, whatsoever that they deem to be acceptable, and to retain such securities or other property in the Trust Fund; and"

Under Article VI, Section 4 the words "or without" in the second line of the second sentence, shall be deleted.

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"Notices given to or by the Trustees, the Southern Association, the Union or the Employers shall be deemed duly given and sufficient if in writing and delivered by messenger with
a receipt obtained therefor, or sent by prepaid first class mail return receipt requested. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Southern Association, Union or Employers shall be sufficient if delivered by messenger with a receipt obtained therefore or if sent by prepaid first class mail."

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second lines on page 32 to "Executive Board of the Union" and "the Board of Directors of the Association" shall be changed respectively to "The Union" and "The Association."

J. All the foregoing A through I shall apply to the Pension Fund Agreement and Declaration of Trust.

With regard to the outstanding disputes arising out of Article II, Section S of the collective bargaining agreement, I make the following determinations:

1. As the parties agreed at the hearing, the consultants and actuaries for the Local 144 - Southern Funds, shall be the firm of Touche-Ross.

2. The carriers of said Funds shall be selected by the parties from among those carriers who have filed bids with Touche-Ross and who are referred to the parties for selection by Touche-Ross.

3. There shall be a single Administrator. The selection of the administrator and staff shall be made by the parties following advice and recommendations on said matters to the parties from the consultant.

4. The office space for the Funds shall be at an agreed upon neutral location in New York County of the City of New York. The size of the office space shall be made upon the recommendations and advice of the consultant and the administrator. The same shall apply to any other "administrative details."

5. The foregoing rulings, 1 through 4 shall be implemented and put into effect within thirty-five calendar days from the date of this Award. In the event that said implementation and effectiveness is not achieved within said thirty-five days, I will make forthwith and binding rulings to bring about said implementation and effectiveness.

For the foregoing purposes and for the general application and interpretation of this entire Award, I shall retain jurisdiction.

DATED: April 22, 1985
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

Local 144 SEIU

- and -

Southern NY Psychiatric Health Care Facilities Association

AWARD

Completing and supplementing my Award of April 22, 1983, I render the following award on the following disputed issues:

1. Who shall be the carrier and what benefits shall they provide to achieve the "same level of benefits"?

2. Where shall the offices of the L144 Southern Psychiatric Funds shall be located?

3. Who shall be the Funds Administrator.

A Hearing was held on September 26, 1985.

Based on the record before me, I render the following Award:
Issue #1 is determined and awarded in accordance with Exhibit A attached.

The office of the Funds shall be at the rental location 240 W. 35th St., NYC.

The Funds Administrator shall be Howard Katz, a person approved by

To ensure implementation of the foregoing and all provisions of trust Agreement of April 26, 1915,
the date by which the local IVI-Fourth association Funds shall
be operational is extended to December, 1915.

Also for said implementation the Union is directed to sign the Fourteenth
Trust Agreement and the Fourth Association shall agree to an
amendment of said Trust Agreement.
proposed Trust with the Union
Trustees or the Employer Trustees
as separate groups may invoke
deadlock arbitration procedures

The Pension Fund’s carrier
shall be Mass. Mutual. The
Fund shall be a defined
contribution plan with a
target benefit of $350 a month
for pensioners
and shall be converted to a
defined benefit plan as soon
as practicable. I retain
jurisdiction over the application
and interpretation of the implementation
guard plan.

For implementation, application
and interpretation of all the programs, I
retain jurisdiction

Sept 26, 1985

ERIC J. SCHMERTZ
Local 144 - Southern Funds
Group Insurance Plan

Schedule of Benefits

For Eligible Employees

- **Group Life and Accidental Death and Dismemberment**

<table>
<thead>
<tr>
<th>Employees with</th>
<th>Benefit Amount</th>
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<tbody>
<tr>
<td>-1 year service</td>
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<tr>
<td>1-4 years service</td>
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<td>9-10 year service</td>
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<tr>
<td>10 years or more</td>
<td>An amount equal to 100% of annual earnings to the next higher multiple of $100, if not already a multiple. Minimum benefit $10,000, Maximum benefit $25,000.</td>
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</tbody>
</table>

- **Accident and Sickness**

  Coverage is provided for off-the-job accidents or sickness, including maternity.

  Maximum benefit period = 26 weeks
  Weekly benefit = 50% of average weekly wages during last eight weeks of covered employment.

  Maximum benefit = $145 per week
  Minimum benefit = $20 per week
  Waiting period before benefits commence = 8 days from beginning of disability

For Eligible Employees and Dependents

- **Health Coverage - Option I**

  **Hospitalization**
  - New York Blue Cross
    - 120 days in full
    - 180 days at 50% of Hospital Charges
    - 30 days for in hosp. mental & nervous

  (See detailed description of benefits in appendix)
Medical-Surgical and Anesthesia Benefits

GHI insured contract - Type "C" Family Doctor Plan
- Doctor Home Visits paid at $87.50
- Doctor Office Visits paid at $72.50
- Maternity Care
  - Normal Delivery $150
  - Caesarean Section $250
(Copy of scheduled benefits in appendix).

Health Coverage - Option II

Hospitalization, Medical-Surgical and Anesthesia Benefits

HIP/HMO
- Unlimited days in member hospitals
- Inhospital for mental & nervous covered for 30 days.

Surgical-Medical and Anesthesia
- Covered in full when arranged by HIP/HMO medical group.

Private Duty Nursing - in full when ordered by a HIP/HMO doctor.
(Copy of HIP/HMO contract in appendix).

