In the Matter of the Arbitration:  
between:  
International Brotherhood of:  
Boilermakers, Iron Shipbuilders,:  
Blacksmiths, Forgers and Helpers:  
Local 614  
and:  
General Dynamics Corporation:  
Electric Boat Division:  
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OPINION AND AWARD  
Case No. B-90-85  
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The stipulated issue is:  

Did the Employer violate Article XII, Section 4.C(2) when it did not pay employees represent- 
ed by Local 614 the premium stated therein? If so, what shall be the remedy?  

A hearing was held in Groton, Connecticut on April 29, 1986 at which time representatives of the above named Union and Employ- 
er appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The 
Arbitrator's Oath was waived; a stenographic record was taken; and both sides filed post-hearing briefs.  

Article XII, Section 4.C(2) of the collective bargaining agreement reads:  

The Employer agrees to pay two dollars ($2) additional compensation for each shift, or any part thereof, when employees are requir- 
ed to work under the conditions defined here- 
in.  

(2) Employees engaged in sand blasting or silica blasting.  

More specifically, the issue is whether the use by the Boilermakers of a pneumatic powered, portable, vacuum "blaster" to remove slag from welds, is "sand blasting or silica blasting" within the meaning of the foregoing contract provision.  

Though it appears that the use of the "blaster" can be work that is as "dirty" and unpleasant as traditional sand blasting performed by the Painter classification, I am unable to conclude
that it falls contractually within the terms and application of the foregoing contract clause.

Technically, the "blaster" does not use "sand" or "silica", so there is some question as to whether it qualifies as "sand or silica blasting" under the contract terminology. But I do not disqualify it on that ground alone. Significant, I conclude, is the past practice regarding payment to the Boilermakers for this work, and the contract negotiations regarding the application of the "dirty money" payments for its performance.

It is undisputed that the Boilermakers have never been paid the extra $2 for working with the "blaster;" that the extra $2 has never been paid for the use of that piece of equipment regardless of which classified employees use it; and that the $2 premium has only been paid to Painters when and while they perform traditional sand blasting using different equipment. Coupling this practice with the contract negotiations for the 1984 Agreement leads to the persuasive conclusion that the parties did not intend to apply the $2 premium to the use of the portable "blaster."

In those contract negotiations, the Union proposed that the Boilermakers be paid the "dirty money" for the use of the "blaster;" the Employer rejected the proposal and neither the contract provision nor the practice was changed. I interpret this bargaining history as recognition by the Union that the $2 premium did not cover the use of the "blaster" by the Boilermakers. I conclude that the Union's position in the negotiations was not merely a statement or reiteration of what it thought the contract already covered, but rather an effort to enlarge the application of the premium to cover the use of the "blaster" by the Boilermakers.
As the negotiation effort was unavailing, that expansion cannot be obtained through this proceeding. It remains a matter for collective bargaining.

A word of caution to the Employer. I consider it to be a significant distinction when the Employer asserts that the "blaster" is a closed system that does not involve the "open" exposure and other "dirty" conditions of the blasting performed by the Painters. But there is evidence in this record that the "closed, vacuum" system of the blaster has not been working well and is not as protective of the operating employees as it is supposed to be. The Employer is cautioned that steps must be taken to insure the proper and protective use of the "blaster" so that the essential difference between its use and traditional sand blasting by the Painters is maintained in fact and in operation. Unless that is done, or if the continued use of the "blaster" by the Boilermakers is under "dirty" or "exposed" conditions that are as unpleasant and/or "unsafe" to the operators as are the conditions confronting the Painters, I, and possibly a different subsequent arbitrator might well find that the use of the "blaster" had constructively become, "sand or silica blasting" within the meaning of Article XII Section 4.C(2) of the contract.

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

The Employer did not violate Article XII, Section 4.C(2) of the contract when it did not pay employees represented by Local 614 the premium stated therein.

DATED: June 13, 1986
STATE OF New York ) ss.: 
COUNTY OF New York 

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

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between 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 the Union at a hearing on July 1, 1986, the above-named Employer having failed to appear at said hearing after due notice makes the following AWARD:

1. My Award of December 8, 1985 is reaffirmed. Therefore the Employer shall pay to Tom Moran and Farrell 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.

2. I find that Paul Peluso, Michael Regino and Joseph Moa are similarly situated to Messrs. Moran and Beazer. Therefore the Employer is also directed to pay to Messrs. Peluso, Regino, and Moa the same amounts of money as are due and owing Messrs. Moran and Beazer.

3. The Employer shall also pay to the Union the sum of $500 which is the Employer's share of the Arbitrator's fee in the prior case between the parties, which the Employer has failed to pay to the Arbitrator and which the Union has advanced to the Arbitrator on the Employer's behalf.

Eric J. Schmertz
Permanent Arbitrator

DATED: July 7, 1986
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

O.C.A.W., Local 8095

and

Mobay Chemical Corporation

OPINION AND AWARD

Case #86K/05122

Grievance #15 - 85

The stipulated issue is:

Did the Company have just cause to discharge the grievant, Samuel L. Cook on or about October 17, 1985?

A hearing was held on April 11, 1986 at which time Mr. Cook, hereinafter referred to as the "grievant," and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record of the proceedings taken; and the Union and Company filed post-hearing briefs.

The grievant was discharged for excessive absenteeism and for insubordination.

If there is one rule uniformly accepted in industrial relations and by arbitral decision, it is that an employee who is chronically unable to maintain regular job attendance need not be retained in employment even if his absenteeism is beyond his fault or control. That rule is based on the logical and sensible proposition that an employer must be able to rely on regular attendance by its employees to meet its production and service obligations. It is this situation that presents itself in this case.

The grievant is a short-term employee. He was hired on May 31, 1984 and discharged on October 17, 1985. Over that period of sixteen and one-half months he was unable to work the equivalent of 170 work days of the total 349 work days for which he was scheduled.
His absences were due to claimed disabilities from job related and non-job related injuries; and from various claimed illnesses.

I need not make determinations on the bona fides of these claims, because, under the foregoing rule, and with the magnitude of the absentee record, the legitimacy of the reasons for the absences are irrelevant. That the Company may have recorded many of his absences as "excused" only means that it accepted his representations that they were due to illnesses or disabilities. But it does not mean that the Company waived its basic managerial right to terminate his employment for unsatisfactory or irregular attendance. Any such waiver, where a particular absence was "excused" because of illness, would mean that on a cumulative basis, an employer would never be able to terminate the employment of an employee who fails to come to work an excessive amount of time. In short, though individual or separate absences were accepted by the Company as due to illness or disability, the cumulative and excessive nature of the grievant's absenteeism was not "excused;" nor did the Company waive its right to take action in response to the grievant's cumulative record.

As a short-term employee, and considering the magnitude of the grievant's absentee record over the short period of his employment, I find that he was adequately warned by the Company that his record was unsatisfactory and that he risked discharge if it didn't improve. Under these same considerations, I do not find that the Company had to impose a suspension, following verbal warnings, before discharge would be justified. Considering the
magnitude of the absentee record; the short period of the grievant's employment and the apparent chronic nature of the grievant's problems concerning his absenteeism, I am satisfied that the Company adequately complied with "progressive discipline" requirements.

The many and various medical reasons and excuses offered by the grievant for his absences and the quantity of those problems within the short period involved leads me to accept the Company's conclusion that the grievant's problems, with attendant inability to maintain regular job attendance are chronic without any reasonable basis to expect improvement in the future.

Also, I do not find that the claimed procedural defect in notifying the grievant and the Union of the discharge constituted a defect fatal to the Company's action.

As the foregoing facts and determinations justify discharge, it is unnecessary for me to deal with the charges of insubordination.

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

The Company had just cause to discharge the grievant, Samuel L. Cook, on or about October 17, 1985.

Eric J. Schmertz
Arbitrator

DATED: July 8, 1986
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.
August 25, 1986

Mr. Rudolph A. Lawton
New Jersey Education Association
180 West State Street
P. O. Box 1211
Trenton, New Jersey 08607

Dear Mr. Lawton:

I enclosed herewith my Report, Findings of Fact and Determinations in the Matter of the New Jersey Local Education Association Demand and Return System for the membership year 1984-1985, together with my bill for services.

Very truly yours,

Eric J. Schmertz
Umpire

EJS:hl
Encl.
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 representative or "agency" fee assessed against employees in the bargaining unit who choose not to become members of the union representing them.

The Act was previously 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 also 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:

>*The 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

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

¹ This scope of permissible expenditures is limited by certain exceptions discussed later in this report.
.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 RLA 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 proceedings, 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 of 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)

Significant since this Umpire's Report, Findings of Fact and Determinations for the 1983-1984 membership year, has been the decision of the Supreme Court of New Jersey in Booton Board of Education of the Town of Booton v. Judith M. Kramer (A-124) (decided June 25, 1985). Responding to the challenge in that case to the lobbying activities that are authorized by the 1979 amendments to the New Jersey Employer-Employee Relations Act and that are supported by nonmember representation fees, the Court ruled that said lobbying activities are not repugnant to First Amendment freedoms so long as they are germane to policy goals in collective negotiations and contract administration or to advantages in wages, hours and other conditions of employment in order to invoke the State's interest in achieving stability in public-employee relations.

Specifically, the Court stated:

The statute's broad recognition of lobbying activities as an essential element of public employee union activity accurately reflects the significant quantum of public employee rights and benefits that are determined outside the collective negotiation process. Public employees in New Jersey are substantially affected by state and local budgetary decisions and by the various laws and regulations that determine conditions of employment as much as, if not more than, by the negotiations conducted by their majority representative. Indeed, many of the most important benefits of public employment are determined by statute and a public employee union that

Accordingly, under the Act, as judicially interpreted, and consistent with the First Amendment of the United States Constitution, any portion of a nonmember's agency fee used for a prescribed purpose is to be refunded to that nonmember on demand. To meet the foregoing requirements; to avoid the use or expenditure of any portion of a nonmember 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 nonmembers 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, and Booton Board of Education of the Town of Booton v. Judith M. Kramer, supra. However, as a result of the March 4, 1986 decision of the United States Supreme Court in Chicago Teachers Union v. Hudson, the NJEA has reviewed the systems used by its locals and has concluded that these systems may not fully meet the constitutional tests outlined in Hudson.

Nevertheless, in accordance with Section A of said Demand and Return System, I was again retained as the Representation Fee Umpire "to determine the percentage of the Association's dues income for the 1984-1985 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, perforce 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 nonmember to a refund in the amount so used.

The Association has satisfied me that to the extent possible it has moved to comply with the provisions of Hudson as they affect fee payers for the 1984-1985 membership year and has sent a second notice to all fee payers, including those who did not previously object to the fee, advising them of their rights to object and providing them with sufficient documentation to form
an "adequate explanation of the basis of the fee..."¹

The Association has advised me that by retention of the Representation Fee Umpire for the 1984-1985 membership year it is moving to meet those requirements of the Demand and Return System which may satisfy the needs of objecting fee payers, and to comply with those assurances expressly given to fee payers who have objected to the fee.

I am further persuaded by the Decision of the New Jersey Public Employee Relations Commission Appeal Board in the case of Jonathan Mallamud v. the Rutgers Council of American Association of University Professors Chapters that the use of the Demand and Return System for the 1984-1985 membership year is a proper first step in determining the appropriateness of the representation fees charged.

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 1984-1985 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, perforce 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 nonmember to

¹ Hudson p. 17, section VI
a refund in the amount so used.

In carrying out my assignment I have been guided by the aforesaid situations, 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. At my request I was provided with the Association's budget for the 1984-1985 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 18, 1986, 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.

I interviewed Directors of the Association, or representatives of the divisions for which there were budget allocations and expenditures during the 1984-1985 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 1984-1985 membership year the Association's total expenditures (for the purposes of this report overwhelmingly and materially from dues), was $19,414,205. That amount was apportioned among and accounted for by the following nine divisions
with the amounts spent by each division as follows:

- UniServ: $5,024,592
- Legal Services: $2,636,983
- Research & Economic Services: $970,075
- Communications: $1,732,395
- Government Relations: $361,703
- Instruction and Training: $1,070,783
- Business Division: $3,711,854
- Governance and Administration: $1,827,718
- Fringe Benefits: $2,078,102

A description of the responsibilities and activities of the foregoing divisions¹ 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.

**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

¹ Except for reasons later explained, the Division of Governance and Administration and "Fringe Benefits."
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 AND 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...............$78,480

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

in the amount of...............$89,827

Membership Meetings
That portion of those meetings devoted to members-only benefits and political activities,

in the amount of...............$30,340

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...............$12,528
Negotiation Consultants
That portion of these expenditures was used for the NEA Unification campaign during 1984-1985,
in the amount of.....................$66,606

Strengthening Locals
That portion of these expenditures was used for organizing purposes in Newark and for staff meeting expenses,
in the amount of.....................$17,020

1. Higher Education
That portion of meetings and materials devoted to member-only benefits and organizing or political activities in state colleges,
in the amount of.....................$4,223

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.....................$294,697

3. Regional Operating Costs
That portion of expenditures and costs devoted to member-only benefits and political activity,
in the amount of.....................$18,621

4. Regional Offices Rent
That portion of rental space devoted to member-only benefits and political activity,
in the amount of.....................$15,729

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.....................$5,318

TOTAL.............................................$633,389

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 proscribed activities. These activities are, agency shop litigation expenses, legal costs of bargaining elections, certifications and civil service legal matters, and the attendant staff costs,

in the amount of .................... $43,015

RESEARCH AND ECONOMIC SERVICE 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 employees when they deal 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 revenue earned by the Travel Service. I calculate the total proscribed costs to be,

in the amount of.................. $160,468

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 ......................... $4,783

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 ......................... $35,128

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 ......................... $41,607

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 ......................... $80,890

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 .................. $7,462

**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 .................. $37,111

**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 .................. $13,937

**TOTAL**.......................... $220,918.

**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 during the membership year 1984-1985 not related to permissible activities:

A-623 - Designated "The Gifted Child Education Act."
A-1050 - Establishes standard procedures to be followed by a county board of taxation in hearing appeals of tax assessment concerning multiple dwellings.
A-3552 - Establishes the Missing Children Clearinghouse in the Division of State Police.
A-2541 - Establishes a program for school-aged child care in public schools; appropriates $3,400,000.
A-3375 - Reduces the number of course hours of instruction for licensure as a cosmetologist-hair stylist for public school vocational students.
A-2376 - Appropriates $125,000 to the Educational Information and Resource Center in Sewell.
A-546 - Provides for the control of smoking in places of employment.
A-547 - Provides for the control of smoking in certain restaurants.
A-548 - Provides for the control of smoking in government buildings.
A-2498 - Provides for categorical program support by the State for educational programs for autistic pupils.
A-632 - Requires local boards of education to establish standards for pupil retention and promotion and provide remedial instruction for students who fail to meet the standards.

