In the Matter of the Arbitration:
between:
Local 369, Utility Workers Union:
of America, AFL-CIO:
and:
Boston Edison Company:

AWARD OF
BOARD OF ARBITRATION
P&M Grievance #3468

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

The Company did not violate the collective bargaining agreement by its suspension or discharge of the grievants, Robert W. Bingham, Benjamin L. Clayton and Ronald C. Simpkins.

DATED: October 19, 1987
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.

DATED: October 1987
STATE OF
COUNTY OF

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

DATED: October 1987
STATE OF
COUNTY OF

I, William A. O'Shea 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 369, Utility Workers Union:
Of America, AFL-CIO:

and:

Boston Edison Company:

OPINION OF CHAIRMAN

P&M Grievance #3468

The stipulated issue is:

Did the Company violate the collective bargaining agreement by its suspension or discharge of the grievants, Robert W. Bingham, Benjamin L. Clayton and Ronald C. Simpkins?
If so, what shall be the remedy, if any?

Hearings were held on May 29 and June 19, 1987 at which time the above-named grievants and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Messrs. Donald E. Wightman and William A. O'Shea served respectfully as the Union and Company Arbitrators on the Board of Arbitration. The Arbitrator's Oath was waived. A stenographic record was taken; the parties filed post-hearing briefs.

The Board of Arbitration met subsequently in Executive Session.

Impliedly, if not by express stipulation, I am persuaded that by the nature of the case, the opening statements, and the Company's charge against the grievants that they engaged in the crime of conspiracy to commit a theft within the meaning of the Massachusetts Criminal Law, the standard of proof in this case is the criminal standard of "beyond a reasonable doubt."

The testimony of the security personnel from Jordan Marsh does not meet that standard. Neither the Boston Edison Company nor Jordan Marsh disclosed the identity of "Jay," the purported Jordan Marsh employee who broached the idea of stealing VCRs to
the grievants, either on his own initiative or after he heard the grievants discussing the plan, nor was "Jay" produced as a witness. Had the Union pressed its request for "Jay's" identity, I would have ordered his disclosure, as my statements in the record show. Absent the direct testimony of "Jay" and absent the Union's ability to cross-examine him, I think it reasonably possible that the testimony of Paul J. Jones, a Jordan Marsh security officer, as to the alleged admissions of the grievants regarding their participation in moving the VCRs to a location near their trucks and subsequently hiding them, and to their plan to remove them from the building for their and "Jay's" benefit, in the face of conflicting testimony by some of the grievants of what they told him and why they made admissions, may have been embellished to shore up a general investigation of how merchandise has been stolen from its property and to gain for the Jordan Marsh security force a "success" in that investigation.

What happened here, I perceive, is that Jordan Marsh (through "Jay") and its security office may have undertaken a scam to entice and tempt the grievants to engage in a theft. I consider that a lamentable way to generate and then uncover the commission of a crime. Nonetheless, it is permissible activity, and if the grievants were culpable as participants or accessories, they would be guilty of the crime and subject to discharge. But based on the standard of proof beyond a reasonable doubt, if this was all there is to this case, I would conclude as plausible, that the grievants did not participate in the manner and to the extent charged. And that they made certain admissions not because they were guilty, but as they said, they were threatened with arrest but promised that nothing would happen if the merchandise was returned. In short, though there is considerable evidence
implicating them in the conspiracy and the crime, there remains a reasonable possibility in my mind that what happened may have been a "setup" to make the security force of Jordan Marsh look good, even in the face of resistance from the grievants.

But what happened thereafter eliminates any reasonable doubt I may have had. I find that the testimony of Edward MacCormack and William Kilroy, Boston Edison security officers, to be accurate. Between 12 and 22 days after the events at Jordan Marsh, the Company interviewed Benjamin Clayton and Robert Sluthe. I fail to see how or why, with the passage of that time, there would be a reiteration of the "admissions" or statements given earlier to the Jordan Marsh security officer. I reject the explanation that Clayton wanted to be consistent with what was told Jordan Marsh. I am convinced that if the grievants were in fact innocent, they would have asserted their innocence in that later investigation, or on their own initiative immediately or soon after the events at Jordan Marsh. Indeed, Clayton admitted during these proceedings that he told MacCormack and Jones that each grievant had moved the VCRs. So, while I can see some reasonable grounds for why the Jordan Marsh witness might have had a bias or preconceived end, I find no such bias or any other reason why MacCormack and Kilroy from Boston Edison would falsify what Clayton and Sluthe told them, the grievants denials or explanations in the arbitration hearing notwithstanding.

1. The Union contends that Sluthe was not in any position to know what the grievants had actually done because he had remained in the vault area. However, there are a variety of ways by which Sluthe could have acquired such knowledge notwithstanding his lack of physical observation. Again and significantly, I find no reason why Sluthe would give false testimony about his fellow workers.
Put another way, assuming validity to the grievants' fear of the police and their willingness to admit to acts they had not done because of a promise of no reprisals or further action while at Jordan Marsh, I cannot accept any explanation or justification for their failure to proclaim their innocence more than ten days later to their own employer. I conclude therefore that what MacCormack and Kilroy said in their testimony at the hearing is what the grievant Clayton, and Sluthe told them in the investigation by Boston Edison, and what the grievants did. Clayton's testimony during the Boston Edison investigation implicates all the grievants within any relevant standard of proof.

The grievants' misconduct justifies their dismissals. Accordingly, the suspensions or discharges of the grievants are sustained.

DATED: October 19, 1987
STATE OF New York) ss.:          Eric J. Schmertz
COUNTY OF New York)              Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration

between

Unity Lodge Local 405, U.A.W.

and

Chandler Evans, Inc.


The stipulated issue is:

Was there just cause for the July, 1986 suspension of Gilman Vaillancourt? If not, what shall be the remedy?

A hearing was held at the Company offices in West Hartford, Connecticut on February 26, 1987 at which time Mr. Vaillancourt, 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.

It is the Company's contention that the grievant was properly suspended for three days (July 2, 3 and 4) for reporting to work under the influence of alcohol; for boisterously using foul and obscene language; and for angrily kicking a work chair some distance across the factory floor.

The Company has proved the last item in the charge, but not the first two.

Its evidence on the charge that the grievant was under the influence of alcohol is limited to testimony by a supervisor that he smelled alcohol on the grievant's breath; and that the grievant's uncharacteristic anger and boisterousness and the fact that three months earlier he displayed similar symptoms when he was under the influence permit a logical and reasonable conclusion of
being under the influence when he began his work shift on July 2nd.

With the burden on the Company to prove the allegations by clear and convincing evidence, I find the foregoing factors to fall short of establishing that the grievant was intoxicated. Alcohol on the breath means, of course, that alcohol was consumed sometime earlier. But it does not mean that the employee is intoxicated. Here, the grievant admitted to having a beer in the afternoon at home before he came to work. There is no work rule prohibition to that. Probably he had more than one, and that would account for alcohol on his breath. But there was no testimony regarding the condition of his speech, his eyes, his gait, or any of the other traditional conditions that should be relied on in establishing intoxication, short of a blood or other scientific test. Here, no such tests were administered.

I think it significant that the grievant's supervisor testified that he smelled alcohol on the grievant's breath when the shift began. Yet he didn't relieve the grievant of duty then but went forward with assigning him work. I deem that to be evidence that the supervisor did not think then that the grievant was intoxicated, his alcoholic breath notwithstanding.