Optical Benefits
- Eye examinations
  - Frequency - One exam per individual per calendar year.
  - Schedule of Benefits
    (1) Optometrist/Optician $10
    (2) Ophthalmologist $20
- Eyeglass Lenses & Frames
  - Frequency - One pair per individual every two years.
  - Schedule of Benefits
    Eyeglasses and Frames $25

Prescription Drug Benefits

Option I - HIP/HMO covers the full cost of prescription drugs and appliances when obtained through designated participating pharmacies and designated appliance dealers under contract with HIP/HMO. In addition, prescriptions may be filled by mailing them to the HIP/HMO Drug plan.

Option II - Employees choosing Option II Health coverage will have their prescription drugs covered under a self-insured plan as follows:

- Full charge providing prescription is paid by a participating pharmacy. If not, reimbursement is made in accordance with a specific schedule of allowances.
  - Prescriptions not to exceed a 34 day supply.
  - Maximum 5 refills within a six month period if doctor specifies.
The stipulated issue is:

Did the Employer improperly refuse to implement the relief sought in grievance 83-24? If so, what shall be the remedy?

Hearings were held on December 13, 1984 and March 7, 1985 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.

It is the Union's contention that it "won" grievance 83-24 of Article 26 Section A6 of the contract. Specifically it asserts that the Employer failed to respond to the Union's grievance within the time limit set forth in Section A5, and that consequently, as Section A6 mandates, "The grievance shall...be deemed...affirmatively accepted..."

I conclude that the instant grievance 83-69, which protests the Employer's refusal to accept and implement the Union's grievance 83-24 and the relief sought therein, qualifies as a dispute "between an employee and the Employer" within the meaning of Article 26 Section A of the contract, and hence covered by the grievance steps of that Section.

However, I am not persuaded that the procedural default provisions of Sections 5 and 6 obtain in the instant situation.

In my view, the "default" provisions should become effective
only where the default or failure to answer within the prescribed time is clear and unquestionable. As the Union is claiming "default," the burden is on the Union to show the factual clarity and unequivocal nature of the default and that, as in a challenge to arbitrability, the grievance is no longer subject to the grievance procedure and arbitration on the merits.

I conclude that that is especially so where, as here, the substantive consequences could involve a major and highly controverted adjustment of the pension credit system, involving significant costs, significant numbers of employees, and significant administrative changes; and where those consequences would come about without subjecting the substance of the grievance to a test on the merits.

Also, I believe the default must be unconditionally shown where as here, other contract time limits in grievance processing have not always been rigidly observed, as a matter of general practice.

I find that the Employer had the right to ask for the names of all the affected employees during the processing of grievance 83-24; that the Union agreed to provide those names; that the Employer had reasonable grounds to believe that its answer was not required until that information had been provided; and that the Union's claim it "won" the grievance was made and is based on and at a point in time before those names were made available.

In short, I am not satisfied that Step Two of the grievance procedure was completed before the "default" was claimed, and that therefore the claim of a "default" or that the grievance "was won" was premature.

With the foregoing holding I need not deal with any of the other Employer defenses or assertions.

Accordingly, the Union's procedural claim in this proceeding
is denied. However, the substantive matter of grievance 83-24 shall be returned to Step Two of the grievance procedure and the Union shall have the right to process the dispute of that grievance further within the grievance procedure and to arbitration on the merits.

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 provisions and conditions set forth in the above Opinion, the Employer did not improperly fail and refuse to implement the relief sought in grievance 83-24.

Eric J. Schmertz
Arbitrator

DATED: August 31st, 1985
STATE OF New York as:
COUNTY OF New York as:

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 702 I.A.T.S.E.

and

Technicolor, Inc.

The Undersigned, duly designated as the Permanent Arbitrator 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 Company's claim for damages arising out of an alleged Union interference with the Company's efforts to operate the new Black and White Positive-Negative Processing Machine with a crew complement of two operators, is denied.

Interference has not been proved. The Company did not order the operators to work the machine as the Company wanted. The Union was not put to the test. The Company decided not to require operation of the machine with two operators, acceding instead to the Union's objection to the complement, subject to this arbitration. The Company had the right to require operation of the machine as it wanted, subject to the Union's and employee's rights to grieve. But because the Company did not press this right to the point of determining if the employees would work as ordered and then grieve, I cannot find "interference" or actionable Union and/or employee defiance.

2. Under Section 17(c) of the contract, and based on comparability with other reasonably related machines, I am persuaded that the third operator is needed primarily for relief when the machine is run continuously, but is not needed when the machine operation is non-continuous. Therefore the complement for the new B&W Developing Machine may be two when operated non-continuously, and shall be three when operated continuously.

Eric J. Schmertz
Permanent Arbitrator
DATED: June 19, 1985
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 issue in dispute involves the employment of Alan M. Kitz. A hearing was held on October 23, 1985 at which time Mr. Kitz, 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 parties filed post-hearing briefs or statements.

Based on the "Interview for Employment" form, Union Exhibit #1, and the "remarks" thereon, "Temporary - starts/9-20-85 days", written by the Employer's Vice-President, together with the regular practices of the industry regarding said "employment" forms, I am satisfied that the grievant was hired by the Employer, and that a mutual agreement of employment was entered into.