A-519 - Permits the continued use of school buses for 15 years from the date of its registration.

A-104 - Provides for computer education programs in public schools.

S-2126 - Designated the "Computer Literacy Act," provides for the establishment of five computer education pilot projects by the Commission of Education.

A-225 - Establishes a statewide comprehensive program and diploma requirements for secondary school pupils.

A-86 - Provides for a major teacher initiative in the areas of mathematics and science.

S-1845 - Permits students in certain schools to participate in a 1-minute period of silence before the opening of each school day.

A-1 - Establishes procedures for exercising the power of initiative and referendum.

A-2 - Provides for distribution of informational materials on public questions and initiative and referendum questions.

S-2675 - Extends the life of the Commission on Sex Discrimination in the statutes to January 12, 1986.

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 Delegate 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 established 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 informational 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 expenditures of the budget for Legislative Conference involved proscribed activities, in the amount of $NONE.
Expenditures of the budget for Legislative Field Project involved proscribed activities, in the amount of $49,688

Expenditures of the budget for Legislative Publications involved proscribed activities, in the amount of $1,724

Portion of salaries related to impermissible activities, in the amount of $18,196

Total amount of $69,608

**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.................$23,095

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.................$26,477

A portion of the costs of the Summer Leadership Conference devoted to political activity,
in the amount of..................$ 5,145

Costs related to the annual NJEA convention (for members only),
in the amount of..................$76,112

For a total of.................................$130,829
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 repairs 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 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, 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:

2.65% of the time of the Director's office,
in the amount of..................$ 6,113

5.17% of the time of the staff of Data Processing/Computer Center/Office Automation (for political campaign purposes),
in the amount of..................$44,639

11.21% of the time of the staff of the accounting office (for political oriented transactions),
in the amount of..................$13,037

5.10% of the time of the staff of Membership Processing, (for political campaign purposes),
in the amount of..................$15,193

9.17% of the time of Capitol Street Operations (for political activities),
in the amount of..................$30,721

Plus the net cost and expenses of the NJEA Convention (for members only),
in the amount of..................$226,506

Plus overhead costs related to the foregoing,
in the amount of..................$171,515

For a total of..........................$507,724

The total, foregoing, "proscribed" costs and expenditures during the 1984-1985 membership year total, $1,721,941 or 11.1% of the total NJEA budget and expenditures for that year.

I consider it logical and appropriate therefore to conclude that 11.1% of Governance and Administration Division expenses
is attributable to excluded activities, in the amount of

.........................$202,877

and that 11.1% of the Fringe Benefit account be treated similarly, in the amount of .......................$230,669.

Accordingly, the total amount of expenditures during the 1984-1985 membership year that were unrelated to the statutory and/or judicially determined matters of collective bargaining, contract administration or grievance handling is...........

.................................................................$2,155,487.

The foregoing total constitutes 11.1% of the total NJEA expenditures for the 1984-1985 membership year.

DETERMINATION

11.1% of the total NJEA budget and expenditures for the 1984-1985 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 nonmembers. Conversely, 88.9% of the total budget and expenditures were used for permitted activities on behalf of nonmember as well as members. As the nonmember 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 nonmembers (as well as members) than nonmembers contributed toward those activities. Inasmuch as the representative or "agency" fee of a nonmember was 15% less than the dues paid a member, it would appear that none of the proscribed activities were paid for out of an agency fee. Accordingly, nonmembers are not entitled to refunds from the NJEA portion of the representation fee.

Eric J. Schmertz  
Representation Fee Umpire

DATED: August 25, 1986
STATE OF New York )
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 stipulated issue is:

What shall be the disposition of the Union's grievance dated October 28, 1985 on behalf of Robert Warbington?

A hearing was duly held at which time Mr. Warbington, 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.

The grievant, with greater seniority and another junior employee, Lynval Mullings had essentially the same geographical second leg of a tripper schedule. The difference between the two was that Mullings started his trip at Einstein Loop, Coop City at 8:20 AM and the grievant started at 8:30 AM.

When ridership fell off, the Employer decided that only one of these trips was needed. Because Mullings' first leg ended in Manhattan earlier than the grievant's first leg, thereby permitting him to return directly to Einstein Loop for the disputed second leg earlier than the grievant, and because, with only one of the two trips to survive, the Employer wanted the opportunity to load passengers from ten to fifteen minutes earlier at Einstein Loop.
Loop on inclement days. Hence, the Employer picked Mullings to continue the trip; changed his official start time to 8:30 AM, and put the grievant on standby. (Though from time to time during the relevant period when ridership increased, the grievant was called upon to make the trip too).

Clearly the Employer has the right to discontinue runs and trippers, to change their schedules, and to make run and tripper combinations for operational needs. In the instant case it had the right to discontinue one of the two trips involved. But I fail to see why the grievant's trip was not the one to survive.

The surviving trip, driven by Mullings, covered the same route as did the second leg of the grievant's tripper. With the changed starting time for Mullings, his surviving trip became identical with the grievant's original bid under the contract and with the tripper the grievant had operated.

The record before me does not persuade me that operational needs warranted the selection of Mullings, the junior employee, to operate a run or part of a tripper different (as to starting time) from what Mullings had previously operated, and apparently identical with the grievant's prior assignment. The Employer justifies it on the grounds of the need for early loading of passengers at Einstein Loop on days of inclement weather; that Mullings' full tripper, particularly the first leg thereof, brought him back in time to meet that specific operational need, and that the schedule of the grievant's first leg did not allow for this time leeway.

The evidence does not establish this operational need in favor of Mullings. At the end of the first leg of their respective trippers, Mullings deadheaded from 23rd Street to Einstein Loop.
at approximately 7:30 AM, and the grievant at approximately 7:45 AM. As a result, though Mullings arrived at Einstein Loop before the grievant, the evidence does not show that the grievant could not get back in time to load passengers on inclement days ten to fifteen minutes before the official 8:30 AM departure. Indeed, the grievant testified that he and his bus were regularly available at Einstein Loop by 8:05 or 8:10 AM. This testimony was not directly or effectively refuted. That being so, the grievant could have met the changed operational needs of the Employer.

At least, in my view, the Employer should have tried it that way, thereby according proper contractual credit to the seniority arrangements for picks of runs and trippers.

In short, though the Employer may eliminate runs and trippers, and may change the operating hours of runs and trippers, the changes made under the instant facts and circumstances were unjustified exercises of those otherwise managerial rights, and hence not proper uses of managerial prerogatives.

However, the grievant does not and did not have the remedy of a new pick. The contract requires mutual agreement of the parties for a new pick to be offered, and there was no mutual agreement in this case. But the grievant may have suffered some monetary damage by the Employer's action. If so, he is entitled to a monetary remedy. Accordingly, for the improper elimination (or periodic elimination) of the second leg of his tripper, the grievant shall be made whole for wages lost, if any.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:
Within the limitations of the foregoing Opinion, the Union's grievance dated October 28, 1985 on behalf of Robert Warbington is granted.

Eric J. Schmertz
Impartial Chairman

DATED: December 9, 1986
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.
ILPARTIAL CHAIRMAN, LOCAL 100 TRANSPORT WORKERS UNION
-and- NEW YORK BUS SERVICE

In the Matter of the Arbitration:
between
Local 100 Transport Workers Union of America
and
New York Bus Service

The stipulated issue is:

Did the Company violate Sections 1, 2, 34(a) and Exhibit B of the contract when a supervisor performed road calls on disabled buses instead of bargaining unit mechanics? If so, what shall be the remedy?

A hearing was held on February 12, 1986 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.

Under the particular facts and circumstances of this case, and limited to the two incidents presented in this arbitration, I do not find that the two road services performed by Supervisor Richard Johnson on December 6, 1985 violated the contract.

On that day, all the bargaining unit mechanics were occupied on other work. One bargaining unit mechanic was out ill and two bargaining unit mechanics scheduled for overtime did not report. Also, as a result of Department of Transportation inspections, extra mechanical defects, "written up" by the Department, required attention and correction without delay.

At that time, and against the backdrop of those circumstances, Johnson went out twice that day to two buses disabled on the road. To one he delivered two batteries to a bargaining unit mechanic on the scene and at the other he made some electrical repairs.
which took about ten minutes. I consider his road service in
those instances to be minor, of short duration, and, if not an
emergency, at least of some immediacy to get those two buses
moving. To send out a bargaining unit mechanic from the garage
for the short time and minor work involved would have meant stop-
ping mechanical work that was more significant and more demanding
for the overall operation of the Company’s service.

Applied to the facts in this case, I do not find that the
contract sections cited by the Union, bar Johnson from doing what
he did, under the conditions and at the time involved.

Whether the Company has the general right to assign super-
visors to perform road service, or whether there are limits on
the times or circumstances under which such work may be carried
out, are matters not presently before me. Therefore, I make no
determinations one way or the other on those broader questions.

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

The Company did not violate the contract
when Supervisor Johnson performed two
road calls on December 6, 1985.

DATED: February 18, 1986
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

AWARD

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties at a hearing on August 18, 1986, sets forth below his Award as announced at the conclusion of said hearing:

The discharge of George Thompson is reduced to a disciplinary suspension. He shall be reinstated without back pay.

Erin J. Schmertz
Impartial Chairman

DATED: September 9, 1986
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

In the Matter of the Arbitration between

Local 100 Transport Workers Union of America

and

New York Bus Service

OPINION AND AWARD

The stipulated issue is:

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

Hearings were held on August 18 and September 11, 1986 at which time Mr. Knight, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharged for an unsatisfactory driving record. Company Exhibit A in the record sets forth the grievant's "Disciplinary Warnings, Violations and Union Hearings" from the date of his employment on February 27, 1981 to his discharge on April 16, 1986, and the appeal of that discharge on April 23, 1986.

The grievant's record as set forth therein through March 19, 1985 is undisputed. It is also undisputed that he was previously discharged on July 14, 1983 and reinstated by the Employer on July 20, 1983.

Beginning with the recorded violations of October 5, 1985, the Employer has proved in this proceeding, the allegations (or substantial parts thereof) of that violation and those listed in Company Exhibit A and dated November 12, 1985, January 13, 1986, April 4, 1986 and April 15, 1986. The Employer has not proved the
grievant's culpability with regard to the incident of March 27, 1986.

The grievant's record of proved violations beginning October 5, 1985 and those conceded prior thereto warrant disceplinary action, but also the meaningful application of progressive discipline.

Following his reinstatement in July 1983, the Employer began a new "progressive discipline" cycle. He was warned for the accident of November 12, 1985, and for the violation of January 13, 1986 he was suspended one day and "advised that future problems will result in discipline up to and including discharge." Thereafter came the violation of April 4, 1986 which did not trigger his discharge, and the violation of April 15, 1986 which did.

I am not satisfied that the Employer's new cycle of progressive discipline was sufficiently forceful or meaningful to properly lead to the later discharge in this case. Considering the grievant's overall record, I do not find that a one day suspension was sufficiently punitive or severe enough to put the grievant on notice that subsequent violations would result in his discharge. A suspension, in the sequence of "progressive discipline" must be of such an impact and consequence as to make known to an employee in a tangible way, like the loss of pay and employment for a meaningful period of time, that the Employer is dissatisfied with his work record and that failure to correct that record will mean termination. A one day suspension in this case and a verbal warning fell short of the meaningfulness and consequence that I think was necessary in this particular situation.
(I note that in the Brooks decision, decided this date as well, the Employer had imposed a four day suspension on a short term employee. That was a suspension of sufficient magnitude). In the instant case the grievant was longer employed and had a longer and more extensive unsatisfactory record. With the commencement of the new progressive disciplinary cycle, the Employer should have imposed more than a one day suspension in this case to achieve the requisite impact and notice to the grievant that he was on the brink of termination.

Accordingly, I shall give the grievant one final chance. His discharge is reduced to a disciplinary suspension for the entire period since his termination. He shall be reinstated without back pay and expressly warned that future relevant violations will result in his discharge.

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

The discharge of John Knight is reduced to a disciplinary suspension. He shall be reinstated without back pay and warned that future relevant violations, if proved, will result in his discharge.

DATED: October 16, 1986
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 stipulated issue is:
Was there just cause for the discharge of Donnie Brooks? If not, what shall be the remedy?

A hearing was held on September 24, 1986 at which time Mr. Brooks, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant, a short term employee (hired in February 1986) was discharged for an unsatisfactory driving record, particularly his involvement in "four accidents" since completing his probationary period in June 1986.