The grievant's anger, manifested by loud "cussing" could be a symptom of intoxication, but not conclusively. The grievant testified that when he arrived for work, his machine and work station had been left in disarray by the day shift operator; that this had happened several times before; that it made it difficult if not impossible for the grievant to know "where the day shift had left off;" and that he, the grievant, "blew off steam" at that condition. In the absence of other traditional evidence of intoxication and in the absence of any refutation of the grievant's
testimony regarding the condition of the job as he found it, I cannot conclude that his anger and profane language was due to the influence of alcohol.

Also, that on a prior occasion the grievant acted similarly when he was intoxicated is not the kind of probative evidence to prove intoxication this time. It is a "bootstrap" argument that does not meet the requisite test of "clear and convincing."

There is no evidence in the record that the grievant used "obscene" language, or that anything he said was directed to anyone. The testimony is that he said "son of a bitch" and "God damn." Neither phrase, although not of the highest civility, is hardly surprising or unusual in a factory, and I do not think that they fall within a category of the "obscene." More importantly, it is clear that the grievant was talking aloud, to himself, to his machine and to his work area. He was not talking to or directing his anger or words to supervision or any other employee. So, though he was loud and angry I do not find that the circumstance rose to the level of an "obscenity" or to the type of misconduct which the Company alleges.

However, he did act out his anger by kicking a chair or ladder. And he did so with considerable force, causing the object to travel along the factory floor. Nobody was hurt and no equipment was broken or destroyed. But the potential for injury to other personnel and equipment is obvious. That type of violent behavior is a safety hazard and need not be tolerated. For that act, some penalty is warranted.

Though the Company claims that the grievant was suspended for three days, the grievant does not claim back pay for the first day, July 2nd. He asserts that he voluntarily left that day with Company permission, so that pay for that day is neither warranted
or sought.

As the Company has not proved the intoxication charge or the full magnitude of the charge of misconduct regarding the use of loud and obscene language, but has proved the grievant's misconduct regarding kicking the work chair or ladder, I shall reduce the remaining two day suspension to a suspension of one day.

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

There was not just cause for the July 2, 3 and 4, 1986 suspension of Gilman Vaillancourt. He has waived any claim for pay for July 2nd. The remaining two day suspension is reduced to a one day suspension and his disciplinary record shall be adjusted accordingly. He shall be paid for one day.

Eric J. Schmertz
Arbitrator

DATED: March 2, 1987
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

Connecticut State Employees Association, Engineering, Scientific & Technical Unit
P-4
and
State of Connecticut

This is a statutory "last best offer" arbitration of those terms and conditions of the new contract between the above-named parties, which the parties were unable to resolve by direct bargaining.

Commendably, the parties, hereinafter referred to respectively as the "Association" and the "State," resolved all issues and terms and conditions of employment for the new contract except two.

Those two, which are the subject of this arbitration involve Parking and an Alternative Work Schedule.

Hearings were duly held in Hartford, Connecticut, at which time representatives of the Association and the State appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken and both sides filed post-hearing briefs and reply memoranda. The Arbitrator's Oath was waived.

Based on the entire record before me and with due consideration of the statutory factors set forth in Public Act 86-411 Section 5-276A, Connecticut General Statutes, I conclude that the "more reasonable last best offer proposal" on the Parking issue is that of the Association and the "more reasonable last best offer proposal" on the Alternate Work Schedule issue is that of
the State.

I am not persuaded that the State has shown a present need to change or discontinue the parking provisions of the predecessor contract. Its concerns about the adequacy of parking space relate, speculatively to the future. I am not able to conclude that its predictions for the future will obtain or obtain to the magnitude asserted.

That being so, I find no convincing basis to eliminate from the new contract the parking provisions of the predecessor contract. If the difficulties predicted by the State come to pass in the next few years, the next round of bargaining (and arbitration if needed) will be the appropriate forums for remedial action.

Not so speculative however is the State’s objections to each and all of the Association’s proposals for Alternative Work Schedules.

It is clear that alternate schedules comparable to the Association’s proposals herein have been implemented for other bargaining units and for other departments of the State government. It is also undisputed that those schedules, for the most part, have worked satisfactorily. I am also persuaded that alternate work schedules have been well received by the affected employees, have improved employee morale and with staggered hours and/or a shorter work week have produced travel conditions and other conditions of employment highly desireable to the employees.

Those are important considerations, but I agree with the State that they are not exclusively determinative. I agree with the State that bargaining units and the services they and their departments perform are different, and that in terms of work productivity, delivery of governmental services and interaction with
vendors, contractors and the public, more significant, and hence
determinative, is the impact of an alternate work schedule on
those latter duties and functions.

In the instant case I am not prepared to dispute or dis-
regard the evidence adduced by the State that the proposed alter-
nate work schedules would conflict and be incompatible with the
hours and days of work of private contractors working on the
State's highways and other projects, resulting in dislocations
in the needed coordination of the work of the employees of this
bargaining unit and those outside personnel.

I think it reasonable to conclude that the absence of
such worktime match would result in inefficiencies and addition-
al overtime costs to the Departments of Transportation and Public
Works, who must rely on the services and availability of many
numbers of this bargaining unit.

In my view, that is the determinative fact. I would
support the proposals on the grounds of morale, more pleasant
travel conditions, the improved effect on rush hour traffic, and
the advantages of an additional day off (in the case of the pro-
posal for a four day week) if there was no adverse impact on
productivity and the regular delivery of affected governmental
services. Here, I will not substitute my judgment for the essen-
tially unrefuted evidence by the State that there would be such an
adverse impact.

Therefore, I deem it proper that at present at least, an
alternate work schedule be introduced only if agreed to bilater-
ally. At this juncture, I do not think that the Association's
proposals can be supported by an arbitration order as "more
reasonable" within the statutory meaning and intent.

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 current language on Parking, namely Article 33 of the predecessor contract, shall be continued and maintained in the new contract.

2. There shall be no provision in the new contract regarding Alternate Work Schedules.

DATED: December 7, 1987
STATE OF New York )
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument which is my AWARD.
In the Matter of the Arbitration:
between
International Union of Electronic,
Electrical, Technical, Salaried
and Machine Workers,
AFL-CIO and Its Local 313
and
Dresser-Rand Company

OPINION AND AWARD
Grievance No. C889

DECISION OF THE BOARD OF ARBITRATION

A hearing was held upon the above-captioned grievance on
July 7, 1987 at which both the Union and the Company presented
witnesses in support of their respective positions regarding the
grievance. A meeting of the Board of Arbitration was held October
16, 1987. This Award is rendered by the Board of Arbitration,
with dissents as to portions of this Award, as noted below, pur-
suant with the provisions of Section 33 of the collective bargain-
ing agreement.

ISSUE

The parties at the hearing could not reach agreement as to
the issue to be submitted for decision. However, it is clear that
the parties seek a resolution as to the interpretation of past
practice and potentially conflicting language in the collective
bargaining agreement regarding the vacation eligibility of laid-
off bargaining unit employees.