That the Employer did not know that the grievant was a member of the Union's bargaining team and that those duties might interfere with at least thirty days of uninterrupted work for the Employer, at a time when such work schedule as a Timer was very important to the Employer, is as much the fault of the Employer as that of the grievant. In my view, the Employer had as much an opportunity and duty to ask the grievant when he was interviewed about any role he might have had with the Union's bargaining team, as the grievant had the duty to disclose any such position. As I see it, the fact is that the Employer thought of or learned of this possible conflict of time between the productivity needed in the Timer's job and the grievant's role as a Union negotiator after
the grievant was hired. Therefore the Company's insistence that the grievant and/or the Union give assurances that the grievant would give at least 30 days of uninterrupted work as a Timer or make up any interrupted periods by overtime, cannot be construed as conditions precedent to the grievant's employment. Therefore, no matter how reasonable or realistic the Employer's request were in those connections, the hiring of the grievant was not dependent upon his or the Union's response. Therefore though he and the Union did not give the Employer the assurance it sought, the Employer had no right to claim that it would not hire the grievant or commence his employment on September 20th. The employment "contract" had previously been made.

Moreover, though I understand and appreciate why the Employer wanted assurances of at least 30 days work, or an overtime agreement to make up work interrupted by contract negotiations, I am not persuaded that the Employer had any real and present basis for requiring any such assurances at the time the grievant was to start work. At the time, no contract negotiation sessions were scheduled. Neither the grievant nor the Union knew when any such meetings would take place. Indeed, the Employer's concern was speculative at the time. Other circumstances were possible. First, subsequently scheduled meetings might have been few, if at all, during the critical 30 day period. Second, any subsequent schedule when arranged, could and should have been the point and basis for an arrangement between the parties to achieve an acceptable balance between the grievant's duties as a Timer and his role with the Union bargaining team. And thirdly, when and if any subsequently scheduled meetings unreasonably interfered with the grievant's duties as a Timer, and if the parties were unable then to work out an acceptable accommodation, the contract would provide the answer. Apparently, such a circumstance was contemplated when
the parties negotiated Section 28 of the collective bargaining agreement.

I recognize how the application of Section 28 might disrupt the Employer's plans in this case in connection with what it needed and expected from the Timer. But, once unconditionally hired as the grievant was, the Employer is thereafter bound to the terms of the contract regarding "absence from service of the Employer because of "any Union office or position." The Employer cannot, after the fact, circumvent the contract provision on that point by refusing to put to work a person it hired after it learns that that person may exercise his Section 28 contract rights.

Under the facts of this case, and holding as I have that the Employer had as much responsibility to ask or learn about the grievant's role as a Union negotiator as he had to volunteer that information, I must conclude that the grievant was denied implementation of the agreement to hire him because of his position as a member of the Union's negotiating team, and that such denial constituted a "deprivation of employment ...because of Union membership" in violation of Section 2 of the contract. That the denial was not based on anti-union animus is no less a contract violation.

AWARD

For the foregoing reasons, the grievant should have been put to work as a Timer, beginning September 20, 1985, and was entitled to the temporary period of employment for which he was hired. The Employer shall make him whole for his lost wages during the period involved.

DATED: November 18, 1985
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

International Ladies' Garment Workers' Union

and

Thomson Mfg. Company

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above named Union and Company, and having duly heard the proofs and arguments of said parties at a hearing on October 8, 1985, makes the following AWARD:

The Company's close down of the plant in Bennington, Vermont did not violate the contract.

The benefits to which the affected employees are entitled are the same as set forth in my Award of April 17, 1985, International Ladies' Garment Workers' Union and Jonathan Logan, Incorporated (Modern Juniors).

The Company is directed to accord said benefits to said affected employees.

Eric J. Schmertz
Impartial Chairman

DATED: November 11, 1985
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
   Air Line Pilots Association : AWARD
       and
       Trans World Airlines :

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 Association and Employer, make the following AWARD:

1. The claim of Roger Moore for a paid move to St. Louis is part of his grievance and is an arbitrable claim in this case.

2. Roger Moore is not entitled to a paid move to Chicago or to St. Louis under Section 13 and other related Sections of the Agreement.

DATED: January 31, 1985
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.

Captain William Hoar
Concurred in #2 above
Dissenting from #1 above

DATED:
STATE OF
COUNTY OF

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

Captain D. H. Brown  
Concurring in #1 above.  
Dissenting from #2 above.

DATED:  
STATE OF  
COUNTY OF  

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

Captain Paul Sedlak  
Concurring in #1 above.  
Dissenting from #2 above.

DATED:  
STATE OF  
COUNTY OF  

I, Paul Sedlak do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
TO: Capts. Brown
ADDRESS: Moran
CITY: Sedlak

FROM: J. W. Hoar
ADDRESS: 605 Third Avenue
CITY: New York, New York
DATE: March 20, 1985

SUBJECT: System Board of Adjustment - Case NY-54-83

Enclosed is a fully executed copy of the decision in Moore vs. TWA.

J. W. Hoar
Vice Chairman
TWA Pilots System Board

cc: J. S. Berger
A. C. Fullerton
H. R. Hoaglander
R. J. Kenny
J. P. Martinico
H. B. Pratt
R. E. Reynolds
E. J. Schmertz

Space permitting, reply at bottom of page
TWA PILOT SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration:
between:
Air Line Pilots Association:
and:
Trans World Airlines:

In accordance with Sections 21 and 22 of the collective bargaining agreement between the Air Line Pilots Association, hereinafter referred to as the "Association" and Trans World Airlines Inc., hereinafter referred to as "TWA" or "the Company", the Undersigned was selected as the Chairman of a Board of Adjustment to hear and decide the following issues:

1. Whether the claim of Roger Moore for a paid move to St. Louis is part of his grievance and is an arbitrable claim in this case.

2. Whether Moore is entitled to a paid move to Chicago or St. Louis under Section 13 and other related sections of the agreement.