In my view, the pivotal evidence in this case is the testimony regarding the allegation that with passengers aboard the grievant "passed a stop sign" and "tailgated" an automobile in Co-op City on August 13, 1986.

The testimony of supervisor Allen about this incident is credible. I find no reason why he should falsify what he saw and what action he took. He testified that he was off duty at the time, in front of his house, and saw the grievant drive the bus through a stop sign. He testified that he saw the grievant then tailgating a passenger car at a speed excessive for that location in Co-op City. He testified that he got into his own car, intercepted the grievant and admonished him with the question "where
are you going driving like that!"

In response, the grievant's testimony is unacceptably sparse. He seemed to deny the incident occurred at all. All he said was that Allen's testimony was "not accurate."

I accept Allen's testimony as accurate, and the grievant's denial as not only not believable but as evidence of his inability or unwillingness to heed prior warnings about his driving and as a failure to learn from the four day suspension imposed on him only a month and a half earlier.

The aforesaid four day suspension was for "accidents" of June 12, and June 29, which the Employer deemed "chargeable" or "preventable." That suspension was not grieved; hence the reasons for it are no longer challengeable in this proceeding.

Following the suspension, in addition to the stop sign and tailgating incident of August 13th, the grievant is charged with "speeding on the property" on July 15th, an "accident with a van" on August 25th, and a "short stop accident" on September 1st.

Without in this case deciding the import of the "chargeable" and/or "preventable" allegations involved, the Employer has proved enough violations and infractions following the four day suspension, especially the "stop-sign and tailgating" incident to lead me to conclude that the grievant failed to heed the warning and import of the four day suspension and that the Employer had cause not to risk his continued employment.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:
There was just cause for the discharge of Donnie Brooks.

Eric J. Schmertz
Impartial Chairman

DATED: October 16, 1986
STATE OF New York ) \ss.:
COUNTY OF New York)

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

Did the Company violate Article 17.01 of the collective bargaining agreement with regard to the posting of Edwin Miller's work schedule for the week ending March 9, 1985? If so, what shall be the remedy?

A hearing was held on September 25, 1986 at which time Mr. Miller, 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.

I conclude that the Company's method of giving notice of work schedules for day, evening and night shifts, was amateurish and ambiguous, and could result in reasonable mistakes or wrong notice to employees about a prospective work schedule. Because of this failing and the resultant imprecision, I find that the Company did not adequately comply with Article 17.01 of the contract.

However, I shall deny a remedy to the grievant because I think he knew or should have known that the schedule posting as he interpreted it had to be wrong; that he promptly learned what his actual schedule was to be from a different posting; that based on the unvaried practice of not making evening shift changes until a prior schedule had been worked two weeks he should have known that a "change" after one week had to be wrong or highly unusual and that his two week wait after learning unquestionably what his
schedule was to be before he claimed a contract breach, suggests some doubt or equivocation on his part regarding the accuracy or sincerity of his position. In short, I conclude the grievant did not have the requisite "clean hands" to be entitled to a remedy.

The Company notes day, evening and night shift schedules by coloring the schedule periods in white, green and red. "White" is a day shift; "green" denotes an evening shift and "red" a night shift. The Union's and grievant's claim is that the grievant's posted schedule was "white." The Company claims it was "green." The claim is that a posting of a "white" schedule — which the Union suggests was later changed to "green" was consequently a defective schedule posting under the contract.

My examination of what was offered as one copy of the posting shows the ambiguousness and potential for confusion. The "green" on the grievant's schedule is a green shading. While I think it could be discerned as colored, I did not observe it as it was posted, enclosed in a locked glass bulletin board. Significant, and not helpful to the Company's case is the fact that the Company produced only the posting that was in the fifth floor locker room, but could not produce the posting which was above the foreman's desk on the sixth floor. That omission lends some evidentiary support to a conclusion that those who viewed either or both of the two original postings may have seen "white" or failed to see the "green shading," or that the posting at the two locations may have been different.

Considering the testimony offered by the Union and the tentativeness of the coloring used I am not prepared to conclude that the grievant and the Union witnesses testified falsely about what they saw and what they were told.

However the grievant must share the fault. He knew that
prior work assignments were for two weeks before a shift change was scheduled. He was working the evening shift for only a week; so a change to days (with a "white" color notation) would have been unprecedented. When he learned a few days later from the "meat schedule" (another but unofficial posting) that he was to continue on the 4-12 shift, he had notice and should have reasonably inferred that the official posting was for, or was intended to continue him for at least another week on the 4-12 shift. Also, he relied on what his steward and other employees told him the official posting showed, without seeking authoritative clarification from management under circumstances where the seeking of clarification was warranted. Additionally, I fail to see why he waited two weeks to grieve. If he was convinced of the Company's contract breach, and if had been damaged thereby, I believe he would have complained earlier. I am constrained to believe that he had his doubts about any contract breach, and that in any event he had not been damaged by any late or faulty notice.

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:

By the nature of the disputed work schedule posting, and because of its lack of clarity and potential for confusion, the Company violated Article 17.01 of the contract with regard to the posting of the work schedule of Edwin Miller for the week ending March 9, 1985.

However, for reasons set forth in the above Opinion, Mr. Miller is not entitled to a remedy.

DATED: December 22, 1986
STATE OF New York)
COUNTY OF New York)

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 course of the hearing of the above matter, the parties reached a settlement of the dispute. That settlement is made my AWARD, as follows:

Without conceding the Union's position that the grievant filed for the 90% option in timely fashion, and without establishing a precedent for any other case and without prejudice to the Board's position regarding the time limits involved, and recognizing that the facts in this case are unique and do not involve any other employee, it is agreed that Peggy Askoff shall receive the 90% lump sum option, effective February 1, 1986.

A monetary adjustment between what she has received as terminal leave pay and the 90% option payment shall be made to reimburse the Board for the terminal leave payment made since February 1, 1986.

It is understood that with the 90% option payment to Ms. Askoff, the Board has no further liability to Ms. Askoff.

Eric J. Schmertz
Arbitrator

DATED: June 5, 1986
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.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

North Babylon Teachers Association:

and

North Babylon UFSD

AWARD

Case No. 1739-0063-86

In the course of the hearing of the above matter, the parties reached a settlement of the dispute. That settlement is made my AWARD, as follows:

Without conceding the Union's position that the grievant filed for the 90% option in timely fashion, and without establishing a precedent for any other case and without prejudice to the Board's position regarding the time limits involved, and recognizing that the facts in this case are unique and do not involve any other employee, it is agreed that Peggy Askoff shall receive the 90% lump sum option, effective February 1, 1986.

A monetary adjustment between what she has received as terminal leave pay and the 90% option payment shall be made to reimburse the Board for the terminal leave payment made since February 1, 1986.

It is understood that with the 90% option payment to Ms. Askoff, the Board has no further liability to Ms. Askoff.

DATED: June 5, 1986

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

Maritime/Metal Trades Council (M/MTC)
AFL-CIO

and

Panama Canal Commission

OPINION AND AWARD
FMCS #85K/29885

The stipulated issue is:

1. Is this dispute arbitrable?
2. Should Joseph W. Posey have been excluded from the rotation policy? Should he have been rotated out of his job?

A hearing was held at the offices of the Panama Canal Commission on December 13, 1985 at which time Mr. Posey, hereinafter referred to as the "grievant" and representatives of the abovenamed Council (hereinafter referred to as the "Union") and Commission, (hereinafter referred to as the Commission" or "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. In accordance with the practices and procedures of the Union and Commission, the arbitration hearing was tape recorded and the tapes were made available to the Arbitrator as the official transcript of the proceedings.

The Union and Commission filed post-hearing memoranda which were dated December 20, 1985 and which reached the Arbitrator on December 23, 1985. Under Section 8.19 of the collective bargaining agreement, the Award in this matter is to be rendered by January 22, 1986.

The Commission asserts that the grievance is not arbitrable because the relief sought, namely the grievant's exemption from the five year rotation policy and his reinstatement with back pay are beyond the Arbitrator's authority and inconsistent with management's rights under Title VII of the Civil Service Reform Act.
Also, it contends that any such remedy or relief would effectively nullify the Commission's regulation regarding rotation which implemented a provision of the Treaty between the United States and Panama and would thereby encroach on rights reserved to the Commission under 5U.S.C. 7106(a).

The Commission confuses arbitrability with the merits of the grievance. It is well settled that a particular remedy sought relates to the merits of a dispute. It is the result or consequence of a finding that the grievance is meritorious and hence has nothing to do with the threshold question of whether the dispute is subject to adjudication as an alleged contract breach under the collective bargaining agreement.

It is also equally well settled that a grievance is arbitrable if it bears a factual and reasonable relationship to a contract provision, and is founded on a claim of a breach of that contract clause(s). A finding that the clause has not been violated or that the grievance lacks factual or legal validity are matters involving the merits of the dispute and do not determine arbitrability. Indeed, though a particular remedy may be statutorily barred does not mean that an arbitrator cannot find the grievance to be contractually sound and fashion a different remedy or no remedy at all.

Here, the Commission's "five year rotation policy," is a Commission "policy" and "regulation" within the contemplation and meaning of Section 2.01 of the collective bargaining agreement. Said Section reads:

TREATIES, INTERNATIONAL AGREEMENTS, LAWS, REGULATIONS AND POLICIES. In the administration of all matters covered by this Agreement, Commission officials and employees are governed by existing or future treaties, international agreements, laws, and the regulations of appropriate authorities,
including published Commission policies and regulations in existence at the time the Agreement was approved; and by subsequently published Commission policies and regulations required by treaties, international agreements, laws, or by the regulations of appropriate authorities. All Commission rights, functions, and prerogatives are retained by and shall remain exclusively vested in the Commission except as clearly and specifically limited by this Agreement.

(Underscoring supplied).

There is no dispute that the rotation policy is in written form, and was in effect "at the time, the Agreement was approved." Said policy was first issued on March 18, 1980. I then read:

"United States citizen employees and other non-Panamanian employees whose permanent appointment occurred on or after October 1, 1979 to positions in the Commission in the Republic of Panama shall be required to rotate out of their positions no later than five years from the date they arrive at their duty stations on the Isthmus."

The Administrator of the Canal Commission, permitted individual employees to be excluded from the rotation policy "for sound administrative reasons." The rotation policy was modified again in 1984. The provision concerning the granting of exceptions was revised to permit exclusions from the rotation policy "only when there are no qualified Panamanians available for the positions or for other sound administrative reasons."

The foregoing policy was in response to and in implementation of Article X Section 5 of the Panama Canal Treaty of 1977. The Treaty provision reads:

"The United States of America shall establish a policy for the periodic rotation, at a maximum of every five years, of United States citizen employees and other non-Panamanian employees, hired after entry into force of this Treaty. It is recognized that certain exceptions to the said policy of rotation may be made for sound administrative reasons, such as in the case of employees holding positions requiring certain non-transferable or non-recruitable skills."
It is clear therefore, that the relevant parts of the Treaty as legislated into a policy and regulation by the Commission, are incorporated at least by reference into the collective bargaining agreement.

The Union's claim is that the Commission's policy is an erroneous interpretation and application of the Treaty provision; that the Treaty, unlike the policy, makes no distinction between permanent and temporary employees; that the Commission's decision to "rotate" and terminate the grievant after five years of service because he was a temporary employee on the critical date was improper because he was an "employee" of the Commission when the Treaty went into effect and not "hired" thereafter; and that alternatively, the policy and regulation has not been consistently and uniformly applied to employees similarly situated to the grievant in that many others were granted exemptions from the policy for family, humanitarian and other grounds unrelated to "sound administrative needs" or the availability of "qualified Panamanians" to replace them. Not to accord the same exemption to the grievant claims the Union is to treat him in an unfair, disparate and discriminatory manner.

In short, the Union is challenging the policy as an incorrect reflection of the Treaty and is challenging the propriety of the treatment of the grievant under the policy. As such, the Union's grievance alleges violations of the explicit and incorporated by reference provisions of the collective bargaining agreement. Its claims, factually and substantively, relate to contract provisions and to terms and conditions of employment under the contract. That is enough to make the grievance arbitrable, irrespective of whether or not the Union is contractually correct in its allegations and regardless of whether or not an arbitrator could grant the remedy the Union seeks if the Union's allegations are upheld. Indeed,
based on the foregoing, the contract definitions of a "grievance" has been met.

Section 8.02, in pertinent part provides:

Grievance means any complaint by:

a. Any bargaining unit employee concerning any matter relating to the employment of the employee;

b. The CR concerning any matter relating to the employment of any bargaining unit employee; or

c. Any bargaining unit employee, the CR, or the Commission concerning:

(1) The effect or interpretation, or a claim of breach, of this Agreement; or

(2) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Clearly, the Union's case herein involves claims "relating to the employment of the employee;" "to the employment of any bargaining unit employee;" and "any claimed violation, misinterpretation or misapplication of any law, rule or regulation affecting conditions of employment" (emphasis added).

Having met the definition of a "grievance," the grievance is subject to arbitration under Article 8 of the contract.

On the merits, the essential facts are not in dispute. The grievant was hired in June 1979 as a temporary security guard. He was still in temporary status when the Treaty went into effect. Thereafter, on October 1, 1980, without any break in his employment, he was converted to permanent status. In June 1983 he transferred to the job time-and-leave clerk. At the end of five years of permanent employment, on October 1, 1985, he was terminated after his appeal for an exemption from the rotation policy was denied by the Commission. His appeal was denied because he had become a permanent employee not before October 1, 1980; was
thereby subject to the rotation policy; and was not eligible for
an exemption because his skills were not needed for sound admin-
istrative reasons and because a qualified Panamanian could be
recruited to replace him.