POSITION OF THE PARTIES

The Union relying upon a statement in Section 14(N) of the
collective bargaining agreement contends that "notwithstanding"
anything to the contrary within the agreement an employee who
works 900 or more hours in any calendar year is entitled in the
next calendar year to vacation whether or not he works during the
next calendar year.
The Company, on the other hand, maintains that this is contrary to past practice and the language contained within Section 14(D) which requires employees to have worked 900 hours within the past 12 months and be on the active payroll just prior to taking vacation. The Company argues that only those employees who (1) were employed on January 1, 1987 and had worked 900 hours during the prior year or (2) who are on the active payroll at the time of requesting vacation and who worked 900 hours during the preceding 12 months are entitled to vacation pay. The Company further points to certain changes in Section 14(D) in the last negotiations, as well as Union proposed changes to this section, to bolster its position that the Union's interpretation is incorrect and improper with respect to the meaning of Section 14(N). Although the Union concedes that there has been a practice as described by the Company, it contends that this clause, although included in the agreement for many years, has never required interpretation until now due to the steady employment which the Company has in the past been able to provide. However, with the recent layoff of large numbers of employees for extended periods of time this has lead to a denial of vacation benefits to a large number of laid-off employees. Thus, the Union now seeks to enforce its interpretation of the meaning of Section 14(N) and recover vacation pay for those laid-off employees denied vacation pay at least since the filing of this grievance.

DECISION AND AWARD

There is no question that there has existed for many years a practice consistent with Section 14(D) with respect to the payment of vacation pay to bargaining unit employees. However, this practice is not necessarily consistent with the language of Section
14(N). Neither party has offered any explanation to resolve the potential inconsistency. Thus, without such guidance one must interpret the language in a manner consistent with other provisions of the agreement wherever possible. The language of 14(N) which, in my opinion, must be given a meaning is inconsistent with the current practice with respect to how bargaining unit employees become eligible for vacation benefits. A reconciliation can be made between 14(D) and 14(N) if one is to apply a similar procedure as set forth for employees on "RDE" status as described in 14(D).

Accordingly, I find that employees presently on layoff status and those employees who are laid-off in the future shall have their vacation eligibility frozen at the time of layoff. At time of future recall their eligibility for vacation shall be calculated based upon the prior 12 months previous to layoff without consideration in the calculation for the time while on this current layoff. Section 14(D) will be applied without consideration for the time while the employee was on the layoff from which he has most recently been recalled.

Thus, an employee who had worked the requisite number of hours to be eligible for vacation in the calendar year of layoff, will upon recall in a subsequent calendar year be immediately eligible to take vacation-consistent with the proviso in Section 14(J) that an employee upon recall may not receive vacation for 30 days unless agreed upon by his Supervisor. On the other hand, if the employee is recalled with sufficient work hours during the 12 months just prior to the current layoff, the vacation eligibility hours will be calculated as provided in Section 14(D) discounting the months while the employee was in the current layoff status. In no event will an employee be entitled to receive during any
one calendar year more vacation pay than his or her service would entitle.

In view of the consistently applied and the long established past practice, I find no basis to award, as the Union seeks, vacation pay to those employees who in the past have been denied vacation pay due to practices inconsistent with the Board's ruling. My ruling is to have prospective application only.

DATED: October 17, 1987
STATE OF New York ) ss.
COUNTY OF New York ) Eric J. Schmertz
Impartial 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.

The Union Arbitrator joins the decision with respect to my AWARD of the prospective vacation eligibility but dissents as to the denial of vacation pay to employees previously adversely affected.

DATED: October 1987
STATE OF ) ss.
COUNTY OF ) Rand Little
Union Arbitrator

I, Rand Little 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 Company Arbitrator dissents as to the first finding eligibility for vacation pay and joins with respect to the denial of back pay.

DATED: October 1987
STATE OF )
COUNTY OF ) Donald Miller
Company Arbitrator

I, Donald Miller do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issues are:

1. Did the Company, in effecting layoffs in the negative workers department violate the collective bargaining agreement by laying off Lisa Chrystal and retaining Robert Mathias, a less senior employee? If so, what shall be the remedy?

2. Did the Union violate Article 15 by posting a certain notice on July 20, 1987 and by taking other related actions? If so, what shall be the remedy?

A hearing was held on August 7, 1987, at which time representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

**ISSUE NO. 1**

I find no need to decide whether the enumerated jobs or functions set forth on page 43 of the contract under the heading Negative Workers Department are separate classifications, or a single classification of a negative worker with different duties at differing rates of pay.

Also, I need not decide whether the contract or past practice relating to whether layoffs are by seniority within a department or within a classification.

The disagreements between the parties on these matters are pre-empted, in my view, by the undisputed operational and business needs of the Employer in this particular circumstance.

The undisputed facts show that Robert Mathias was capable of and performed duties under category (e), negative cutting and matching as well as work under category (b) as a negative worker. And that the grievant, Lisa Chrystal, was not capable of
performing the duties under category (e) and was confined to the work of a general negative worker under category (b).

The record also establishes, significantly, that the Employer experienced a fall-off in the work performed by general negative workers but that negative cutting and matching work remained.

In the absence of a specific contract provision requiring layoffs strictly on a seniority basis, without any consideration of "ability," I deem it axiomatic that where a junior employee is laid off, the retained senior employee(s) must be able to perform the remaining available work.

Here, there is no such contract provision. Indeed Section 7(a) of the contract requiring rotation of the available work amongst qualified employees within the classification affected, when less than a full week's work is not available, confirms that principle, and I deem that Section (c) (1) is founded on the same principle.

In short, in both reduced workweek situations, and in layoffs because of reduced work, coverage of the available work by qualified employees is mandated, and reductions in force are made in classifications or duties where the work has fallen off.

The Union's reliance on a past practice to the contrary is not controlling. It has not been shown that in those instances, where the junior employee in a department was excessed, the remaining available work could not be performed by the retained, senior employees.

But in the instant case, had Mathias been laid off and the grievant retained, the available work of negative cutting and matching could not have been handled. I find nothing in the contract or in past practice that contemplates or supports any such result. Therefore the Union's grievance is denied.

ISSUE NO. 2

The Employer complains that on July 20th, the Union's steward posted a notice that was designed to instruct employees (and Union members) to defy certain Employer actions. The Notice read:

Dear Member:

The Officers and Executive Board hereby notify the members of 702 that during short time there will be no temporary transfers, no overtime, and no jobs performed by Supervisors.

Any violations of this should be reported to a Union official immediately.
The Employer also claims that on the same night the steward (Mr. D. Mercurio) twice threatened an Employer Supervisor, that he would order members not to carry out work assignments if the Employer took certain actions.

At the hearing, this Arbitrator advised the Union that the Notice could be construed by employees as a Union directive to defy Employer orders and work assignments, and that it therefore violated Article 15 of the contract. The Arbitrator instructed Steward Mercurio to call the shop and have the Notice removed. Mercurio complied with the Arbitrator's instructions.

There was no denial of the allegations that Mercurio threatened supervision that work assignments would not be carried out. I find that too was a violation of Article 15 of the contract.

As a remedy, I shall reiterate what I said in my arbitration decision of October 8, 1970, between the Union and Deluxe General. I make that decision as set forth below, the concept of which I have time and again stated is binding industry-wide, applicable to the collective bargaining relationship between the Union and DuArt:

An employee must perform a work assignment or an order from the Employer even if he or the Union believes it to be in violation of the contract or any other agreement between the Union and the Employer.

The right of the employee and/or the Union is under the grievance procedure of the contract. In other words, the employee must perform the work assigned, subject to his right and the right of the Union on his behalf to complain to the permanent Arbitrator, subsequent to performing the assignment, that it is in violation of the contract, and to seek whatever remedy or relief would be appropriate.