Hearings were held on May 31, September 4 and October 1, 1984 at which time Mr. Moore, hereinafter referred to as "Moore" and representatives of the Association and TWA appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Captains William Hoar and Wallace J. Moran served as the TWA designees on the Board, and Captains D.H. Brown and Paul Sedlak served as the Association designees on the Board. The Oath of the Arbitrators was waived. The parties filed post-hearing briefs, and the Board met in executive session thereafter. The Award in this matter was rendered
earlier and signed by the Chairman on January 31, 1985. This is the Chairman’s Opinion.

FACTS

Although there was some dispute concerning the details of certain conversations and other oral communications, the basic facts material to the determination of this appeal are not in dispute and they are relatively simple. Both parties agree that the meaning and application of Section 13(A) of the agreement must be resolved for the determination of the substantive issues.

Section 13(A) in relevant part, provides:

Pilots, when transferred from one domicile within the United States, to another domicile within the United States, at Company request, will be allowed actual moving expenses for household effects up to a maximum of 3000 pounds gross weight for an employee without dependents and up to a maximum of 8000 pounds gross weight for an employee with one dependent, plus an additional 600 pounds gross weight for each additional dependent. Moving of such household goods shall be handled in accordance with the procedure set forth in the Company's Management Policy and Procedure Manual. When such procedure is approved by the Company, expenses for the moving of two (2) cars shall be allowed each pilot at the rate of twelve cents (12¢) per mile for the first car and eight cents (8¢) per mile for the second car based on the most direct mileage between the domiciles from which he is being transferred as set forth in the table below, plus en route expenses per Section 7(A)(1) for each hour en route based upon 400 miles travel per day. Also $250 relocation expenses will be allowed the pilot. If the pilot's wife and dependents also move to the new domicile they will be allowed relocation expenses of $150.00 for the wife and $50.00 for each dependent. Dependents are as presently defined in the Company's Management Policy and Procedure Manual. If the pilot is a successful bidder for another domicile, effective within fifteen (15) days of the effective date of his assignment to the domicile to which he was transferred at Company request, the above relocation allowances shall be reduced by one-fifteenth (1/15th) for each day under fifteen (15).
On or about October 1, 1982, Moore was involuntarily transferred from TWA's San Francisco domicile to its Chicago domicile. Fearing that the Chicago domicile would be soon closed and wishing and anticipating that he ultimately would be transferred to the St. Louis domicile and for other reasons such as avoiding two moves (to Chicago from California and to St. Louis from Chicago), Moore decided to move his family to and establish residence in St. Louis. There is no dispute between the parties that a voluntary transfer of domicile (whether to Chicago or St. Louis) would not have obligated TWA to pay moving expenses under Section 13(A). Both parties agree that Moore's transfer to Chicago in this case, "at the Company's request", was the kind of transfer (involuntary) which is covered by Section 13(A). The dispute between the parties is whether the move made by Moore otherwise satisfied the requirements of that Section.

In order to bring himself within the scope of Section 13(A), Moore made several proposals during various discussions with TWA management. His main proposal was that he ship his household goods to his brother-in-law's residence in the Chicago area at TWA's expense, off-load in Chicago and place the goods on another van for shipment to St. Louis at his own expense. He also proposed as a better alternative that TWA pay for shipment direct to St. Louis because he claimed it would be less costly than the other proposal. During the course of these discussions Moore addressed a written inquiry to TWA asking what TWA would pay. TWA advised him in writing that it would pay his actual expenses as provided for in the contract if he moved to the Chicago area, although a move within 100 miles of the domicile area would be acceptable. These discussions took place and correspondence was sent and received
over a period of time from March through April, 1983.

Having exhausted discussions with some management representatives who maintained the Company would pay for a bona fide or good faith move to Chicago, but not to St. Louis, and having been told that the kind of off-loading plan he had in mind should not be undertaken without Company approval, Moore, on or about April 15, 1983, filed Company supplied forms applying for moving expenses to Chicago and listed his brother-in-law's address as the destination. Moore’s admitted intention was to off-load at his brother-in-law's house and ship to St. Louis at his own expense. Mike Lannoy, a management official in the Los Angeles domicile told him, that Company approval was required for this plan. Moore claims that during his pre-application discussions that one, Gerald Moran, a TWA management employee, advised him that there was no rule as to how many days the goods had to remain off-loaded to qualify for payment by TWA and indicated that just off-loading could or would be sufficient. Moran denies that he gave Moore such advice and maintains that the essence of his statement was that Moore had to make a good faith move to Chicago and it was not possible to state with precision what would be a good faith move. Resolution of this factual dispute is not crucial because (1) Moore did not act in reliance on Moran's version of the statement and (2) Moore was subsequently advised by authoritative TWA officials that what Moran allegedly advised was not the policy of TWA; and (3) TWA never approved the plan.

In any event, Moore did file his application for payment of moving expenses to Chicago which was routinely approved by TWA. Apparently, sometime after he filed his application, but before he actually moved his goods, Moore’s intention to off-load in Chicago
and ship to St. Louis to his actual residence came to the attention of Captain Pratt, who had the final say on approval of moving expenses. Pratt and Moore met. In substance, Pratt warned Moore of the danger of discharge for fraud if he pursued his plan which was not a good faith move to Chicago. Moore claims he was threatened with termination. He thereafter withdrew his application for payment of expenses for a move to Chicago and commenced the grievance process.