I am satisfied that I do not have the authority to decide
if the Commission's rotation policy was and is a proper reflection
of the relevant Treaty language. For me to consider that question
requires a retroactive inquiry into the Commission's legislative
processes at a period of time several years before the beginning
of the instant collective bargaining relationship. The Arbitrator
has no such retroactive authority. His authority stems from and
is limited to the provisions of the collective bargaining agree-
ment and to the relationship between the Union and the Commission
during that period. Obviously therefore, he may not nullify a
Commission regulation or policy which had its legislative origins
years earlier, especially when that policy, as it existed, was in-
corporated by reference into the collective bargaining agreement
without change or challenge.

Rather, I must take the policy as written and applicable at
the time the collective agreement was first negotiated and I must
assume, with its unchanged inclusion by reference in the contract,
that it was an acceptable and proper interpretation and implement-
ation of the Treaty. Had the Union thought otherwise it should
have negotiated a different provision or a conditional application
of the policy when the contract was negotiated. That it did not
means that the policy cannot now be challenged in arbitration as
an erroneous reflection of the Treaty. In legal terms, the Union
is estopped from now complaining about a circumstance and policy
which it accepted and which became part of the contract by oper-
ation of Article 2 thereof. Therefore the Union's claim that the
Commission's policy improperly distinguishes between temporary and
permanent employees, cannot be upheld in this proceeding.

It follows therefore that on its face and considering the facts of the grievant's employment, the policy is squarely applicable to the grievant. He was a temporary employee when the Treaty went into effect, his job and skills were not so unique or irreplaceable by a Panamanian to warrant his exemption from the policy, and he had served the maximum five years.

That he may have been promised permanent status and did not achieve it until October 1, 1980 only because of a job freeze are "non sequitors." The fact is that at the critical time he was still a temporary employee. The policy sets forth no reasons, special circumstances or other conditions which would make one temporary status different from another or which would exempt any temporary employee from the rotation policy. Even if I accepted the grievant's testimony that he was promised permanent status and that only a job freeze foreclosed it before the cut-off date, I can find no contractual basis on which I could transform his temporary status to a permanent status at the critical time. It is regrettable that the promise to make him permanent was not carried out earlier, and it is unfortunate that a job freeze intervened. But these circumstances are nowhere contemplated or recognized as exceptions to the policy. For the Arbitrator to recognize them as such would do violence to the restrictions of Section 8.16h of the contract which require the Arbitrator to "base his decision on this Agreement and applicable...regulation;" and which caution him not to "add to, subtract from, or modify this Agreement." In short, the policy or regulation is precise and unambiguous. For it to be interpreted in a manner significantly
different than as written is to improperly go behind its clear and unqualified language and to exceed arbitral authority.

Remaining is the allegation of inconsistent, unevenhanded and discriminatory treatment of the grievant when compared to other employees similarly situated who were granted exemptions from the policy.

The Union's case is rejected, not because disparate or inconsistent application of the policy has not been shown, but because it has not been shown during the period probative to this case.

The Union has shown a number of instances, similar to the grievant, where non-essential or non-specially skilled employees who were not permanent at the critical time were granted exemptions for family, personal and/or humanitarian reasons. But virtually all of these predated the collective bargaining relationship and the collective agreement. They took place in the early and more liberal years of the implementation of the Commission's policy, and are not probative in this case. It is not unusual for an employer to carry out policies in a loose, uneven or even discriminatory manner when there are no collective bargaining restraints; and then tighten those procedures and make the policy consistent and uniform when and after the collective bargaining relationship is established.

The Arbitrator is confined to the period of the collective bargaining relationship in making comparisons and judgments over whether policies have been applied uniformly to employees similarly situated. If there is to be a finding of unfair comparative treatment or discrimination, it can only be found by an Arbitrator within and against the backdrop of a collective agreement and a
collective bargaining relationship. Absent that bilateral arrangement, inconsistencies are not actionable or challengeable, unless violative of other external law, in which event it would be a matter for some other forum.

What the Commission did before the contract with the Union cannot be used now as a measurement of the contractual requirement of consistency and evenhandedness. What is probative and determinative is whether the Commission's treatment of employees similarly situated was uniform, consistent and evenhanded during the time that the collective bargaining relationship existed.

The evidence does not show inconsistent or disparate treatment subsequent to the effective date of the collective bargaining agreement. The cases which the Union points to fall, for the most part, in the years 1980, 1981 and 1982. Indeed a major circumstance, upon which the Union relies, namely where a group of employees were granted exemptions, and some 16 or 17 others, including the grievant, were found thereafter to be similarly situated and were denied group exemptions, but treated individually, was decided by the Commission in March 1981, some two and one-half years before the collective bargaining agreement went into effect. For reasons already stated, I cannot find that precedential for the grievant's complaint under the contract nor prejudicial to the Commission's practices since the contract was negotiated.

Also, the case of the cook whom the Union claims was exempted for reasons unrelated to the policy or the Treaty provision, was decided by the Commission on August 9, 1983, a month before the effective date of the contractual relationship.

Four situations on which decisional dates have been fixed, postdate the contract. They involve a Writer/Teacher, a Legal
Technician, a Computer Equipment Analyst and a Pilot-in-Training. The evidence on these cases in the record is sparse and hardly determinative. The burden is on the Union to show that these exemptions involved circumstances similar to the grievant's request and that the Commission acted inconsistently and/or discriminatorily in granting those four and denying the grievant's appeal. The burden has not been met. The Union has not shown that the four aforementioned employees were not retained because they possessed skills not available or recruitable among Panamanians and not retained for other sound administrative reasons. Under that circumstance I am not prepared to substitute my judgment for that of the Commission on why those four employees (with job titles indicating specialized skills) were granted exemptions.

The questions of whether on a total employment basis, before, beyond and outside the scope of the collective bargaining agreement, these are or were circumstances where inconsistent, disparate treatment or discrimination may be actionable, are not before me and are not ruled on herein. If there be any such circumstances, they are for other forums, not arbitration.

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

1. The dispute is arbitrable.

2. Joseph W. Posey should not have been excluded from the rotation policy. He should have been rotated out of his job.

DATED: January 20, 1986
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:

District 1199E, NUHHCE, AFL-CIO: OPINION AND AWARD
and:

Sinai Hospital of Baltimore, Inc.:

The stipulated issue is:

Did the Hospital violate Section 1.2(a), 1.2(b), of the agreement when it laid off Harry Sherman on June 7, 1985? If so, what shall be the remedy, if any.

A hearing was held in Baltimore, Maryland on April 3, 1986 at which time Mr. Sherman, hereinafter referred to as the "grievant" and 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. Both sides filed post-hearing briefs.

The pertinent contract section involved is Section 1.2(b) which reads:

Bargaining Unit Work: Except for: emergencies; excessive absenteeism; training, coaching and instructing employees; inspecting; demonstrating, testing and experimenting with equipment, materials, means, methods, supplies and techniques; and securing and distributing equipment, material and supplies; bargaining unit work shall not be performed by a supervisory employee for more than 20% of his work time.

It is the Union's claim that when the grievant was laid off from his job as a Stationary Engineer and forced to bump into the lower graded job of Maintenance Mechanic II, his duties as a Stationary Engineer were taken over and performed by supervisory employees on a regularly scheduled basis in excess of the 20% limitation of Section 1.2(b) of the contract.

It must be noted that the contract does not prohibit the performance of bargaining unit work by supervisors, but rather
allows such activity not to exceed 20% of the supervisor's working
time plus other listed exceptions to the prohibition. This 20%
allowance frustrates a portion of the Union's case herein.

I find that following the grievant's layoff supervisory
employees stood watches previously performed by the grievant,
and that for a period of time from June 7, 1985 to October 5,
1985 the quantity and frequency of that work, handled on a regu-
larly scheduled basis, exceeded the 20% allowance of Section 1.2
(b). But for the period thereafter, the standing of watches and
other skilled maintenance work customarily handled by the grievant
or by the Stationary Engineer classification has not been shown
to exceed the allowed 20%. For this latter period the evidence
is contradictory, off-setting and hence inconclusive.

Put another way, I am persuaded that some work, both watches
and skilled maintenance work normally performed by a Stationary
Engineer and more specifically performed by the grievant before
his layoff, were handled by the three supervisory employees ident-
ified in this case. But after October 5, 1985, I cannot conclude
from the record that the quantity reached or exceed the 20% level.

This is not to say that it did not exceed that level, but
rather that the Union, with the burden of showing the contract
breaches by clear and convincing evidence, has not done so in
this record.

The logs relied on by the Union are not conclusive or
determinative. They do not cover the full time periods alleged,
and I am unable to conclude that they are probatively represent-
ative of the entire period. Rather, I must conclude that they
show what they have recorded for the specific dates attached to
each. It is speculative that other logs, if produced, would
show the same things, especially in view of contrary testimony
by two of the supervisors involved.

The same obtains with regard to the quantitative nature of what the logs state. They are written in shorthand form, and in the simplest terms refer to a job or piece of work without describing it in detail or its duration. Hence, even assuming that the work was regular bargaining unit work of the Stationary Engineer, I am unable to conclude that its quantity exceed 20% of the supervisor's time.

There is little doubt that the duties of other bargaining unit personnel and the supervisors were adjusted to cover the essential work vacated by the grievant's layoff. But I cannot tell from the record before me whether the new mix between bargaining unit and supervisory assignments created a factual situation where the latter arrangement exceed the 20% limit. Rather the record establishes the plausible conclusion that the remaining bargaining unit Stationary Engineers took over work vacated by the grievant, at the expense of other duties left unattended or under-attended, and even if the supervisors increased their handling of what is normally work of the Stationary Engineer, they did not do so, in this record, beyond the 20% level.

Therefore, except for the period from June 7, 1985 to October 5, 1985, where in my judgment the quantity and regularity exceeded the 20% level, the burden of showing a continued quantity of bargaining unit work at or above that level, has not been met. My Award shall provide for monetary damages to the grievant for the former period. The supervisory standing of watches during that time, to cover for vacations or otherwise exceeded the 20% level, and is not among the enumerated exceptions to that limit.

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

Following the layoff of Harry Sherman on June 7, 1985, the Hospital violated Section 1.2(b) of the contract for the period June 7, 1985 to October 5, 1985, when supervisory employees performed bargaining unit work of Stationary Engineers in excess of 20% of their working time.

Mr. Sherman shall be paid the difference between what he would have been paid as a Stationary Engineer and what he was paid as a Maintenance Mechanic II for that period of time.

Eric J. Schmertz
Arbitrator

DATED: June 11, 1986
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:

What shall be the disposition of the Union's grievance #1981-5145 dated December 23, 1983?

A hearing was held in Baltimore, Maryland on August 6, 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. The Union and the Hospital filed post-hearing briefs.

The grievance reads:

Complaint

"Mo' Clarice Stephens upon transferring from O.R. to Surgical Center as Instrument Specialist was removed from the bargaining unit to non-bargaining."

Relief Sought

"The job that Mo' Stephens holds belongs in the bargaining unit and should be placed in the bargaining unit."

I find that the Union is correct in its assertion that significant duties performed by Ms. Stephens in the later established non-bargaining unit job of O.R. Technician/Instrument Specialist, she previously performed as a bargaining unit Nursing Assistant and that those duties were also previously performed by at least probably two other bargaining unit employees, also classified as Nursing Assistants.

However, for two determinative reasons, I cannot conclude that those duties, relating to disassembling and cleaning instruments, are or were exclusively bargaining unit work. And therefore I cannot find that the Hospital erred in establishing the non-
bargaining unit job of O.R. Technician/Instrument Specialist to presently perform these duties.

The first reason is that when performed by certain bargaining unit employees classified as Nursing Assistants those duties were "out of classification" assignments because they were and are not part of the job description as regular job duties of a Nursing Assistant. That the two or three Nursing Assistants did this work, when all others similarly classified performed patient care duties consistent with the job description, does not constitute a sufficiently extensive variation in the job description to make the disputed work of disassembling and cleaning instruments a regular or recognized part of the Nursing Assistant portion. Rather, the two or three different situations that differed from the regular and prescribed duties of the other Nursing Assistants and from the Nursing Assistant classification, constitute an exception to the bargaining unit work of Nursing Assistants.

While this does not answer the question of whether the performance of the disputed work was or became, as a consequence, regular or acquired bargaining unit work (irrespective of classification), it does not allow for a conclusion that that work is part of the bargaining unit work of the bargaining unit classification, Nursing Assistant.

However, the remaining question is answered by the second reason. Based on the record, I conclude that at the time the disputed duties were being performed by Stephens and two or more other bargaining unit employees classified as Nursing Assistants the same work was or had been performed by at least one non-bargaining unit employee classified as an O.R. Technician-Instrument specialist and by non-bargaining unit nurses, and that no prior
arbitration award upset or otherwise disturbed those circumstances. That these examples may have taken place in hospital locations other than where Stephens is presently assigned does not persuade me that the work was significantly different. On the contrary, the evidence establishes that the disputed instrument disassembling and cleaning is substantially the same at the different locations involved.

In other words, the history of the performance of the disputed work, as recited in the record before me, persuades me that at least there has been mixed or joint performance of the duties by non-bargaining unit and bargaining unit employees. Therefore, even if the Hospital's argument that the work all along is or should have been a non-bargaining unit assignment and that its performance by a few Nursing Assistants was an error or mis-assignment, the evidence of performance of the work by both bargaining unit and non-bargaining unit employees negates the Union's claim of bargaining unit exclusivity. That being so, the Hospital had the managerial right to structure the work as a non-bargaining unit assignment, and that it is not presently assigned to or performed by a bargaining unit employee is not a contract violation.

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

The Union's grievance #1981-5145 dated December 23, 1983, is denied.