The intent of this directive is to make clear to the parties that the permanent Arbitrator believes that work assigned and orders given must be performed and carried out by the employee so assigned or directed whether or not in violation of the contract, subject to his right to thereafter grieve before the permanent Arbitrator.
The only exception to this well settled rule is when the assignment would place the employee in physical jeopardy or when the assignment is illegal or unsocial.

Violations of the foregoing will justify discharge.

DATED: August 17, 1987
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
Permanent Arbitrator
In the Matter of the Arbitration:

between

OCAW Local 8-397

and

GATX Terminals Corporation

OPINION AND AWARD

Grievance No. 28-86

FMCS No. 86K/22753

The stipulated issue is:

"Was the grievant, Joseph Medwick, suspended
for just cause on June 5th, 1986? If not,
what is the appropriate remedy?"

A hearing was held in Carteret, New Jersey on December 29,
1986 at which time Joseph Medwick, hereinafter referred to as the
"grievant," and representatives of the above-named Union and Com-
pany appeared. All concerned were offered fully the opportunity
to offer evidence and argument and to examine and cross-examine
witnesses. A stenographic record was taken and the Union and the
Company filed post-hearing briefs or memoranda. The parties
waived the Arbitrator's Oath.

Provisions of the Employee Handbook and of the
Collective Bargaining Agreement Between the Parties.

The Employee Handbook, which was promulgated by the Com-
pany, provides in pertinent part:

"Safety Standards, Rules and Disciplinary
Guides:

The following Conduct or Activity is
Prohibited:

...S-5. Reporting for work or attempt-
ing to carry on work while under the in-
fluence of liquor, illegal drugs or other
substance impairing judgment while in the
terminal."

1. The Handbook provides that the penalty for the first violation
of S-5 is a 5 day suspension.
General Conduct Standards

The following Conduct or Activity is Prohibited:

....C-11. Use of obscene, abusive or threatening language or conduct directed toward a foreman, supervisor, fellow employee or customer representative (including truck drivers)^2

The relevant provisions of the Collective Bargaining Agreement between the Union and the Company provide in pertinent part:

ARTICLE 24

SUSPENSIONS AND DISCHARGES

Section 1. In cases in which the Company determines that an employee's conduct or performance of work justified suspension or discharge, he shall first be definitely notified by the foreman of his suspension or discharge in the presence of the Terminal Manager (or his representative) and the Chairman of the Workmen's Committee or a member of the Workmen's Committee. The reason for the suspension or discharge shall be given to the employee and the Chairman of the Workmen's Committee or a member of the Workmen's Committee. Upon notification the employee shall immediately leave the premises of the Company.

Section 2. If an employee believes his suspension or discharge is unfair or unjust, he may within twenty-four (24) full and consecutive hours, exclusive of non-workdays, Sundays and holidays, after receiving notification, file a grievance in writing and request processing of such grievance in Step 3 of the adjustment procedure. A meeting between the Terminal Manager, or his authorized representative, and the Workmen's Committee shall be held in Step 3 within forty-eight (48) full and consecutive hours, exclusive of non-workdays, Sundays and holidays, after the filing of the written grievance....

2. The Handbook provides that the penalty for the violation of C-11 can range from "Suspension to discharge depending upon the full circumstances."
ARTICLE 2
MANAGEMENT RIGHTS

Section 1. Management rights of the Company shall without limitation be solely and exclusively retained by the Company, except as specifically and to the extent limited by this Agreement.

Background Facts

The grievant has been employed at the Company's Carteret terminal for about thirty years. For the last fifteen to eighteen years he has worked as a dockman whose responsibilities include docking and hooking up the hoses which transfer products between the Company's terminal and the barges and ships which deliver and pick up the products. He is considered by all concerned to be a knowledgeable and competent worker. He is also generally known as a person who tends to "speak his mind."

The grievant was scheduled to work a shift which began at midnight, June 4, 1986 and was to end at 8:00 A.M. on June 5, 1986. During the week immediately prior to June 4, he worked about 106 hours, including 40 consecutive hours which he had completed at 8:00 A.M. on June 4. In accordance with past practice, he reported for work at about 11:00 P.M. on the evening of June 4. He admitted that he had consumed "a couple of beers" at about 9:30 to 10:00 P.M. on the night in question and that he felt very tired because of the long hours he had put in during the preceding week.

On the day in question, John White was acting as shift supervisor for the 4:00 P.M. to midnight shift. Mr. White had joined the Company about three months earlier. He observed the

3. Mr. White testified that he had been in a training program until the end of May.
grievant as the latter clocked in and concluded from the grievant's behavior that he was intoxicated. White then asked John Brohl, the pumphouse supervisor, for a "second opinion" on the grievant's condition. Brohl went into the locker where the grievant was changing into his work clothes and concluded that the grievant was intoxicated. He then told the grievant to go home, although the grievant denied that he was intoxicated and offered to go to a nearby hospital to take a blood alcohol test. As the grievant was leaving the premises, he passed White. He pointed his finger at White and said "Your ass is mine." Although no one took any steps to avoid or prepare for a physical confrontation at that time, White said that he believed that the words, tone and manner conveyed a threat. Brohl, a witness to this event, then intervened. After some discussion and argument the grievant left work in his own car. On his way home, at about midnight, he went to a bar and met Joseph Welusz, the President of the local union, and commenced a conversation with Welusz about that evening's events.

The next morning David Schultz, the Terminal Superintendent, received a report from Mr. Kadel, the Assistant Operations Manager, concerning the incident which occurred the previous night. He then spoke to White and Bohl about the events in question and informed Stephen Surto of the results of his discussions. Surto contacted Brohl and White and decided to suspend the grievant indefinitely pending further investigation. Surto then telephoned the grievant to advise him of the suspension. The grievant went to the terminal and met with Welusz who then called Mr. Surto and requested an immediate meeting. Surto responded that an immediate meeting was not possible. Welusz then told Surto that he wanted a decision on the suspension in writing as soon as possible so
that he could respond with a grievance and have a Step Three meeting within the time set forth in Section 2 of Art. 24 of the collective bargaining agreement between the parties. Surto then relayed the information to Ernest D. Erdelyi, the Company's Terminal Manager. Erdelyi then decided to suspend the grievant for ten days for violations of Sections S-5 and C-11 of the Employee's Handbook. In deciding upon the appropriate punishment, Erdelyi also took into consideration the grievant's prior years of service and his job performance. In addition, he also considered a prior incident which occurred between a year to a year and one-half earlier. The grievant had "chased" an Exxon representative from one of the Company's docks and in the process had used profanity towards the customer's representative. The grievant received an oral warning for this prior incident. While Erdelyi could not testify as to the precise effect the prior incident had on his decision to suspend the grievant for ten days, he conceded that it had some effect on his decision although not an overriding one. Erdelyi told Surto to inform the grievant of the decision. A grievance was filed and a Step Three meeting was held the next day.

The Disputed Facts

The Company and the Union offered conflicting testimony as to whether the grievant was in an intoxicated condition when he reported for work on the evening of June 4. Brohl testified that he first encountered the grievant outside the entrance door and informed him about a work related matter. Brohl stated that the grievant shrugged his shoulders and said "what else is new" and proceeded inside. He testified that the grievant appeared "clumsy" even though he wasn't paying too much attention to him at that time. On cross-examination he stated for the first time that the grievant
was "weaving" a little bit as he climbed the entrance steps. On the other hand, Brohl testified that the grievant gave the impression of someone who was "just rolled out of bed ... being tired and just slouching your way inside." The grievant denied any encounter with Brohl as he entered the terminal to report for work.