During the conversation with Pratt, there was reference to what appeared to be a practically contemporaneous case in which TWA paid moving expenses under similar circumstances to a Captain William O'Neill. Although O'Neill was not mentioned by name during their conversation, both Pratt and Moore were aware that at about the same time Moore's application for moving expenses to Chicago was being questioned, O'Neill's moving expenses to Chicago had been approved in a situation where O'Neill, like Moore, was involuntarily transferred to Chicago from Los Angeles. Sometime later, O'Neill's expenses were paid by TWA. It appears that Moore sought to bring himself into a fact situation similar or identical to O'Neill's. The facts and significance of the O'Neill situation is considered later in this opinion.

Moore withdrew his application for expenses to Chicago on May 6 and simultaneously initiated the Section 21 contract grievance. On May 23, 1983, Moore made a written request for moving expenses to St. Louis. A step 1 grievance hearing was held on May 31, 1983. TWA denied the grievance in a letter dated June 2, 1983, and specifically denied the St. Louis request in a letter dated June 2, 1983. The matter was submitted by a letter to this Board, dated June 23, 1983.
The Association asserts and TWA denies that the Board has jurisdiction to consider the denial of Moore's request for expenses to St. Louis. The applicable contract provision Section 22(1), in relevant part states:

No matter shall be considered by the Board which has not first been handled in accordance with the provisions of Section 21 of this Agreement; provided that by agreement of the parties, matters may be submitted directly to the Board.

The St. Louis issue was not handled in full compliance with the procedures established by Section 21 of the agreement. Thus, if the Board has jurisdiction over the St. Louis matter it would be by virtue of conduct amounting to a waiver of the Section 21 requirements or an agreement under Section 22. A verbatim record of the May 31 Step 1 hearing as well as all of the relevant correspondence was received in evidence by the Board.

I agree with the Association that during the Step 1 hearing the St. Louis issue was considered and, viewed in the context of the correspondence and discussions, both parties understood and at the least TWA led the Association reasonably to believe that the St. Louis request would be denied and that there was agreement that it would be determined in the same arbitration with the Chicago issue. Hence, whether by virtue of TWA's waiver or agreement, I conclude the Board has jurisdiction over the St. Louis matter. Additionally, because in the alternative, the Union claims that St. Louis is in the Chicago domicile, a grievance over the latter covers the former.
Issue No. 2. The Substantive Questions

Both parties agree that the transfer to the Chicago domicile was "at the Company's request" and hence Section 13(A) applied to Moore's transfer. The issue which separates the parties is whether Moore was required to do more than and something other than he proposed to do, i.e. off-load in Chicago and ship to St. Louis at his own expense to qualify for payment of the expenses to Chicago, or ship directly to St. Louis for payment of expenses to Chicago or St. Louis.

The Company argues that the language of 13(A), the intent of parties as it is reflected in other conduct (particularly collective bargaining negotiation postures) and a common-sense resolution of any ambiguities in the contract language require the conclusion that the Company's obligation is limited to payment of actual expenses of and only when there is a bona fide move by the involuntary transferee into the Chicago area, the new domicile. The Association, on the other hand, argues that the contract language contains no requirement of a move into the Chicago area; that TWA conduct on at least two occasions as well as certain alleged admissions by TWA management support the Association's view of the matter; and the Association's resolution of the ambiguity makes more sense.

THE CONTRACT LANGUAGE

The Association argues:

(1) Section 13(A) by its terms does not require that the pilot move to the new domicile (the Chicago area) to be entitled to "actual moving expenses for household goods"; and

(2) If Section 13(A) does require the pilot to move to the new domicile, Moore would satisfy this requirement by off-loading in Chicago or by moving directly to St. Louis.
The contract language does not explicitly state the pilot must move to the new domicile, but the language that is used and the context in which it is used leads to the conclusion that such a move by the pilot is contemplated. The language speaks of "actual moving" expenses and the term "moving" itself suggests more than a mere shipment of goods. The entire context of the Section suggests that the pilot and perhaps his family are moving to a new domicile. The dependent's relocation expenses are payable by TWA only if they "also move to the new domicile". This clause suggests that someone else has "moved" to the new domicile and this could only refer to the pilot and his entitlement to moving and relocation expenses. The phrasing of Section 13(A) surely could be better, but the most reasonable construction is that it contemplates a "move" and not a mere shipment of goods and a move refers to a person's (here, the pilot) conduct and purpose. The Association's argument suggests that mere shipment of goods for whatever purpose and with no one "moving" provided it is "household" goods that is shipped would satisfy Section 13(A). This construction must be and is rejected. Rather I conclude that there must be a "move" by the pilot and not a mere shipment of goods to the new domicile to qualify for TWA paid expenses under Section 13(A).

This brings us to the question of whether Moore's proposed conduct constituted a move to the Chicago area for the purposes of Section 13(A). Stripped to its essence the Association's claim that off-loading in Chicago with shipment at Moore's expense to the new family residence in St. Louis rests on the following:

1. The off-load for any period of time at a place in the Chicago area which Moore designated at the destination (here, his brother-in-law's house) must be taken at face value as the place
to which he was moving and subsequent shipment of the goods and
Moore's intent at the time are irrelevant;

(2) If the subsequent shipment to St. Louis is relevant, then
St. Louis is within the Chicago area for the purposes of the con-
tract and it qualifies either the off-load plan or the direct ship-
ment to St. Louis for Company payment;

(3) TWA's conduct on two other occasions as well as advice
to Moore were in accord with the Association's construction of the
contract and as such, constitute authoritative construction of the
language; and

(4) By virtue of its conduct on those two occasions, TWA is
estopped from denying Moore paid expenses, whereas a contrary view
would discriminate against Moore in violation of the agreement.