Eric J. Schmertz Arbitrator

DATED: January 11, 1986
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.
February 3, 1986

Gentlemen:

I enclose to you each herewith, two duly executed copies of my Award in the above matter.

Very truly yours,

Eric J. Schmertz
Arbitrator

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

Suffolk Child Development Center
Teachers Association

and

Suffolk Child Development Center

The stipulated issue is:

Did the Center violate Article XXIII B of the collective bargaining agreement when it issued an amended Policy Manual? If so what shall be the remedy?

A hearing was held on May 21, 1986 at which time representatives of the above-named Association and Center appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Center and the Association filed post-hearing briefs.

Article XXIII B of the contract reads:

The Center shall develop a written policy manual during the term of this Agreement, which may be amended from time to time. Where there is a direct conflict between such manual and this Agreement, this Agreement shall govern. When in the development of the policy manual it becomes necessary to make changes in the terms and conditions of employment not previously considered by the parties, the Center and the Association will negotiate in good faith and agree over such terms and conditions of employment, but will implement the remainder of the policy manual.


The issue in this case is whether "home visits" by teachers are discretionary or mandatory. The Association claims that the 1980 policy manual provided for discretionary home visits; that the amended manual made home visits mandatory; and that the change
constitutes a "change in terms and conditions of employment" within the meaning of Article XXIII B, requiring bilateral negotiations. The pertinent critical language of the 1980 manual read:

"In September, all teachers shall be requested to make home visits to find out as much as possible about the home environment of the child and share short and long term goals with the parents..."

The pertinent critical language of the 1985 amended manual reads:

"You are expected to contact the parents during the first weeks of school in order to introduce yourself and arrange an appointment for a home visit..."

I am not persuaded that the matter of "home visits" is a term or condition of employment within the meaning of Article XXIII B of the contract or under the applicable labor law. Rather I believe "home visits," standing alone, is a work assignment, and absent some express contract prohibition or limitation on that subject, has remained a managerial prerogative under the "educational policy" and "supervision and direction of the staff" provisions of the Management Rights clause (Article VI) of the contract.

However, assuming arguendo that there has been a change from discretionary to mandatory home visits and that that subject is a term and condition of employment, the Association's interpretation of Article XXIII B is nonetheless faulty. The full pertinent part of that contract clause requires bilateral negotiations of changes in terms and conditions of employment "not previously considered by the parties."

With that proviso, I need not decide whether the duty to bargain applies only to changes effectuated by the development of the original policy manual or whether it also covers later
manual amendment. Either way, the duty to negotiate is not just for changes in terms and conditions of employment, but changes "not previously considered by the parties."

Clearly the subject of "home visits" was previously considered by the parties. It was included in the 1980 manual and was an express provision in the Teachers Handbook in 1980 and in subsequent years.

Moreover, I am not persuaded that the 1980 manual language is as "discretionary" as the Association alleges. The phrase "...teachers shall be requested to make home visits..." is at least ambiguous in its discretionary or mandatory meaning or intent. The use of the word "shall" can be logically and properly construed to mean that the teachers "will" be so requested, and thereby carries a mandatory tone. If the word "requested" is relied on to mean that home visits were at the discretionary decision of the teachers, the ambiguity is clarified by the parallel and subsequent teachers handbooks. The 1980 handbook stated:

"Remember you will be required to set up home visits for each student in your class..."
(emphasis added)

As the subsequent annual handbooks repeated the foregoing mandatory language, the ambiguous wording of the 1980 manual must be resolved in favor of the Centers interpretation that "home visits" have always been required.

With the foregoing conclusion, and regardless of whether "home visits" are or are not a condition of employment, I find that the 1985 amended manual made no substantive change in the subject of "home visits," especially when the unambiguous mandatory language of the teacher handbooks was never complained about or
grieved by the Association. With the possible ambiguity of the 1980 manual so clarified, any past practice to the contrary (under which teachers decided to make home visits on a discretionary basis) is immaterial in the face of the preeminent language and meaning of the 1980 manual as clarified by the handbooks and as codified in the 1985 manual.

Finally, the Association has not shown that mandatory "home visits" would change the length of the work day or work week. It is a scheduled work assignment within the contractual work week. Though it may require changes in the amounts of time devoted to some activities such as reports and paper work, I cannot find that it would add time to or change the times in and of the work day and work week set forth in Article IX of the contract.

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

The Center did not violate Article XXIII B of the collective bargaining agreement when it issued an amended Policy Manual.

DATED: September 16, 1986
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 Authority violated the collective bargaining agreement by failing to assign overtime work to Jerry Bryant on March 2, 1985 and April 27, 1985? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on November 14, 1986 at which time Mr. Bryant, hereinafter referred to as the "grievant" and representatives of the above-named Union and Authority appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Certain facts are not in dispute. On the days in question, namely the Saturdays of March 2 and April 27, 1985, the grievant had less accumulated overtime than the employee who was assigned the overtime work. Also, it is stipulated that each time overtime is assigned, supervision consults the overtime list to determine for purposes of equalizing overtime, which employee had the least accumulated overtime at that point. And that such resort to the overtime list was pursuant to Article XII Section 7 of the contract and the overtime letter agreement of December 2, 1982 (Joint Exhibit 5).

It is also stipulated that the disputed overtime work on March 2 and April 27, 1985 was performed on preceding week days by Richard Baran, and that he continued on the assignment on an overtime basis on the Saturdays involved.
The Union claims that Baran's continuation on the two Saturdays violated Article XII, Section 7 which reads:

Section 7. Overtime work in any department shall be equalized among the departmental employees as far as is practicable. Lists for overtime shall be maintained by the department on a weekly basis in a conspicuous place near work stations or time clocks, and overtime status shall be based on hours paid and not hours worked. Procedures for equalization of overtime shall be in accordance with existing Memorandum of Agreement dated December 2, 1982.

and Article III Section A of the Memorandum of Agreement of December 2, 1982 which reads:

A. Particular Work Project
1. When a particular work project requires continuity of work beyond the end of an employee's workday, the employee or employees working on such work project prior to the end of the workday shall be assigned to work the overtime required on said project on said day.

It is the Union's assertion that a work project that requires "continuity" allows assignment of overtime work to the employee regularly assigned to that project only for and at the end of that particular workday, and does not allow a carryover to the next day. The Union points out that in the instant case, Baran was assigned overtime not at the end of the regular workday he performed work on the project, but on a subsequent day, namely Saturday.

The Authority defends its assignment to Baran on the following grounds:

1. Both assignments involved work of a specialized nature, about which Baran was more experienced and knowledgeable.

2. For purposes of safety the project had to be continued by the employee who had worked on it during the week.

3. On April 29, the grievant was in East Hampton, on an assignment which involved overtime that week, and it was impracticable to bring him in from that distance.

4. The contract does not require "equalization of
"overtime" over short periods, so long as at the end of the year the overtime has been equalized. In the case of the grievant and Baran their overtime quantity at the end of 1985 was virtually equal so that the letter and intent of the contract and Memorandum had been met.

5. To grant the grievant a monetary remedy would unbalance the total 1985 overtime in the grievant's favor.

6. The practice in the Department had been to permit and carry out a continuity of assignment from the regular workweek into overtime on a subsequent day by the same employee.

The work on Saturday, March 2nd, involved completion of electrical wiring in the engineering office. The work on Saturday April 27th, related to the detection and repair of trouble with a sprinkler system at the Oakdale location. I do not find that either was an emergency that required the immediate or continuing attention of the employee who started the work on a previous workday. Nor do I find that either involved any special safety situation or required any special experience or knowledge that a qualified electrician did not possess or that a qualified electrician could not handle or take over from a preceding employee. There is no dispute that both the grievant and Baran are qualified to perform this type of work. It may have been more convenient or even more efficient for Baran to continue with the job, but the contract does not provide for "continuity" for those purposes.

As to when equalization of overtime is to be done the Authority conceded that it resorts to the overtime list each time an overtime assigned is made, to see which qualified employee in the department has the least accumulated overtime. That means to me that an effort at equalization is made with each overtime assignment. Therefore the cumulative overtime figures at the end of 1985 are immaterial even if unbalanced by a decision in the grievant's favor.
What is material is where the grievant and Baran stood on March 2nd and April 27th. On those days, the grievant had less overtime than Baran.

I am not persuaded that the grievant's location in East Hampton made it impracticable to assign him the overtime. The facts indicate that the Authority knew in advance of the need for Saturday work on the sprinkler system. Baran had inspected it previously, preliminary to the Saturday work. With that amount of notice, the grievant could have been brought in from East Hampton.

I find the contract language to be clear and unconditional. Article III Section A of the Memorandum of Agreement specifically limits the assignment of overtime to the employee working on a project when "continuity" is required, to the end of that employee's workday. It does not provide for "continuity" by the same employee on a subsequent overtime day, nor does it provide exceptions for efficiency, safety or other operational conveniences. Therefore, based on the express language of the Memorandum, the Authority's assignment of the Saturday overtime work to Baran when the grievant's accumulated overtime was less was in violation of the language of the Agreement.

What remains is the assertion and evidence that in the particular department involved there has been a practice to schedule overtime on a subsequent day for the same employee who was working on the project during the regular workweek, and that this practice evolved from an incident in early 1960 when a serious electrical accident occurred at a pump station at Hauppauge. The Authority asserts that as a consequence and for reasons of safety, it required the employee who made the electrical installation to be the one to return to turn it on, and that a change on an overtime day
to other personnel less experienced with the particular installation was unsafe.

It is well settled that a practice contrary to unambiguous contract terms cannot prevail. Hence, in the face of the clear language of Article III Section 7 of the Memorandum, the practice of this particular department must give way to what the contract provides. Moreover, while I appreciate the safety concerns of the Authority, I do not find that the particular work dispute in this case, namely wiring in the engineering office and repair of a sprinkler system involved the type of danger or potential danger that attended the 460 volt junction box at the pump station in Hauppauge in 1960.

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 Authority violated the collective bargaining agreement by failing to assign overtime to Jerry Bryant on March 2, 1985 and April 27, 1985.

The Authority shall make a monetary payment to Bryant equivalent to the amount he would have earned had he been assigned that overtime.

Eric J. Schmertz
Arbitrator

DATED: November 3, 1986
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
Technicolor, Inc.

The stipulated issue is:
Has the Employer violated Sections 7, 13 or 17 of the collective bargaining agreement on or about May 6, 1986 resulting in the layoff of Louise Chirichella? If so what shall be the remedy?

A hearing was held on July 1, 1986 at which time Ms. Chirichella, 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 record clearly establishes that the work of "notching" and "writing numbers and notations" has been a regular duty performed by the Timers as well as the Timer/Clerk. Though the Timer/Clerk does only this work, it has not been work exclusive to her classification. On the night shift where there has never been a Timer/Clerk, the "notching" and "recording of numbers" has always been done by the night shift Timers as part of their regular functions. On the day shift, the Timers have regularly performed those duties as well, but because until recently they were busy with other regular duties of the Timer classification, some of the "notching" work and the recording of numbers has been handled as well on a full-time basis by the Timer/Clerk.

The Employer has shown a substantial reduction in its business and production, and specifically a substantial reduction in Timer's work. Indeed, the complement of Timers has been reduced to two on days, and two on nights. With the drop in work,
the Timers are able now to handle all the "notching" and "number recording" required of and attendant to their Timer job. The work of the Timer/Clerk, as an adjunct to the Timers on the day shift, is no longer needed. The Employer has shown that there is not enough "notching" and/or "number recording" work to keep a Timer/Clerk fully or substantially occupied. In fact, recently, while one day shift Timer has been away, all the available Timer work, including the "notching" and "number recording" has been adequately handled by a single day shift Timer.

Accordingly I find that the grievant was properly laid off for lack of work under Section 7 of the contract, and that her layoff did not violate Sections 13 or 17.

The Undersigned, 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:

The Employer did not violate the contract in the layoff of Louise Chirichella.

Eric J. Schmertz
Permanent Arbitrator

DATED: July 7, 1986
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, I.A.T.S.E.

and

Technicolor, Inc.

The stipulated issue is:

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

A hearing was held on December 19, 1986 at which time Mr. DiBari, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharged for unsatisfactory attendance, following the progressive discipline steps of warnings and suspension.

There is no question about the unsatisfactory nature of the grievant's record. In 1985 he was absent twenty-six days and his pattern of absenteeism continued following a seven day suspension that year. In 1986, up to his discharge in November, he had been absent fifteen days, many of which followed a warning.

Particularly objectionable to the Employer has been the grievant's pattern of "taking long weekends" by staying out on Mondays or Fridays and by "extending" holidays. The Employer finds this particularly burdensome because with many employees on layoff due to difficult economic conditions for the industry, the grievant's absences on the busy days of Monday and Fridays taxes the available personnel and often requires a supervisor to fill in
(the grievant's job was as a can carrier). The latter generates Union complaints.

Based on the record I conclude that the grievant's record, especially comparing 1986 with 1985 shows improvement and that with ten permitted days off under the contract (seven sick days and three personal leave days) the grievant's fifteen absences in 1986 constitute an unacceptable record. But it is not so bad (i.e. five more than contractually permitted) as to justify his discharge, particularly in view of the fact that he was not fired following his 1985 suspension but warned again in 1986, thereby restarting the progressive discipline cycle.

Apparently, moreover, the grievant did not hide the fact that he took extended weekends to stay with his elderly mother on Long Island, particularly after his brother's death. Though he was wrong in doing so, I am constrained to believe that he may have thought that with notice to the Employer (usually towards the end of the weekend) it was all right or excused.

Under the foregoing circumstance I think it proper and appropriate that the grievant be given one final chance to maintain a satisfactory attendance record. He should be disciplined by a suspension, and he is expressly warned that he will be subject to discharge if his attendance record does not improve forthwith to a satisfactory level and that it be so maintained.