White testified that after clocking in, the grievant hit the locker room door with his right shoulder and bounced off the wall on the right-hand side. The grievant denied that he ever banged into the door. Instead, he testified that the door was almost always left open and that he was "pretty sure" it was open on the evening of June 4.

Brohl testified that after observing the grievant in the locker room at White's request he concluded that the grievant was totally intoxicated. The bases for his conclusion were that: (1) he smelled "hard liquor" on the grievant's breath; (2) the grievant's speech was slurred and (3) the grievant's general demeanor was consistent with intoxication. Brohl stated that the grievant denied that he was unfit for work and offered to go to the hospital for a blood alcohol test. Brohl decided not to accept the grievant's offer because "he didn't want to take responsibility of putting the man on the road in that condition." Yet, Brohl admitted he knew that sending the grievant home would also put him on the road. Brohl also testified that he did not notice any objective manifestation's of the grievant's alleged intoxicated condition during the confrontation with White which occurred only a few minutes later. Brohl stated that at those moments, he wasn't paying attention as to whether the grievant was or was not

4. Brohl didn't use the word "weaving" in his written report of the incident. He stated only that grievant appeared "clumsy."
The grievant denied he was intoxicated. He admitted he had "a couple of beers" about an hour before he reported to work and testified that he was very tired and that he so informed Brohl during their locker room conversation. Richard Brodniak, a co-worker, testified that he observed the grievant during the confrontation with White. Brodniak concluded that the grievant "looked tired but wasn't drunk" and that he always drank beer, rather than hard liquor. Welusz, now president of the local Union and the chairman of the grievance committee at the time of the incident in question, also testified regarding this issue. He stated that he met the grievant at a local bar about one hour after the grievant left the terminal and had a conversation with him about the events of that night. Welusz testified that the grievant did not appear drunk or intoxicated; that he had been drinking with the grievant many times before and that, to his knowledge, the grievant always drank beer and not hard liquor.

There was also a conflict in the testimony relating to the confrontation between the grievant and White. The grievant admitted that he pointed his finger at White and told him "Your ass is mine." However, he testified that he only meant that he would no longer give assistance in the performance of White's supervisory job responsibilities. Indeed, the grievant testified that he "explained" his language in the presence of White immediately after he stated "your ass is mine." Brodniak corroborated the grievant's testimony. On the other hand, the grievant admitted that he was a "little angry" with White and that even his statement as explained was not a "proper statement." Brodniak also admitted on cross-examination that the grievant seemed angry at
White and that his tone was "a bit louder than a normal tone."

Both White and Brohl denied that the grievant attempted to explain what he meant by "Your ass is mine" in front of White. Brohl testified that the grievant's first attempt at such an explanation occurred a few minutes later in a conversation between the two in the old lunchroom. Brohl also testified that the grievant also mentioned a prior incident between White and the grievant relating to the failure of White to give the grievant adequate notice to report to work on an emergency basis.

White further testified that at no time prior to June 4 had he worked with the grievant and that the grievant never "covered" for him or helped or assisted him. The only prior contact he had with the grievant was during the preceding week when he called him in for some overtime work. The grievant testified that he had worked with White prior to June 4 because to some slight degree their shifts overlapped. This Arbitrator then asked the grievant to specify exactly the prior incidents which he believed constituted "covering up" Mr. White or "doing Mr. White's job."

Grievant testified that: (1) he often decided which hose should be connected to the proper manifold and that White should have been on the dock making that decision himself; (2) he signed a "notice of readiness" which was the supervisor's job, although he had been doing it for years for many other supervisors and (3) White was constantly calling him and asking questions about which berth was appropriate for a particular barge. However, the grievant was only able to pinpoint one specific incident by referring to the name of the ship involved. He could not recall the time

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5. Brohl admitted that he did not transmit the grievant's explanation to anyone else. Brohl explained that he didn't remember grievant's explanation at the time he filed his written report.
and dates of any other such incidents.

Lastly, there is some conflict in the testimony regarding whether a written record was to be kept regarding the so-called Exxon incident. Erdelyi and Suto both testified that the grievant was so informed at meeting between them, the grievant and Welusz. The grievant and Welusz denied that Erdelyi ever mentioned that the incident would be recorded in writing.

Contentions of the Parties

The Union

The Union argues that the Company must satisfy its burden of proving both infractions as set forth in the Violation Notice. If any one of them fails, then the suspension was not for just cause. No evidence was adduced which could provide the Arbitrator with any reasonable basis to uphold the suspension because of a single violation or to trace the impact of one violation on the decision to suspend for 10 days. The Union also contends that no other violation can be considered because neither Violation Notice nor any other written document contains a reference to any other violation such as the Exxon incident. Further, the Exxon incident cannot be considered in determining the validity of the instant suspension because neither the Union nor the grievant was informed that a written record thereof was to be included in the grievant's personnel file.

The Union argues that the Company has failed to satisfy its burden of proving that the suspension was for just cause. First, the Union claims that the suspension was invalid because of the Company's failure to abide by Article 24 Section 1 of the Collective Bargaining Agreement between the parties. That clause
provides that the grievant "shall first be definitely notified by the foreman of his suspension or discharge in the presence of the terminal manager or his representative and chairman of the Workmen's Committee or a member of the Workmen's Committee."

Even though Suto admitted that Welusz had requested such a meeting on June 5, none was held before the grievant received written notice of the ten day suspension.

In addition, the Union argues that the Company's investigation was flawed since none of its representatives obtained the grievant's version of the incident before a final decision was made. The Company official who made the decision did not even know that the grievant had explained his "intent" to Brohl immediately after stating to White that "Your ass is mine."

With respect to both of the alleged violations, the Union contends that the Employees Handbook is not binding on the employees because it was never negotiated with the Union.

The Union further argues that the testimony fails to establish a violation of C-11. It points to the fact that no one present when the grievant told Mr. White "Your ass is mine" did anything or made any movement in reaction to the so-called threat. This belies the testimony of the Company's witness that White was in fear for his physical safety. Further, a threat within the meaning of C-11 must be of a "coercive character." A threat not to help White in the future is not within the meaning of the rule and, in any event, was not the particular violation charged. In addition, both the grievant and Brodniak testified that the grievant made it clear that there was no threat of physical violence. Moreover, the statement as explained was not a threat, but only a warning or notification or promise as to the grievant's future work plans.
With respect to the charge of reporting to work in an intoxicated state, the Union contends that the testimony of Brodniak and Welusz was unimpeached and entirely credible. The Union makes special note of the fact that the grievant voluntarily offered to take a blood alcohol test, but the Company refused to accept his offer. The only explanation offered for their refusal to do so is simply not credible. The stated reason was Brohl's desire to avoid putting the grievant on the road, but at the same time he knew that the same risk was present in sending him home. This impeaches Brohl's entire testimony and tends to establish that Brohl sent the grievant home only as a show of support to White, who was then a new shift supervisor. Lastly, the Union contends that a ten day suspension is unjust in light of the grievant's thirty-year record of competent employment performance, unblemished but for the Exxon incident. Indeed, the severity of the punishment might well have violated the doctrine of progressive discipline.

The Company

The Company argues that the Employee Handbook is binding on all of its employees. It points specifically to Article 2 of the Collective Bargaining Agreement between the parties. That clause retains to the Company "management rights" except as specifically limited by the Collective Bargaining Agreement. No clause in that agreement purports to limit the right of the Company to promulgate the rules of conduct contained in the Employees Handbook.