To hold that the clear intent to ship to St. Louis is
irrelevant, as the Association urges, would make the requirement
that the pilot actually move to the new domicile a meaningless
requirement. It would permit utilization of Section 13(A) as a
device for requiring the Company to pay expenses not actual moving
expenses. If, as I have already determined, Section 13(A) requires
the pilot to move to the new domicile area in order to qualify for
expenses under 13(A), then where he intends to move as part of the
moving process is clearly relevant. It is true that borderline or
difficult cases can be envisaged where this determination might
present difficult questions, but in this case, where the Association
agrees and the evidence is undisputed and comes from Moore himself
that he unequivocally intended to ship his goods from his brother-
in-law's house in the Chicago area to his new home in the St. Louis
area, no difficulty is presented. Hence, unless TWA by its conduct
has construed the provision differently and thereby bound itself in
this case or unless St. Louis is in the Chicago area for the purposes
of Section 13(A), Moore's move was not to the Chicago area and his
plan to off-load in Chicago and ship to St. Louis or to ship to St. Louis would not comply with Section 13(A) for purposes of moving expenses.

In this connection, the disputed versions of Moran's statements to Moore in which Moore claims he was told all he had to do was off-load in Chicago would not be dispositive of the issue. If Moran did make such a statement to Moore, it was not a binding construction of the contract in view of the fact that Moore did not act or rely on the statement to his detriment and because of the clear contrary statements he later received from Moran, Captain Pratt and others before he moved. TWA's view of its contract obligations communicated to Moore before he moved were wholly consistent with their position throughout their dealings with Moore and in this proceeding.

There remains the question of whether TWA is estopped from denying Moore's request. The Association relies on two instances to support its position. The first involves the 1971 example of a Captain Van Etten, who was involuntarily transferred to Los Angeles from Boston, moved to Las Vegas and was paid his moving expenses to Las Vegas. One instance does not reflect a policy or a prejudicial practice, and hence is insufficient as a basis for estoppel. The reason Captain Van Etten's expenses were paid are unclear in the record. As I see it, at best the Van Etten situation might be argued as authority for payment under an "equivalent move" concept i.e. that a move to St. Louis is less costly than shipment to Chicago, but it is not authority for the "off-loading" plan of this case.

But in relying on the Van Etten situation in its request for a paid move to St. Louis, the Association, disclaims reliance on the concept of "equivalent move", asserting instead that St. Louis is within the Chicago domicile.
Hence, the facts of the instant case, the theories relied on by the Association, and the Association's disclaimers, remove the "equivalent move" concept from this case. Though there is no probative evidence in the record supporting the view that an "equivalent move" concept is part of the proper application of Section 13(A), a determination of that question need not therefore be made. Accordingly, the Van Etten matter is not precedent for the application of Section 13(A).

As for the case of Captain O'Neill, it does appear that he, like Moore, was transferred to Chicago. He, like Moore, anticipated a move to St. Louis. He, as Moore intended to do, off-loaded in Chicago prior to shipment of the goods to his new home in St. Louis. TWA actually paid the expenses to Chicago for O'Neill, but conducted an examination of the circumstances of the payment when it became aware of the shipment to St. Louis. Payment was made to the moving company because the move was already made and it had relied on TWA's commitment to pay. At the time Moore was making his inquiries and patterning his move after O'Neill's, TWA's examination of the O'Neill situation was underway. Ultimately, TWA determined that O'Neill may have relied in good faith on what he believed he had been told by TWA and that the move was made before an impropriety was made clear to O'Neill. Consequently, TWA determined to pay the moving company and not to seek repayment from O'Neill. The O'Neill case does not represent an instance of payment pursuant to TWA policy. Indeed, the contrary is the case. Approval was given; payment was made before TWA was aware of all the facts of O'Neill's move. The question for TWA was what action should it take where payment was made contrary to TWA's policy and its view of the contract, where there may have been good faith reliance by O'Neill and the moving company. This cannot be binding or persuasive precedent in the instant case where unlike O'Neill
he was instructed not to carry out his plan, Moore did not proceed, there was no payment, and no reliance.

As for the claim that TWA discriminated against Moore in its treatment of him, the foregoing material differences between O'Neill's and Moore's cases preclude a finding of discriminatory treatment.

There remains the question of whether St. Louis is in the Chicago area. St. Louis, 289 miles away from Chicago, on its face would not be viewed as being in the "Chicago area". There was no evidence that Moore's object in moving to St. Louis bore any relationship to its proximity to the Chicago area. Indeed, his entire course of conduct recognized that St. Louis was not in the Chicago area. Additionally, TWA has identified St. Louis and Chicago as separate, independent domiciles. Such determination is a managerial prerogative.

The evidence indicates that Moore did not intend to reside in St. Louis because of its connection with the Chicago area; rather, his purpose was to avoid an additional move from the Chicago area to St. Louis because he expected and wanted a transfer to St. Louis. The basis for his arguments to TWA when seeking approval never suggested that living in St. Louis in any way was in aid of his being assigned to the Chicago domicile. Indeed, his proposal that he off-load in Chicago and ship to St. Louis at his own expense was an implicit admission that St. Louis was not in the Chicago area for the purposes of Section 13(A). Irrespective of any Company policy or guideline that TWA would accept moves within 100 miles of the Chicago area for the purposes of Section 13(A), it is clear that St. Louis does not meet that criteria and that no purpose is served by including St. Louis in a requirement that a pilot move to the Chicago area. I conclude, therefore,
that St. Louis is not within the Chicago area for the purposes of Section 13(A). Consequently, neither TWA's denial of expenses for the move to Chicago nor its denial of expenses for the move to St. Louis violated Section 13(A).