Additionally, I shall enjoin him from taking extended weekends or holidays to stay with his mother. As understandable as his desire to do so may be, he will just have to make other arrangements.

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 Robert DiBari is reduced to a suspension. He shall be reinstated without back pay and the period of time between his discharge and his reinstatement shall be deemed a disciplinary suspension for his unsatisfactory attendance record. DiBari is warned that this is his final change. If his absenteeism record continues unsatisfactory, he shall be subject to discharge. Additionally, he is enjoined from taking extended weekends or extended holidays to visit and stay with his mother.

DATED: December 22, 1986
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
Everitt E. Lewis, Esq.
Lewis, Greenwald, Kennedy
& Lewis, P. C.
232 West 40th Street
New York, New York 10018

Bonnie Glatzer, Esq.
Seyfarth, Shaw, Fairweather
& Geraldson
520 Madison Avenue
New York, New York 10022

RE: Local 702 -and- Technicolor
Kitz Arbitration

Dear Mr. Lewis and Ms. Glatzer:

You have submitted to me, respectively, letters dated December 23, 1985 and January 2, 1986 in which you set forth certain disagreements regarding the interpretation and implementation of my Award of November 18, 1985. You have asked me for clarification of the Award and/or determinations on the disagreements.

To the extent that I am able, considering the scope of what was presented to me in the arbitration, I do so as follows:

1. Had Mr. Kitz been actively employed following his "hire," he would have begun work on September 20, 1985. I assume he would have completed the temporary assignment on November 22, 1985 and that Mr. Goldstein worked longer only because he started later.

   Therefore payment to Kitz for the period September 20, 1985 to November 22, 1985 was proper.

2. There was nothing in the record before me showing how many days Kitz attended Trustee meetings and negotiation sessions. Your respective letters are not of evidentiary value on this point, nor is the letter of November 22, 1985 from Mr. Norman Stein.

   What is important is not how many meetings he attended, but for how many of those meetings or negotiations he was paid. On this point, and in the absence of any other probative evidence, I accept Kitz's affidavit under oath that he was paid for only six such meetings.
and negotiations. Therefore, six days should have been deducted from the payment to him that my Award ordered. The Company shall make the adjustment.

3. The question of deduction or non-deduction of unemployment insurance also was not presented to me or argued at the arbitration hearing. But it is relevant to the damages I directed. Had I been asked to rule on that matter in my Award, I would have directed the Company not to deduct unemployment insurance, but rather to notify the unemployment insurance department of the arbitration Award, and request that department to recoup the appropriate amount of insurance payments from Kitz, and to adjust the Company's experience rating accordingly. As this has been my consistent practice in back pay situations in which I am asked to rule on the unemployment insurance question, I make that practice my ruling in this case. The Company shall restore the amount of deducted unemployment insurance to Kitz's payment.

4. No requests for pro-rata vacation pay or for two weeks wages in lieu of notice of layoff were requested in the arbitration. For that reason and because I am not persuaded that a planned, short period of employment to cover work on a temporary basis carries with it any right to pro-rata vacation or pay in lieu of notice of layoff, the Union's requests for these two benefits are denied.

5. The tax deductions made by the Company were not improper and may stand.

Very truly yours,

Eric J. Schmertz
Arbitrator
PILOT'S SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration:

between:

Airline Pilots' Association

and

Trans World Airlines

AWARD

ALPA Case No. NY-80-85

The Undersigned, duly designated as the Pilots' System Board of Adjustment, and having duly heard the proofs and allegations of the above-named parties, make the following AWARD:

TWA had just and sufficient cause for discharging C. W. Handley for reasons assigned in Captain E. J. Stroschein's letter dated November 15, 1985.

Eric J. Schmertz
Chairman

DATED: November 26, 1986
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.

W. J. Moran
Concurring

DATED: November 1986
STATE OF New York)
COUNTY OF New York)

I, W. 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.

J. G. Colpitts
Concurring

DATED: November 1986
STATE OF New York)
COUNTY OF New York)

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

DATED: November 1986
STATE OF New York) ss.:
COUNTY OF New York)

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.

P. Sedlak
Dissenting

DATED: November 1986
STATE OF New York) ss.:
COUNTY OF New York)

I, P. 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.
In accordance with the arbitration provision of the collective bargaining agreement between Airline Pilots' Association, hereinafter referred to as "ALPA" or the "Union," and Trans World Airlines, Inc., hereinafter referred to as "TWA" or the "Company," the Undersigned was selected as the Chairman of a System Board of Adjustment to hear and decide together with the ALPA and TWA designated members of said Board the following stipulated issue:

Whether or not TWA had just and sufficient cause for discharging C. W. Handley for reasons assigned in Captain E. J. Stroschein's letter dated November 15, 1985.

Captains D. H. Brown and P. Sedlak served as the ALPA designated Board members and Captains W. J. Moran and J. G. Colpitts served as the TWA designated Board members.

Hearings were held in London, England on June 18, 19 and 20, 1986 at which time Mr. Handley, hereinafter referred to as "Handley" or as the "grievant" and representatives of ALPA and TWA appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators was waived. A stenographic record was taken. Each side filed a post-hearing brief and ALPA submitted additional material concerning a pending lawsuit, to which TWA responded.

Following receipt of the aforesaid briefs and material the Board met in executive session.

ISSUE

In a November 15, 1985 letter of termination addressed to the grievant, Handley, TWA made five charges upon which it based its dismissal of Handley as a pilot. The charges were that Handley:
(1) October 26, 1984 failed to protect TWA Flight #703 to which he was assigned as First Officer, thereby causing major disruption of the operation;
(2) consumed wine and beer while on layover, thereby violating flight operation policy;
(3) failed to prepare mentally and physically for flight duty;
(4) subjected TWA to adverse publicity by virtue of his behavior; and
(5) failed to notify TWA in a timely manner of his inability to cover the flight, thereby denying TWA the ability to effect the most efficient recovery of the operation.

FACTS

Handley, a TWA employee for 20 years with no prior adverse disciplinary record, was dismissed by TWA on November 15, 1984 for the reasons stated in the previously described letter. The basis for dismissal arose out of an event which occurred during the evening of October 25 and the morning of October 26, 1984. On the afternoon of October 25, 1984, Handley arrived in London having served as First Officer on flights from London to Copenhagen to London. He was on layover in London, assigned to serve as First Officer on Flight #703 from London to New York, scheduled to depart Heathrow at 12 noon on October 26. He did not report for duty. TWA cancelled the flight and made other arrangements to handle the passengers. The circumstances of his failure to report and the cancellation of the flight constitute the gravamen of the offense TWA relied on to terminate Handley's employment.

Handley arrived at the Kensington Hotel at about 2:00 P.M. on layover upon his return to London from Copenhagen awaiting his
departure Flight #703 on October 26 to New York. At about 7:30 P.M. on October 25 Handley and one Paul Martin, another TWA employee who has since resigned, went to a pub, the Duke of Clarence, where he had two pints of beer. At about 9:00 P.M. they went to Topo D'Oro, a London restaurant. At dinner, according to Handley, he and Martin shared two bottles of wine and Handley had two brandies. According to Handley, on their way out of the restaurant after dinner, they went to the bathroom in the restaurant. When they emerged, they discovered that everyone was gone, the restaurant was closed and they were locked in the restaurant. At the hearing Handley claimed they were leaving the restaurant sometime after midnight and were in the bathroom only about five minutes; although he admitted that on two earlier occasions he had told TWA that he had gone to the bathroom at 10:30 P.M. He claimed that his earlier versions were false and were made in order to place his situation in a better light.

When he actually went to the bathroom and how long he remained there is in dispute.

Upon discovering they were locked in, Handley said they tried unsuccessfully to find keys and to force the doors. They called the police at 1:41 A.M. and a passerby made a second call at 1:58 A.M. Some officers arrived at the restaurant at 2:00 A.M. During the course of the morning hours the police were there on two occasions. The police described Martin, Handley's companion, as very drunk, very vocal and hostile. Handley was described by the police as quiet and apparently trying to quiet his companion, but also very intoxicated. For the most part Handley was not in the sight of the officers and appeared to them to be trying to avoid being seen.

Handley and Martin refused the police offer to break in the door which was conditioned on their being financially accountable.
for the damage this would cause. The police finally located the owner and Handley and Martin were released from the restaurant at 7:15 A.M. In the interim, Handley admitted that he had two additional brandies. Both emerged from the restaurant appearing to the police to be very intoxicated. They were similarly described by Mr. Rubin, a Kensington employee, when they arrived at the Kensington. On arrival, they went to bed.

Prior to that time and while in the restaurant, at the suggestion of Mr. Rubin, they concluded he should contact TWA. This conversation took place shortly after 5:00 A.M. when Rubin called them at the restaurant. Rubin contacted TWA and TWA employees contacted the police and the restaurant. TWA authorized the breaking of the door, although this proved to be unnecessary. TWA also ascertained from Martin and Handley they were unfit to fly. The flight was cancelled and arrangements made to place the passengers on another flight. These arrangements were complex and affected other flights. Handley claimed they did not try to contact TWA Heathrow operations because they thought it was closed. In fact however, it was open 24 hours. Their earlier attempt, at about 3:00 A.M. to contact the Flight #703 captain through the hotel employee, Rubin, also failed because when he called the Captain's hotel room at about 3:00 A.M. there was no answer.

TWA introduced copies of newspaper articles which reported the flight cancellation and the disposition of the passengers. The article also referred to Handley and Martin's experience but only in terms of having been locked in the restaurant overnight.

DISCUSSION

ALPA's responses to the five reasons relied on by TWA for discharging Handley are (Union Br. 7-9):
Reason #1: It concedes that Handley failed to protect his assigned flight, but claims there are mitigating circumstances and denies that the cancellation resulting from Handley's failure to fly Flight #703 caused a major disruption. According to ALPA, if there was a disruption it was not due to TWA's inability to find a replacement for Martin and Handley and, in any event, TWA suffered no financial loss from the cancellation. Mitigation of the charge, according to ALPA consists of the fact that Handley and Martin were accidentally locked in the restaurant overnight and this is not attributable to their drinking. Further, ALPA urges, the fact that Handley recognized early in the morning of October 26, that he was not mentally and physically fit to fly also is a mitigating factor.

Reason #2: The Union concedes Handley violated TWA's rule against consuming alcohol while on layover, but claims that TWA's discharge of Handley is inconsistent with TWA's past practice in similar cases and thereby Handley has been denied even-handed treatment.

Reason #3: The Union concedes Handley failed to prepare himself mentally and physically for flight duty but asserts the mitigating circumstances claimed in response to #1, supra.

Reason #4: The Union concedes there was publicity concerning the cancellation, but denies it was adverse and if it was adverse TWA failed to show it suffered any harm or loss as a consequence.

Reason #5: As for the failure to advise TWA in a timely manner and denying it the opportunity to recover the flight, the Union denies any fault on the part of Handley for failing to advise operations before 5:00 A.M. and claims that TWA was advised as soon as practicable after Handley realized his physical and
mental condition. The Union also claims that it was not the timing of the notification to TWA that prevented the recovery of the flight, but it was the absence of replacement pilots which caused the cancellation.

Finally, the Union points to Handley's twenty years of unblemished service as a mitigating factor and claims that Handley is the victim of a discriminatory application of TWA's disciplinary policy. According to the Union, "the Company, in the past, has not disciplined as harshly, other similarly situated pilots who have violated the Company's drinking regulations in the same or in a more aggravated manner as Handley." (Union Br. 9)

After considering the contentions of the parties, I have concluded that the only significant issues to be resolved are whether the circumstances are such that they should be viewed as mitigating Handley's violations and whether TWA's discharge of Handley constituted discriminatory application of TWA's disciplinary policy. These two issues remain after concluding that:

(1) Handley failed to protect his assigned flight, as the Union concedes, and that the cancellation of the flight was itself a disruption of the operation. And that combined with the need to shuffle passengers and other flights became a major disruption. The Union concedes the cancellation was the "result" of Handley's failure to fly Flight #703. Thus it fairly can be said that a major disruption of operations was Handley's conduct. The Union's claim that TWA suffered no revenue loss is irrelevant, because proof of revenue loss is not necessary to sustain the charge of disrupting operations. In any event, there was sufficient evidence to establish there was a financial loss.

(2) The Union conceded that the prohibition on drinking on layovers was violated. I find that Handley drank to excess before being locked in the restaurant and continued thereafter, and was
intoxicated. The issue of penalty is all that remains on this charge.

(3) Similarly, only the question of penalty remains in view of the admission Handley failed to prepare himself mentally and physically for the flight.

(4) As for the claim of adverse publicity, I conclude that there was publicity but the content of the newspaper stories was such that they were not so adverse on their face as to warrant an inference that the publicity was adverse without further evidence that TWA was harmed. There was none presented by TWA other than Captain Stroschein's conclusion that it was adverse to TWA's image of providing reliable schedule fulfillment and his admission that he knew of no actual harm or loss suffered by TWA.

(5) The charge that Handley failed to notify TWA in a timely manner of his predicament and that this denied TWA the opportunity to recover the flight is not sustained by the evidence. Handley concedes that no effort to contact TWA operations were made until sometime after 5:00 A.M. When TWA was contacted it was by Rubin the hotel employee and he contacted TWA only after he initiated the suggestion to Handley that TWA be contacted. Handley's explanation for not contacting TWA is that he was unaware TWA operations was open during the night. However, the evidence shows it was open and this fact appeared in a manual which employees were charged to consult. The record supports the conclusion that notwithstanding an abortive attempt to advise Captain Lowrey of their predicament, they delayed contacting TWA because of their condition. Hence, there was not timely notice given to TWA,

But this is not the end of the inquiry. The charge is not simply a failure to give timely notice but also that the failure caused a result; i.e., TWA was denied the opportunity to recover
the flight. The Union claims that the failure to recover the flight is attributable to TWA's lack of available pilots and not to the failure to give timely notice. In any event, to sustain the charge TWA was required to show that the flight would have been or at least likely could have been recovered if it had received earlier notice. TWA failed to establish at what point notice should have been given so that TWA could have recovered the flight. Consequently, I conclude there was a failure of proof on this full charge.