The Company emphasizes that it only has to demonstrate that it has not been arbitrary and capricious, and only reasonable in its disciplinary decision. Under this standard, the
Arbitrator must uphold the Company's good faith conclusion that the grievant was intoxicated. The Company argues that the testimony of Brohl and White, as well as the grievant's own admission that he had a "couple of beers" and was very tired on the night in question, establishes its good faith.

With respect to the charge of threatening a supervisor, the Company relies upon the testimony of Brohl and White. The fact that no one took any action or steps to prevent physical violence is simply irrelevant; White reasonably felt threatened and so behaved after the incident. The threat might have well related to future violence. The grievant's explanation of his threat is simply not credible in light of White's testimony that the grievant never worked for him and the grievant's own inability to specify precisely a number of such incidents when he "covered-up" for White. Moreover, even a threat not to assist a supervisor in the workplace is a violation of C-11. Any doubts as to the credibility of the witnesses should be resolved in favor of the Company since the grievant is an interested party.

The Company argues that the ten day suspension is valid whether or not the Company properly took into consideration the Exxon incident because the events of June 4 by themselves are sufficient to justify the discipline. Indeed, the Exxon incident, in which the grievant threatened a customer representative with the use of profanity, is directly relevant and supports the decision to suspend the grievant for ten days. He had received a warning for similar conduct in the past. Whether the warning was oral or written is irrelevant.

Lastly, the Company disputes the Union's claims that the suspension should be overturned because of the Company's failure
to comply with Article 24 of the Collective Bargaining Agreement. First, the Company argues that no harm or prejudice was caused to the grievant by the failure to abide by the letter of the contract. The grievant and the Union were promptly and officially informed of the indefinite and then the definite suspension and the reasons therefor. The next day, the 3rd step meeting was held and all concerned were given the opportunity to make their arguments and set forth their versions of the events. Second, the failure to hold an initial meeting was caused by Welusz's insistence that a final decision be made as soon as possible so that a step 3 meeting could be held on July 6. Had the Union's President not been so insistent, the initial meeting contemplated by Section 1 of Article 24 would have been held before the grievant had been definitively notified of the terms of his suspension.

Opinion

Before reaching the merits of the Company's claim that the grievant violated S-5 and C-11 of the standards contained in the Employee's Handbook, several preliminary matters must be determined. First, I am persuaded that the Safety and General Conduct Standards contained in the Handbook are binding on employees notwithstanding the fact that it was not negotiated with the Union. It is well established that absent any contractual restrictions, management has the unilateral right to establish reasonable rules regarding an employee's workplace conduct. The Collective Bargaining Agreement between the parties neither expressly or impliedly establishes any limitations which would invalidate the rules contained in the Employee's Handbook. Indeed, Article II, Section 1 of the Agreement specifically reserves to the Company "management rights...without limitations" except as "specifically"
Second, the Company's admitted failure to comply with the procedures set forth in Article 24, Section 1 of the Agreement does not invalidate the suspension. Whatever the justification for the Company's denial of a meeting on June 5, witnesses for both the Company and the Union have testified that it was the Union who pressed for an early, definitive decision and notification with respect to the 10 day suspension. Suto's uncontradicted and unimpeached testimony indicates that but for the Union's request the Company would have complied with the requirements of Article 24 by holding the required meeting on the following Monday, the first work day after the weekend. The Union cannot be heard to complain about the Company's failure to follow procedures when the Union precipitated the Company's acts. In addition, there is no indication that the lack of the Article 24 meeting in any way prejudiced either the grievant or the Union. Both were informed promptly of the precise nature of the charges and the punishment. Both were given the opportunity to present their versions to the Company at the Step 3 hearing which was held on Friday June 6, only 48 hours after the alleged incidents in question.

In this regard, I also do not find that the Company's failure to learn of the grievant's version of the incidents invalidates its action. First, no clause or provision of the Collective Bargaining Agreement purports to impose that duty upon the Company,

6. Suto's prior decision to suspend the grievant indefinitely pending the outcome of the Company's investigation of the charges against the grievant did not constitute "definitive" notification of the suspension within the meaning of Article 24, Section 1. To decide otherwise would be to assume that the Company could take no interim steps to protect itself pending further investigation without reaching a "definitive decision on the violation and punishment."
Second, both the grievant and Welusz could have attempted to set forth their positions to the Company in their conversations with Suto which took place before Erdelyi made his decision to suspend the grievant for ten days. Apparently, neither made any attempt to do so. Third, the grievant and the Union took the opportunity to set forth their versions by filing the written grievance and by attending the Step 3 hearing which, as noted previously, was held within forty-eight hours of the incidents in question.

Lastly, the Company's consideration of the Exxon incident in no way adversely affects the validity of the suspension at issue in this case. This Arbitrator must assume that the verbal warning issued to the grievant as a punishment for his prior actions was justified, since no grievance was filed to contest the validity of that action. The Company was clearly justified by the doctrine of progressive discipline into taking into account a prior violation of the grievant which involved similar conduct, i.e. the use of profanity or obscene language to another. Whether or not the Union was told that a written record would be made of the facts of the incident is irrelevant.\(^7\) The Company would have been justified in taking the Exxon incident into account had no written record been kept particularly since the grievant himself admitted that he used profanity in telling the Exxon representative to leave the dock.

In any event, the present suspension can be judged based solely on the events of June 4. Although Erdelyi testified that he took the Exxon incident into account, he was not asked whether

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7. Thus, I find it unnecessary to resolve the conflict in the testimony as to whether the Company informed the grievant and the Union that a written record would be kept.
he would have meted out a lesser punishment if he could not consider the prior incident.

Thus, the case turns on the questions of whether the Company has met its burden of establishing the grievant's violation of S-5 and C-11 by clear, persuasive and convincing evidence. A careful and thorough review of the testimony and exhibits submitted in this proceeding has persuaded me that the Company has not satisfied its burden with respect to a violation of S-5, but has with respect to a violation of C-11.

S-5 of the Employee Handbook prohibits an employee from "reporting for work or attempting to carry on work while under the influence of liquor...or other substances impairing judgment while in the Terminal." Both White and Brohl testified that they believed that the grievant was intoxicated. I do not question their credibility or their good faith in reaching that conclusion. However, their testimony reflects only their lay conclusions which were based upon their observations of the conduct and demeanor of the grievant. In my view, in order to prevail in this proceeding the Company must provide by clear and convincing evidence that the conduct and behavior which they observed were a result of intoxication. Their good faith belief that that was the case is in itself not enough to prove a rule violation. S-5 prohibits reporting to work "under the influence of alcohol;" it does not prohibit reporting for work in a condition which might create a reasonable belief that an employee is "under the influence."

White's conclusion was based solely on his observation that the grievant hit the locker room door and bounced off the wall. Much of Brohl's testimony is also based in substantial part upon
the grievant's "clumsy" and "weaving" physical behavior and
general demeanor, as well as his slurred speech. Yet these
manifestations are also consistent with the behavior of a man
who had worked an enormous amount of hours the previous week,
including 140 consecutive hours which had concluded just fifteen
hours before he reported to work on June 4. Indeed, even Brohl
admitted that the grievant gave the impression of someone who
"just rolled out of bed... being tired and just slouching...."
Brohl also admitted that during the confrontation with White,
which occurred just moments after Brohl's locker room meeting
with the grievant, he did not notice any slurring of speech
or other manifestation of intoxication. Although Brohl testified
that he smelled hard liquor on grievant's breath, beer and liquor
contain alcohol and a recent consumption of a non-intoxicating
amount of beer could well have left the smell of alcohol on the
grievant's breath. Thus, even if the testimony of White and Brohl
were the only evidence submitted on the issue of intoxication, I
might well find that the Company did not satisfy its burden on
this issue.