DATED: February 28, 1985

Eric J. Schmertz
Chairman
In the Matter of the Arbitration
between
International Chemical Workers Union
AFL-CIO, Local 183
and
Union Carbide Corp., Linde Division

AWARD AND OPINION

The stipulated issue is:

Did the Company violate the contract by eliminating the Shipper job classification and assigning some of the Shipper duties to the DCC? If so, what shall be the remedy?

A hearing was held on August 9, 1985 at which time representatives of the above named Union and Company appeared and were afforded full opportunity of offer evidence and argument and to examine and cross-examine witnesses.

The Undersigned was selected as the Chairman of the Board of Arbitration. Messrs. William Maier and Edward S. Danielski served respectively as the Union and Company designees on the Board of Arbitration.

The Oath of the Arbitrators was waived. The Company filed a post-hearing brief. The Union gave its summation verbally.

In accordance with Article IV Step 4 of the contract and the agreement of the parties and the Board members at the hearing, no panel session of the Board was held, and the decision of the Chairman, with appropriate concurrence by at least one Board designee, constitutes the Award in this case.

The issue is narrow. The Union does not protest the establishment of the non-bargaining unit DCC job, nor does it protest the bulk of the combinations of duties in the job which were previously part of other jobs classifications. Nor does it protest the overall arrangement to combine some fourteen jobs into seven of which the DCC job was among the latter, as part of the Company's plan to gain greater job assignment and productivity flexibility.
What the Union does complain about is the assignment of certain duties to the DCC job which were previously performed by the bargaining unit shippers, and the consequential elimination of the Shipper job, and the layoff of two Shippers.

The dispute further narrows to the Company's primary assertion that the parties bi-laterally agreed to the elimination of the Shipper job and the transfer of some of its duties to the DCC classification, and the Union's denial of any such agreement.

The weight of the credible evidence persuades me that in bi-lateral negotiations over the general question of accordng the Company greater job flexibility, the Union impliedly, if not expressly agreed to the elimination of the Shipper classification and the assignment of the disputed duties to the DCC classification.

First, the Union witnesses did not deny the Company's testimony that there were express discussions of a quid pro quo nature, under which the Company agreed to establish two new truck driver jobs in exchange for the elimination of the Shipper classification. The subsequent establishment of the two truck driver jobs is, under traditional contract interpretation, affirmation and persuasive evidence of that "deal." There is no logical explanation for the creation of the two truck driver positions except as the agreed to consideration for dropping the Shipper classification.

Additionally I find that though there is equivocal evidence on whether the Company told the Union specifically that the Shipper job would be eliminated, there is probative evidence of duties which the DCC would encompass, and that among those specified duties were some that had been performed by the Shipper. From that the Union should have known either directly or constructively that the consequence of the DCC job would be to eliminate
the Shipper, especially when it was clear that the object of the negotiations was to consolidate jobs and increase job assignment flexibility.

Further determinative is the fact that the contract which the Union signed following those negotiations did not include the Shipper job among the listing of bargaining unit jobs, whereas that job was listed in the predecessor contract. If the parole evidence rule of contract interpretation was applied, the Union would be barred from attempting to impeach the written contract and the absence therefrom of the Shipper classification, by evidence of any prior oral agreements to the contrary. But such a technical approach is unnecessary. The contract has eliminated the Shipper classification from the list of bargaining unit jobs; the Union signed that contract; and the weight of the evidence of what preceded the preparation and execution of the contract points convincingly to the conclusion that the parties agreed to the elimination of the Shipper. Hence the contract is confirmation of that arrangement, and explains why the Union signed it. That the Union thereafter reserved its right to complain to the NLRB and/or to an arbitrator that the Shipper classification was improperly eliminated does not mean that the Union is excused from the effect and responsibility of signing the contract; does not change the evidence of what happened in the bi-lateral negotiations and does not mean that the Company was wrong. Rather it preserved the right of the Union to bring on this arbitration proceeding for a hearing and decision on the merits. That right has now been exercised and the respective contentions of the parties have been adjudicated in this arbitration on the merits as presented.

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

The Company did not violate the contract by eliminating the Shipper job classification and by assigning some of the Shipper duties to the DCC.

Eric J. Schmertz
Chairman

Edward S. Danielski
Concurring

William Maier
Dissenting

DATED: October 7, 1985
STATE OF New York | ss.: COU NY 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  
AAUP, University of Bridgeport  
Chapter  
and  
University of Bridgeport  

OPINION AND AWARD  
Case #12 39 0476 82  

The stipulated issue is:  

Does the terminal contract of May 1, 1984 offered to Mr. van der Giessen fulfill the intention of the Arbitrator's Award? If not what shall be the remedy?  

A hearing was held on June 25, 1985, at which Professor van der Giessen, hereinafter referred to as the "grievant" and representatives of the above named parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing statements.  

My Award of February 7, 1984 held that the terminal notice given the grievant by the University in May, 1981 violated the contract. I directed that he be reemployed by no later than the beginning of the next academic year; that he be made whole for net salary and benefits lost; and that the terminal notice be expunged from his file.  

The University re-employed him for the academic year 1984-85 (and presumably complied with the back pay and benefits direction), but made his contract for the 1984-85 year another "terminal contract." The Union contends that the latter terminal contract was violative of my Award, and that the grievant's re-employment should have been under a regular yearly contract, according him an additional year thereafter (i.e. for the academic year of 1985-86) if he was to receive another terminal notice.  