I now turn to those factors upon which the Union relies as mitigating the violations charged in 1 and 3: the failure to protect Flight #703 and the failure to properly prepare mentally and physically for flight duty. The mitigating factors specifically relied on by the Union are (1) the fact Handley was accidentally locked in the restaurant overnight and that this was not attributable to his drinking and (2) that he removed himself from the Flight #703 when he realized that his physical and mental condition prevent from flying safely.

I conclude that neither of these constitute mitigating factors. Indeed to recognize these as mitigating factors would swallow up the charges to which they are addressed. The facts are that Handley voluntarily drank alcohol and each of the witnesses who observed him testified that he was quite intoxicated. As a violation of TWA's rule against drinking while on layover, and considering the quantity of alcohol which the grievant admits he consumed before and after he was locked in the restaurant, I conclude that his resultant condition affected his ability to fly Flight #703 at 12 noon the next day.

Aside from the fact that the grievant changed his position
regarding when he went to the bathroom and when he tried to leave the restaurant, which I do consider relevant on the matter of his credibility, the actual hours are unimportant in deciding the basic issue presented.

Based on Handley's change of position at the hearing, I am constrained to believe that the restaurant closed at about 1:30 A.M. It is significant that his statement at the hearing that he went to the bathroom sometime after midnight was made after he had received information from a restaurant employee that the restaurant closed at 1:30 A.M. Hence his position at the hearing would place him even in a better light than his earlier statement fixing the time at 10:30 P.M. By his admission and changed position, it is logical to conclude that about 1:30 A.M. was the time the restaurant closed.

But the critical fact is that after finding himself locked in and without any idea whether he would get out shortly or not, he further compounded his violation of the Company's rule by drinking some more. If he ever thought that he was or would be able to make his flight, he made that impossible under any reasonable test, by consuming more liquor. Whether objectively true or not, if he believed he was capable of meeting his flight schedule at the time he found himself locked in, he would have and should have consumed no more alcohol regardless of when the authorities or the restaurant owner got him out.

That he did not, I consider an act of manifest and continued irresponsibility, irrespective of when and how he got locked in, and to my mind is evidence of his realization that at the time he found himself locked in he was already intoxicated and unfit to fly at the upcoming noon hour.
His own misconduct of putting himself in an unfit condition and the exacerbation of that condition after finding himself locked in, cannot now be used as a defense to or mitigation of the charges against him. He was unfit before he was locked in, so the locked restaurant cannot be an acceptable defense. That he believed he would have been fit to fly if he hadn't been locked in is not a defense either, because, not knowing that he wouldn't get out shortly, he drank more alcohol, assuring his continued unfitness no matter when he was extricated.

Indeed that he was locked in, after consuming a large quantity of alcohol inside of 24 hours of his scheduled flight may have been fortunate "in the public interest," because it precluded his plan to fly under conditions that I think would have been precarious and unacceptable.

As an additional mitigating factor applicable to all the charges, the Union points to Handley's unblemished twenty year record of service with TWA. I conclude that this is to be weighed by TWA in the first instance, and I find that TWA did take it into account when it decided on the penalty of discharge.

It is well settled that where misconduct standing alone justifies dismissal, it is for the employer, not the arbitrator to mitigate the penalty because of a prior clear record.

Here the evidence establishes that Handley was guilty of the violations charged in items 1, 2 and 3, and those violations under the Company's rules and under the circumstances presented, constitute cause for discharge, his prior record notwithstanding, unless it can be shown that dismissing Handley was an act of discriminatory enforcement of TWA policy.

I conclude that it was not discriminatory or unevenhanded.
TWA's rule provides:

Use of Intoxicants

a. Use of intoxicants, including wines and beer, while on duty or within a 24-hour period prior to assigned schedule or frequenting places, other than restaurants, where intoxicants are sold, while in uniform or on duty is prohibited.

b. Admission to the cockpit is prohibited to any person following use of intoxicants. Flight crew members proceeding to or from a flight assignment in uniform are not to be served intoxicating beverages.

c. Any violation of above regulations will be cause for immediate dismissal.

The rule is not challenged, and consequently it concededly applies to Handley. He violated the rule by drinking alcohol while on layover and the rule explicitly authorizes dismissal. The Union has suggested that there is a pattern of non-enforcement of the rule or at least a pattern of no imposition of the penalty of dismissal where there has been an isolated social drink (usually at dinner) although that conduct would come within the terms of the rule. I need not decide that question because this clearly is not a case of that nature. Handley drank a quart of beer, a bottle of wine and four brandies by his own admission. This is not the social drink at dinner.

For its claim of discriminatory enforcement, the Union relies on several instances in which dismissal was not invoked by TWA. After examining those cases as well as others presented by TWA and the Union, I conclude that TWA did not have a prior policy of not dismissing those who broke the "layover" rule which was reflected in uniformly imposing a lesser sanction.

The Union and TWA cite cases or instances which support their respective positions on the claim of discriminatory enforcement.
The simple fact is that the discipline in each case was imposed on the basis of the specific facts in those cases. There is no uniform imposition either of discharge or a lesser sanction in every case. Consequently, it is necessary to know the specific facts of those cases in order to determine the common thread, if any, in deciding to impose sanctions. Thus, where sanctions less than dismissal have been imposed, some of the employees have been alcoholics, but some have not been alcoholics (Brennan, Leach). In one instance, the employee had an alcohol problem and violated the 24 hour rule, TWA discharged him, but the arbitrator reduced the penalty to a suspension on the grounds it was the first time there had been a discharge for a violation of the 24 hour rule when the employee's work had not been affected (Exum). In this regard, I view TWA's act of discharging Exum, the employee, as an expression of TWA's disciplinary policy. I am not bound by that arbitrator's decision on the question of what is TWA policy. In any event, Exum can be distinguished because I find that Handley's act of totally disabling himself from the performance of his duties surely was work-related.

In other cases, discharge was upheld where the employee engaged in egregious conduct which prevented him from reporting to work or where he did report for work while intoxicated (Bolsenga, Mollohan, Matterson). In one instance, Young, cited by the Union, we do not know what discipline was imposed because that decision was to be affected by a medical examination and the results are not in the record. In some cases, the employee was not discharged when he expressed remorse and clearly understood the gravity of violating the relevant rule. (Leach).

The case closest to Handley's is that of Bolsenga, where as
a consequence of intoxication, the employee failed to report for duty. Bolsenga who was not an alcoholic, was jailed during his ill-fated drinking bout. His claim that he failed to report to duty because he was in jail and not because he was drinking was rejected. The only certain conclusion that can be drawn from the cases is that there has not been a consistent TWA policy not to discharge personnel who violate the 24 hour - layover rules, but rather the decisions have been mixed and obviously made on the special facts of each case.

I believe this is permissible and TWA's decision to discharge Handley should be upheld if TWA establishes just cause and its determination to discharge Handley is not the product of mere whim or caprice or the consequence of relying on some invidiously discriminatory factor. There has been no claim and certainly no evidence that TWA relied on an invidiously discriminatory factor to discharge Handley. The basic facts it relied on were (1) Handley drank to the point of disabling himself from flying, (2) any drinking at all while on layover violated a clear unambiguous well-known written company rule; (3) TWA operations were disrupted as a direct result of Handley's conduct and (4) he compounded his own unfitness when a dilemma in which he found himself called for different conduct. At the hearing it further appeared that Handley had been less than truthful in two pre-hearing statements or in his sworn hearing testimony. Further and importantly it appeared that he did not fully appreciate the importance of complying with the layover rule. Handley said he believed that with a good night's rest his drinking a bottle of wine, 2 brandies and a quart of beer would not affect his ability to perform the next day. The fact is that this is not and was not his decision to make and his attitude certainly did not work in his favor or towards mitigation. His
obligation was to comply with a rule designed to help insure the safety of the aircraft and the passengers who placed their trust in TWA. In assuring that there was compliance with its rule, TWA was acting reasonably within its own management prerogatives and in the public interest.

Under these circumstances, no matter how sympathetic the Arbitrator may be over the grievant's plight after twenty years of apparently faithful and capable service, he may not substitute his judgment on the penalty imposed for that of TWA, unless the Company's judgment was violative of the contract, violative of a consistent past practice or arbitrary or capricious. None of these limits are present in this case.

The discharge of Mr. Handley was for just cause.

DATED: November 26, 1986

Eric J. Schmertz
Chairman
In the Matter of the Dispute between
The Union and Employer Trustees of the Local 144 - Southern New York Pension and Welfare Funds

The stipulated issue is:

Unless there is mutual agreement of the Trustees, what shall be the locale of Trustee meetings?

A hearing was held on January 23, 1986 at which time representatives of the Union and Employer Trustees appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

In my Award of September 26, 1985, I ruled that the office of the Funds shall be at 240 West 35th Street, New York City.

An office for the Funds is established at that location, and, as the parties were advised the Arbitrator visited that office on January 27, 1986, to observe its location and its facilities for the holding of Trustee meetings.

For various reasons including its location in the heart of the garment center, parking difficulties, inaccessibility for the Union members, and the smallness of the conference room, the Union Trustees object to holding Trustee meetings at that location.

The Employer Trustees assert that the appropriate place for Trustee meetings is at the office of the Funds; that information needed by the Trustees in the course of those meetings is available only at that office; that the size of the office and the conference area is adequate to accommodate the Trustees; that the parking and/or accessibility is no more difficult than at any other busy section of New York.
When I rendered my Award of September 26, 1985, I ruled that the Funds office be at 240 West 35th Street not just because the office was by then in existence at that location, but primarily because, in my view, it was the only "neutral" location presented to me by the parties. And I concluded that the office of the Funds should be at a neutral location, unless the parties agreed otherwise.

However, I am not persuaded that the same principle of a "neutral" location need apply to meetings of the Trustees. Realistically, the Trustees are often partisan and adversary, whereas the Fund administrator, staff and office location should be non-partisan and neutral. The personnel of the office are employees of The Funds and the Trustees; are responsible for the impartial implementation of Trustee policies and decisions. The records and files of the Funds enjoy the same neutrality, objectivity, impartiality and non-partisanship, consistent with the joint administration of the Funds.

Hence, there are reasons why the office of the Funds and the records of the Funds should be a neutral location, that do not necessarily apply to the meetings of the Trustees.

My feeling therefore is that if either set of Trustees object to participating in meetings at the locale of the Funds office, they should not be ordered by an arbitrator to do so. I agree with the Employer Trustees that meetings at the Fund office are more efficient because the records and files are there and are readily available for use during the meeting. But convenience and efficiency are not enough to my mind to force one group of Trustees to meet at the Fund office when they do not wish to do so, and when their work may at times be adversarial and partisan.
On the other hand, I agree with the Union Trustees that the locale of the office is in one of the most congested traffic areas of the City, and that the conference room space in the office is small and probably tight and uncomfortable for Trustee meetings. (The overall office, however, is modern, newly renovated and quite attractive.)

Under the foregoing circumstances and findings, I think the alternative possibilities for Trustee meetings as set forth in the Agreements and Declarations of Trust, should be followed.

Section 11 of the Welfare Trust Agreement and Section 11 of the Pension Trust Agreement both provide, in pertinent part:

"Meetings shall be held at the office of The Fund...or at the offices of either the Union or the Southern Association..."

(emphasis added)

Until or unless the Trustees mutually agree otherwise, the meetings of the Trustees shall be held on an alternating basis at the offices of the Union and at the offices of the Southern Association, with the first meeting under this arrangement held at the offices of the Union.

DATED: February 3, 1986
STATE OF New York )
COUNTY OF New York )

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration:
between:
Local 431, IUE, AFL-CIO:
and:
Waldes Truarc, Inc.:

OPINION AND AWARD

The stipulated issue is:

Whether the subcontracting of porter or matron work violates the collective bargaining agreement? If so, what shall be the remedy?

A hearing was held on June 4, 1986 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived. The Union and Company filed post-hearing briefs.

The Company subcontracted work previously performed by bargaining unit porters and matrons. Five porters and one matron were laid off, and one porter retired. One in each classification was retained.

My view on subcontracting bargaining unit work is, I believe the majority view of arbitrators. It is that subcontracting is barred or restricted under any of the following circumstances.

1. It is explicitly barred or restricted by the terms of the collective bargaining agreement.
2. It is not supported by a bona fide economic or significant business need.
3. Its purpose is to damage the bargaining unit and/or the bargaining agent or was otherwise in bad faith.
4. Regardless of its economic or business purpose, its effect is to decimate or substantially cripple the bargaining unit and/or the bargaining agent.

Irrelevant to this case are such considerations as the standards of employment of the subcontractor, the questions of
the special skills and equipment of the subcontractor and the question of "overflow" of tightly scheduled bargaining unit work when the bargaining unit is fully occupied.

With regard to the relevant items #1 through #4 above, I find none present in the instant case to bar the subcontracting.

The contract terms contain no specific bar or limitation on subcontracting. I do not infer any such bar or restriction from the recognition clause, which is of the standard type. That clause grants the Union jurisdiction over "production and maintenance employees employed at its plant..." (emphasis added.) That provision requires the performance of bargaining unit work by bargaining unit employees when that work is performed by the Company and its employees. But it does not reach work which the Company and its employees do not do, but which is subcontracted. In short, subcontract work is not work handled by employees "employed" within the meaning of the recognition clause. This interpretation of the recognition clause is also, I believe, the majority interpretation and view of arbitrators.