There was, however, additional testimony supporting the
grievant's denial that he was intoxicated. First, Brodniak, a
co-worker, testified that he observed the grievant moments after
his locker room conversation with Brohl. Brodniak testified that
the grievant did not appear intoxicated. More importantly, Welusz
tested that he had a long conversation with the grievant about
one hour after the incident in question and that the grievant was
not intoxicated. Finally, all parties admit that the grievant
offered to undergo a blood alcohol test but that the Company
refused the offer. While there may be valid reasons which support
an employer's refusal to accept such an offer, none were given in this case. It's hard to understand why the offer would be refused out of fear of allowing the grievant to drive to the hospital in his alleged condition, and at the same time direct the grievant to drive home. In a case where the Company's other evidence is inconclusive, and contrary evidence is unimpeached and uncontradicted, the Company must bear the responsibility for its failure to corroborate its management's conclusions through the use of objective, scientific tests that are available. Thus, I find that the Company's determination that grievant violated S-5 was not for just cause.

C-11 of the Employee's Handbook prohibits the "use of obscene, abusive or threatening language or conduct directed towards...a supervisor." The grievant admits he pointed his finger at White and said "your ass is mine." That he might not have intended his statement as a physical threat is irrelevant. Mr. White felt threatened and that reaction was a reasonable one in light of the language of the grievant's tone. White was not required to attempt to read the grievant's mind. The fact that no one present took any physical action to avoid an imminent physical attack is also irrelevant. No threat of immediate physical danger is necessarily communicated by the words used. The threat could well be meant or understood as relating to future physical attacks.

8. Grievant admitted that he was "a little angry with Mr. White" and that his statement was no "proper." Mr. Brodniak also admitted the grievant seemed angry and that his tone was "a bit louder than a normal tone." The grievant and Brohl testified that the words were uttered in a very angry, threatening tone.
The grievant testified that immediately after using the threatening language, he explained to White, his real intentions. He testified that he told White he would no longer "cover" or assist White in the performance of his responsibilities. Brodniak corroborated the grievant's testimony. On the other hand both White and Brohl testified that no such explanation was offered in front of White. The issue does not turn solely on the credibility of these witnesses. First, I take notice of the fact that the words "your ass is mine" are commonly understood as a threat of physical violence. It seems highly improbable that the grievant would choose these words merely to indicated to White that he was no longer going to receive job-related assistance. Second, when the grievant was questioned by this Arbitrator to state the exact dates and precise circumstances when the grievant allegedly did White's work for him, all the grievant could state was, with one exception, that at some unspecified time and place he responded to Mr. White's telephone requests for information, signed "notices of readiness" (which he had done for many other supervisors) and decided which hose should be connected to the proper manifold. Not only were the answers vague, but the examples included routine work within the grievant's responsibilities, and in total do not seem to me to constitute the kind of "covering" or "assistance" to White, which if discontinued would constitute a realistic threat.

In any event, C-11 does not prohibit only threats of physical violence; it prohibits "obscene, abusive or threatening language."9

9. This interpretation is also corroborated by the paragraph on page 2 of the Handbook which states in pertinent part: For example, if any employee uses profanity towards a foreman in private, the offense is serious but no as serious as the use of the same words in a loud and insulting tone before a large group of other employees.
There is no doubt that the grievant's words and conduct came within all three of these categories of prohibited activity. The Union's contention that the words or threats must be of a "coercive" character is unsupported by anything in the record and contradicts the plain meaning of the words of the Employee's Handbook. Equally unpersuasive is the Union's argument that the Company must establish a threat of physical violence. The "Violation Notice" stated not just that the grievant "threatened a supervisor," but charged a "violation of rule...C-11 in the Employee's Handbook." Thus, throughout these proceedings, the grievant knew or should have known that his conduct had constituted violations of any and all of the activity prohibited by C-11. Accordingly, I find that the Company's suspension of the grievant for the violation of C-11 was for just cause.

There remains for determination the question of the appropriate remedy since I have determined that only one of the violations charged was valid. The Company argues that the entire ten day suspension be upheld on the basis of a violation of C-11 since under the Employee's Handbook such a penalty was permissible. The Union argues that the entire suspension must be invalidated as there is no way to prorate the length of the suspension. I find both arguments unpersuasive. The Employee's Handbook specifies that a first violation of S-5 will result in a penalty of a 5 day suspension. In the absence of contrary testimony, I must assume that was the punishment imposed by the Company for the alleged violation of S-5. As that was not for just cause, the grievant must be made whole for that five day suspension attributable to this claimed violation. The additional suspension of five days for the proved violation of C-11 shall stand.
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 ten day suspension of Joseph Medwick was not for just cause. There was just cause for a five day suspension. Therefore his suspension is reduced from ten days to five days. He shall be made whole for the difference.

DATED: May 1, 1987
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:

Whether the discharge of Sheri Braithwaite on June 11, 1986 was for just cause. If not, what shall be the remedy?

A hearing was held in Syracuse, New York on March 25, 1987 at which time Ms. Braithwaite, hereinafter referred to as the "grievant," and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The grievant was discharged because the Company concluded that she was an accessory to, had conspired in, or had specific prior knowledge of her boyfriend's plan to and his act of physically assaulting employee Michael Evans with a tire iron.

The charge parallels a crime. And though the criminal standard of proof is not applicable in arbitrations, it is well settled that offenses of such seriousness must be proved by evidence that is substantial, clear and convincing.

The Company's case falls short of that standard. There is circumstantial evidence supportive of the Company's charge and theoretically circumstantial evidence can be enough to meet the standard. But I cannot find, in this case, that it adds up to connecting the grievant to the physical assault in the clear
and convincing manner required.

Though the grievant knew that her boyfriend (now her husband) would confront Evans, and though she may have threatened Evans that her boyfriend "would get him," and even if she pointed Evans out to her boyfriend as Evans left the plant, just prior to the assault, I am not convincingly persuaded that she knew that the confrontation would take the form of a physical assault with a dangerous instrument, or was a party to that type of planned assault.

The fact is that the physical assault was committed by the boyfriend, not the grievant. The criminal complaint that followed did not name the grievant, and she was not subject to any criminal charge.

The grievant's explanation that she expected that her boyfriend would confront Evans and demand he stop spreading what the grievant considered to be false and malicious rumors about her in the plant, but did not see the tire iron and did not know or condone physical violence, is plausible. And the circumstantial evidence, such as her threats to Evans, an ongoing feud between them, and her identification of Evans leaving the plant, do not prove complicity in a criminal assault actually committed by someone else.

I am not saying that the grievant did not know, condone or even participate in the full extent of her boyfriend's plan. Indeed, I think the Company had reasonable grounds to so believe. Rather, I am saying that the proof of a nexus between her complaints to her boyfriend about Evans; her words of threats to Evans; together with her obvious expectation that some kind of confrontation would ensue, and the actual physical assault with a dangerous instrument, has not been shown by the evidentiary
But the grievant is clearly responsible for creating the circumstances and "climate" which led to the assault. Regardless of the merits of her anger at Evans, her complaints about him to her boyfriend obviously generated his anger at Evans. She provided the elements of and set the stage for an inevitable end result - namely some form of angry retaliation by her boyfriend. Though humanly understandable, her conduct in that regard cannot be excused. It constituted negligence and recklessness.