I find no contract bar to the University's attempt to do
correctly in 1984-85 what it did incorrectly by its May, 1981
notice.

The contract allows the University to give terminal contracts
or terminal notices for "institutional need." The University's
error by its May 1981 notice was its failure to provide persuasive
reasons, or particularizations for and in support of its con-
clusionary "institutional need." My Award had the effect of
transforming that earlier terminal contract into a regular con-
tract, and gave the grievant the right to re-employment. The
latter right of re-employment was not ordered or guaranteed for
any period of time beyond another academic year. My Award did not
deal with whether the re-employment contract was to be a regular
contract, a terminal contract or based on any other conditions.
My Award was limited to expunging the May 1981 notice and pro-
spectively, for the grievant's re-employment at the beginning of
the academic year following the Award.

The University retained its contract right to give terminal
contracts for "institutional need," and my Award did not prohibit
that or restrict that procedural right for the academic year of
the grievant's re-employment.

Accordingly the grievant's re-employment for the 1984-85
academic year, albeit with a terminal contract, complied with my
Award. However this is not to say that the terminal contract for
the 1984-85 academic year was substantively proper. That question
is not before me. It is my view that the University must still
show persuasive reasons and justification for and in support of
its "institutional need," but that may be a matter for a subse-
quent arbitration, when and if the propriety of the University's
procedural right to issue a terminal contract is tested on the
merits. The rights of the parties on this latter question are
expressly reserved, and I observe that a grievance on that question is presently pending.

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

The terminal contract of May 1, 1984 offered to Professor van der Giessen fulfilled the intention of the Arbitrator's Award.

Eric J. Schmertz
Arbitrator

DATED: July 30, 1985
STATE OF New York ) ss.:
COUNTY OF New York )

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

Did the Village violated Article X Vacations, in limiting the number of vacation days which may be taken contiguous to weekends? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in Garden City, New York on November 27, 1985 at which time representatives of the Rockville Center CSEA, hereinafter referred to as the "Association" and the Village of Rockville Center, hereinafter referred to as the "Village" appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Article X, Paragraph 5 of the contract reads:

"All vacation schedules are subject to the approval of the Department Heads."

In the early summer of 1985, the Village Administrator notified Department Heads that no more than five vacation days could be scheduled and approved contiguous to weekends. The Village asserts that the policy is necessary to meet the Village's operating and staffing needs on weekends and on the Fridays and Mondays that respectively precede and follow the weekend. It is undisputed that prior to this new policy, there was no limitation on the scheduling of vacation days contiguous to weekends and that Department Heads regularly approved any and all such schedules "subject to operating needs."
The Association asserts that the new policy is arbitrary because it is rigidly and uniformly applicable to all weekends and to all employees regardless of the particular operating or staffing requirements of and for any particular weekend and the days immediately preceding and following that particular weekend. The Association contends that any such absolute policy is violative of the contractual provision permitting vacations to be scheduled "subject to the approval of the Department Heads;" that the policy strips the Department Heads of discretionary authority; and that the policy sets up unilaterally, a new condition for taking vacations that is not supported by the contract or practice.

I do not find the Village policy to be unreasonable or unrelated to operational needs. The authority of Department Heads referred to in Article X Paragraph 5, is not solely that of and/or discretionary with the Department Head. Clearly it relates to the Villages' "managerial" authority to consider vacation schedules in the light of operating and staffing needs, and, though exercised by and through Department Heads, may be determined and set by the Village Administrator. Therefore, the Administrator's instructions to the Department Heads was a normal and traditional implementation of managerial authority and did not improperly oust the Department Heads of any contractual authority or discretion.
Had the Village promulgated the new policy without regard for or study of the impact on operating and staffing needs by vacations scheduled contiguous to weekends, I would agree with the Association that the policy was arbitrary because it was not prompted by or related to known factual conditions. But that is not the case here.

The Village offered unrefuted testimony that the governmental functions of the Village were in fact hampered and in some cases crippled, by the large number of employees, both bargaining unit and supervisory, who scheduled vacation days contiguous to weekends. So, the Village has shown factual and realistic difficulties attendant to unrestricted vacation scheduling and has demonstrated an operational basis and need for its new policy.

Under that circumstance, I consider it appropriate and reasonable for the Village to believe that because Mondays and Fridays are regularly "peak days" the efficiency, essential services and other functions of the Village would be regularly impaired if the scheduling of vacation days contiguous to weekends was not limited.

Therefore, in view of the practice of approving vacation schedules subject to operating needs, I find no contractual reason why the Village is required to make vacation application decisions on a weekend by weekend basis. The evidence in the
record persuasively points to a uniform and calendar-wide problem; and a uniform policy in response is proper.

Moreover, I find the policy to be reasonable in its dimensions. In addition to the vacation days that may be scheduled contiguous to weekends, the Village stated at the hearing that the three "floating days" accorded the employees under the contract may also be taken contiguous to weekends. So as a practical matter, employees may schedule eight days off contiguous to weekends. And considering the vacation entitlement set forth in Article X, Paragraph 1, which accords yearly vacations of ten, fifteen, twenty-three and twenty-five working days to employees respectively with five, ten, twenty and over twenty years service, I do not find the scheduling restriction placed on five of those days to be unfair or unreasonable under the circumstances of this employment setting.

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

The Village did not violate Article X -Vacations- in limiting the number of vacation days which may be taken contiguous to weekends.

DATED: December 14, 1985
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.