Indeed, the acknowledged past practice of subcontracting work normally performed in the tool and die shop runs counter to the Union's interpretation of the recognition clause. Also, I think that the Union recognized the faulty nature of its interpretation advanced herein when, many years ago, it sought in contract negotiations a prohibition on all subcontracting. While I agree that at that time the prohibition sought was probably directed to the tool and die work, the Union's failure to obtain any specific restriction or prohibition can only be construed now as meaning that no contract restriction exists with regard to any bargaining unit work. Put another way, the failure to prohibit
or restrict subcontracting of tool and die work can hardly mean that there was and is some implied prohibition on the subcontracting of other bargaining unit work. In this area, specificity is required.

The Company has shown a bona fide economic and business need. It has suffered significant business losses (lately in excess of one million dollars a year, a figure unrefuted by the Union). Subcontracting the porter and matron work will save $90,000 a year. Also, it has shown a change in the nature of the work. The Company has a new single level plant. Before, its plant was multi-level. The new plant layout has simplified the cleaning requirements and fewer cleaning personnel are needed. This fact stands unrefuted in the record.

There is no evidence that the subcontracting was intended to damage the bargaining unit or the bargaining agent. Nor can I conclude that it was of a magnitude that crippled or decimated the unit. Nor do I find bad faith.

Before subcontracting the work, the Company informed the Union of its economic difficulties; indicated its intention to subcontract work; and asked for any ideas on how costs could be cut. This approach, was unavailing.

I am persuaded that the subcontracting was done to save money in the face of large losses and because of a reduced need for cleaning personnel. The layoff of six employees, while not insignificant, was only a small percentage of the total unionized work force (approximately 3%). The porter and matron work was not totally removed from the unit; two employees with those titles remained. Therefore I cannot conclude that the layoffs, under the particular circumstances involved "crippled or decimated"
the bargaining unit within the meaning of item #4 above.

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 subcontracting of porter or matron work did not violate the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: July 8, 1986
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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Local 365, Cemetery Workers and Greens Attendants Union and
Woodlawn Cemetery

OPINION AND AWARD
Case #1330 0508 86

The stipulated issue is:

Did the Employer violate the contract when it did not pay a full tour of eight hours to the following named employees for less than eight hours work on Saturday February 8, 1986?

Brian Maffucci
Steve Vizard
Robert Rozek
Joe D'Arrigo

If so, what shall be the remedy?

A hearing was held on September 30, 1986 at which time the above-named employees 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.

It is stipulated that the above-named employees hereinafter referred to as the "grievants" worked less than eight hours removing snow on Saturday February 8, 1986, and were paid for seven and one-half hours at the overtime rate.

The Union contends that by the wording of Article XII, Section A of the contract, and by past practice, there is a guarantee of eight hours pay at the overtime rate, if any employee is required to work on a Saturday, even if the work he performs is less than
eight hours in duration.

The Union has not proved its case, either under the contract language or by a binding past practice.

Article XII, Section A reads:

SATURDAY AND SUNDAY WORK

A. Any work which an employee is required to perform by the Employer on Saturday shall be paid for at the rate of time and one-half the employee's regular hourly rate of pay. Work beyond eight hours on Saturday shall be paid at double time the employee's regular hourly rate of pay. Any work which an employee is required to perform by the Employer on Sunday shall be paid at the rate of double time the employee's regular hourly rate of pay. Work beyond eight hours on Sunday shall be paid at double time and a half the employee's regular hourly rate of pay.

That clause does not contain any express language supporting the Union's claim of an eight hour guarantee. In my view and in my experience, such a guarantee is of sufficient importance and consequence as to warrant specific contract language that provides that benefit. Such guarantees, which exceed the actual time worked are regularly found in the specific language of collective bargaining agreements, if that benefit is accorded.

I do not think that any such guarantee should be implied, where, as here the bare contract language does not lend itself to that implication. Indeed, the wording of Article XII suggests otherwise. It provides for payment on Saturdays for "any work which an employee is required to perform by the Employer" (emphasis added). A fair reading and interpretation of that language would mean that the pay shall equal the amount of time worked. In any event, in the face of that limiting language, I fail to see how
an eight hour guarantee, or in other words pay for time not worked or not required can be logically inferred or imputed.

If the contract language is deemed clear with regard to limiting Saturday pay to the actual hours worked, any past practice to the contrary would be immaterial.

It is not unreasonable however, to construe Article XII Section A as ambiguous. The Union argues that the second sentence which provides for double time pay for work "beyond eight hours" means that there is a minimum eight hour guarantee at time and one half. If the ambiguity is accepted as reasonable, then the past practice under the clause would be relevant to its meaning and interpretation.

However, to be probative, a past practice must be of significant duration, unvaried and specifically delineated as to facts and circumstances. The evidence of past practice offered by the Union does not meet this test.

The few instances referred to were not adequately particularized as to time or circumstance. It was not established that employees were actually paid for a full tour when they worked less. In one instance the employees were "on the clock" for the eight hours, though the first hour was apparently spent seeking the final member of the snow removal crew. That the Employer paid for that first hour was logical and proper and is not evidence of payment for time not worked. There is no evidence that the crew member who started later received pay for the full tour.

In another instance an employee was offered eight hours if he would come in on an emergency basis. Obviously this was designed as an inducement to get the employee to work, when the Employer
had not scheduled him for Saturday work the preceding day. To my mind this is evidence of a lack of a guarantee. If eight hours is guaranteed it did not have to be offered as an inducement. Also, I reject this as "a practice" because the employee involved turned the offer down.

That the Employer may have provided eight hours of work on a Saturday, and where the employees worked those eight hours, is not evidence of a guarantee of eight hours for less time worked. This is so, even if a part of the eight hours worked is "make-work." It is work nonetheless within the meaning of Article XII Section A, and does not involve pay for work not performed.

The only possible example of payment for eight hours on Saturday for less time worked, was the testimony regarding the crematory operator. However, setting aside the fact that the operator did not testify and the facts of his Saturday work were allegations by other employees, a single instance of this type does not make a "past practice."

Finally, the Union's testimony regarding the negotiation history of Article XII was unclear and indeterminative. The testimony regarding a call-in guarantee for grave diggers when vault operators handled interments in the vault established an arrangement limited to that particular circumstance, and there is no evidence that it is applicable to the snow removal crew working on a Saturday.

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 contract when it did not pay a full tour of eight hours for less than eight hours work on
Saturday February 8, 1986. The grievance of Brian Maffucci, Steve Vizard, Robert Rozek and Joe D’Arrigo are denied.

Eric J. Schmertz
Arbitrator

DATED: October 8, 1986
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 450 I.U.E.
and:

Zenith Corporation

The stipulated issue is:

Whether the Company violated the labor agreement between the parties by failing to recall a laid-off employee and if so, what the remedy should be?

A hearing was held at the offices of the American Arbitration Association on October 9, 1986 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.

In December 1985 Joanne Watson, a Counter Clerk/Order Clerk suffered an injury on the job, and thereafter went on disability. It was anticipated that she would be off the job for two to three weeks. By agreement between a Company representative (Mr. S. Goldman) and a new Union Shop Chairman (Mrs. K. Murphy), Murphy was to call employees on lay-off and offer them the employment opportunity created by Watson's disability.

I accept Murphy's testimony that he told most of the laid-off employees he called that the vacancy was "temporary" until Watson returned. To some he said that it was "temporary", but "could become permanent if Watson did not return." Murphy called all ten employees on the relevant lay-off list in seniority order. All rejected the offer except the tenth, Jim Zuchnieovich, who had the least seniority.
I find that the other nine rejected the offer, primarily at least, because they were told or otherwise believed that the job was temporary; that Watson would return within a few weeks; and that to accept a return to active employment for such a short period of time would be disruptive to their unemployment insurance entitlement.

As it turned out, Watson did not return to work until March 17, 1986. Within ten days after she returned to work, another employee in the Department, A. Mould, a Shipping and Receiving Clerk, retired. The Company then made the following assignments in the Department. Zuchnieovich who had filled the Watson vacancy as a Counter and Order Clerk while Watson was out, moved to the job of Shipping and Receiving Clerk which was vacated by the Mould retirement, and Watson resumed her original job as a Counter and Order Clerk. It is stipulated that the jobs of Counter and Order Clerk and Shipping and Receiving Clerk are interchangeable in terms of qualifications.

The Union contends that when Mould retired, his job should not have been filled by Zuchnieovich, but offered to the employees on lay-off originally canvassed for the Watson vacancy. Specifically the Union claims that the Mould vacancy should have been offered to David Diaz, the employee on lay-off with the greatest seniority, and that to retain Zuchnieovich, the least senior employee in the original lay-off group, was in violation of Article XI Section 3 of the contract which reads:

"Regular employees shall be recalled from lay off in seniority order in their department, provided such employees have the skill and ability to perform the available work."

There is no dispute that Diaz had the ability and skill to
perform the work previously performed by Mould.

It is the Company's position that Diaz and the others who remained involuntarily laid-off had waived and extinguished their rights to be recalled when they declined to return to work to fill the Watson vacancy. The Company argues that there is no contractual recognition of a difference between a "temporary" vacancy or a permanent vacancy. All vacancies are covered by the recall provisions of the contract and that an employee on layoff shall lose his seniority rights under the provisions of Article X Section 3, paragraph (f) of the contract, if he:

"fails to report for work within a seventy-two (72) hour period after receipt of notice of recall; such notice of recall shall consist of a telegraphic or registered mail notice to the employee's last known address as registered by the employee with the Company, or by such other means as agreed upon by the Company and the Union."

It is not disputed that the arrangement to have Murphy call the employees on layoff constituted "other means as agreed upon by the Company and the Union" within the meaning of the foregoing clause.

I accept the Company's additional assertion that it did not tell or authorize Murphy to inform the employees canvassed that the Watson vacancy was "temporary" or that the "recall would be only for the period of her disability." I find that he so informed the canvassed employees on his own, but that this was a factual and logical interpretation of the circumstances of the recall offer, inasmuch as an employee on disability has a right to reclaim his or her job when the disability ends.

The issue therefore narrows to whether the relevant group of laid-off employees had lost their right to claim the job from which
Mould retired, because of their previous refusal to accept recall to the Watson vacancy. And whether, by transferring Zuchnieovich to the work previously performed by Mould when Watson returned, the Company is correct in its assertion that "the only vacancy involved" was the original Watson opening while she was on disability.

Based on past practice and fundamental contract interpretation, I find the Company's position to be unpersuasive. The Company argues that it "decides when a vacancy exists" and that in the instant case, the "only vacancy declared and recognized" was when Watson left on disability. Obviously vacancies may occur and exist without being so identified and recognized by the Company. When an employee on active duty leaves a job classification and where and when his or her duties are still to be performed and the job classification is taken over by someone else, there has been a vacancy and that vacancy has been filled, whether the Company officially recognizes it is such or not. A mere transfer of an employee from one classification (Counter and Order Clerk) to the classification (Shipping and Receiving Clerk) cannot camouflage the fact that a vacancy existed in the former job and was filled by a transfer from the latter. And the Company cannot escape the fact of such a vacancy nor effectively deny it, by asserting a managerial right to decide when and if a vacancy occurs. If the Company's assertion in this case is that it has the managerial right to leave a vacant job vacant; or to discontinue the work previously performed by an employee when he leaves, and thereby not fill the vacated classification, it is correct. But that is not what happened here. The Mould job was not left vacant and its job duties were not discontinued. Instead, Zuchnieovich was placed in the position,
by transfer, and he picked up the job duties of Shipping and Receiving Clerk previously performed by Mould.

I find therefore that when Mould retired, a vacancy in the job Shipping and Receiving Clerk occurred. That vacancy should have been filled in accordance with Article XI Section 3 of the contract, by the recall of a qualified employee on layoff. Zuchnieovich had no pre-eminent right to that job; his employment rights were circumscribed by the period of Watson's disability and her rightful return to her job upon her return from disability.

The critical question is whether the employees on layoff, who had rejected the recall offer to the Watson vacancy lost their recall rights under Article X Section 3(f) of the contract.

Based on evidence in the record of a practice in recall situations of distinguishing between a recall notice for a "temporary" job assignment and a regular or indeterminate job assignment, I find that the bare language of Article X Section 3(f) is ambiguous as to meaning. It is unclear whether the seventy-two hour recall limit applies to regular, permanent jobs or jobs of an indeterminate length of time only or also covers work of a short-term or temporary in nature.

The probative evidence on past practice persuades me that Article X Section 3(f) has been applied to the former but not the latter, and that employees who rejected recall for short term or temporary work did not lose their seniority for later recall. And that in the instant situation the laid-off employees believed and had reasonable grounds to believe that their rejection of a short term or temporary job opening, would not prejudice, or extinguish their seniority rights under Article XI Section 3 of the contract.

With the foregoing finding, it follows that the Company erred in not offering the vacancy in the job Shipping and Receiving Clerk created by the Mould retirement to those employees on layoff who had rejected the Watson vacancy. As Diaz testified that he
would have accepted that recall, and as he was the senior employee on the layoff list and the one who grieved, he should have been recalled, and is the employee entitled to a remedy for the Company's contract breach consistent with Article XIV Section 5 of the contract.

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

The Company violated the labor agreement between the parties by failing to recall David Diaz. Mr. Diaz shall be recalled to the job of Shipping and Receiving Clerk and shall be paid for back wages lost due to the Company's failure to recall him in accordance with the provisions and limitations of Article XIV Section 5 of the contract.

DATED: November 3, 1986
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.