If she though Evans was defaming her, she had other remedies. She should have complained to the Union and the Company and permitted the orderly processes of the grievance procedure and the investigative methods of the Union and Company to work. And a civil action for defamation was also available. A course of conduct in the employment setting, under which physical violence is a foreseeable consequence is not permissible, and is a violation of the Code of Conduct.

Therefore, considering the foregoing, I am constrained to impose a severe disciplinary penalty, but short of discharge.

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

There was not just cause for the discharge of Sheri Braithwaite; but there was just cause for a suspension.

Ms. Braithwaite shall be reinstated, but without back pay. The period of time from her discharge to her reinstatement shall be deemed a disciplinary suspension.

DATED: May 26, 1987
STATE OF New York )ss.: Eric J. Schmertz
COUNTY OF New York ) 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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

IUE Radio & Machine Workers
and

General Electric Company

OPINION AND AWARD
Case #52-E30-0515-86

The stipulated issue is:

"Whether the discharge of Joseph (Jody) Brown was for just cause? If not, what shall be the remedy?"

Hearings were held in Louisville, Kentucky on February 13, 1987 and May 6, 1987 at which times Joseph Brown, hereinafter referred to as the "grievant," and representatives of the above-named Company and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken and the Union and Company filed post-hearing briefs. The parties waived the Arbitrator's Oath.

Provisions of the Appliance Park Rules of Conduct

The Appliance Park Rules of Conduct, which were promulgated by the Company, provide in pertinent part:

(2) Any single incident of misconduct, if severe enough in the judgment of management, may result in discharge for just cause.

(4) The following are typical examples of the most serious offenses for which any employee can be disciplined. This discipline, at the very least, will include time-off and if considered serious enough in the judgment of management, could subject the employee to discharge on the first offense. In any case, a second act involving essentially the same offense within a twelve month period will normally result in a discharge.

Theft, misappropriation or unauthorized
possession or removal of Company property or the property of others.

Gross misconduct.

Falsifying or forging any Company or business related document such as employment or medical records, pay vouchers, clock cards, insurance or unemployment compensation claims, etc.

Leaving the building, plant, or park without permission.

The Facts

The grievant began his employment at General Electric Company in September, 1966. At all relevant times herein, he was assigned to Section 363-1 as an assembler on the gas dryer line. He made vertical ducts which are components used in gas dryers. The job is paid on an individual piece work (IPW) basis. On occasion, as part of his job he was also assigned to the gas dryer assembly line as a replacement operator. While working on his IPW tasks, grievant was expected to produce 89 pieces per hour of work. However, due to his skill and experience, and by for going lunch and breaks, grievant was able to exceed the expected rate. Rather than turning in to the Company on the days they were made the ducts produced in excess over the expected hourly rate he stored them as a "kitty."

On January 29, 1986, Company management personnel received copies of an anonymous letter which accused an unnamed employee of the theft of almost $70,000 of bearings. The letter also indicated that a foreman on the gas dryer line may have been an accomplice. The unnamed employee was described by job, height, weight, physical appearance, neighborhood of residence and past employment history. Based upon that description, Bernard Boone,
the Manager of Shop Operations, identified the employee as the grievant. As a result, on January 30, 1986 the Company retained Pinkerton, Inc. which then placed the grievant under 24 hour surveillance.

On February 21, 1986, the Building Plant Accountant, Paul Genari, reported a discrepancy between the reports of the Pinkerton investigators and the grievant's time cards. More specifically, on 8 different days between February 4 and February 21, 1986, the grievant's time cards had been punched in at approximately 2:15 A.M., although the Pinkerton investigators reported that they had observed him entering the plant between 5:45 and 6:00 A.M. On these dates, grievant had been scheduled to report in four hours earlier than his normal shift to produce additional vertical ducts. The grievant submitted vouchers on these eight occasions which reflected that he did indeed work on his IPW job for the additional four hours. As a result he was paid premium time (double time) on those days for those hours. Company officials concluded that the grievant had participated in a scheme to defraud the Company by falsifying his clock cards and pay vouchers to falsely reflect the hours which he worked. However, the Company took no disciplinary action on February 21, 1986, even though Boone testified that he would have recommended the grievant be discharged because of the falsification of his clock cards and vouchers. The reason offered for the lack of any action at that time was that the Company did not wish to compromise the ongoing theft investigation by revealing the nature and source of the surveillance of the grievant.

The Company's interest in the theft allegation against the employee identified as the grievant, ended by March, 1986. No evidence was found which in any way connected the grievant to
any such thefts. However, by March 19, reports of the Pinkerton investigators indicated that on eighteen different occasions the grievant had actually reported for work almost four hours later than his clock cards indicated and, accordingly, worked four hours less than his vouchers reflected. In addition, on March 11, 1986 a security guard posted by the time clock observed another employee, Paul Birkle, punching the grievant's clock card. On March 19, 1986, a guard observed still another employee, Kenneth Smith, doing the same for the grievant as well as a co-worker, Rondell Riddle. Further, on February 27 and March 5, 1986, the Pinkerton investigators observed the grievant leaving his job between 1-1/2 to 1 hour before the end of his scheduled shift. His clock cards for those dates, however, were punched out at the end of the shift.

Lastly, the investigators noticed that the grievant had possession of an inside parking sticker which allowed him to park in a restricted area next to Building 1. Company officials asserted that he was not authorized to possess and use such a sticker and in March of 1986 demanded its return. After twice refusing to return the sticker, the grievant did return it, or its holder, to the Company. However, the grievant had removed the numbers from the center of the sticker.

On March 27, 1986, the Company discharged the grievant for "gross misconduct." More specifically, the grievant was discharged for (1) falsifying his clock card on eighteen occasions by participating in an arrangement whereby others clocked him in during hours when he was not working; (2) falsifying his vouchers on 18 occasions to reflect that he worked 12 hours per day (including four hours at double time) when, in fact, he worked no more than 8 hours per day; (3) leaving work without permission on two occasions and (4) misappropriating Company property by
failing to return the parking sticker with the numbers intact.

Three\(^1\) of grievant's co-workers\(^2\) were also disciplined: Kenny Smith was disciplined for punching-in grievant and Riddle on March 19; Riddle was disciplined for participating in an arrangement whereby Smith punched him in on March 19 during hours when he was not at work; and Michael Blair was also disciplined for some clock card violation. Each of these workers were suspended for more than a week, but less than a month. None were discharged, except for the grievant.\(^3\)

The usual punishment for a single time clock violation is a week's suspension and a warning notice. A person who punches another's clock card when the latter is not at work is, of course, also guilty of misconduct. But it is explained that the former is often punished, although the latter is not, because it is often more difficult to prove the latter's intentional wrongdoing, i.e. the person whose card is clocked will often deny that he authorized another to do so.

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1. A fourth worker, Birkle, was also disciplined for punching the grievant's clock card on March 11.

2. Grievant's foreman, Joseph Shewmaker, was also disciplined for, among other things, failing to discover the time card violations. He was put on one year's probation and received no salary increase for two years.

3. The record does not reflect the specific charge against Blair. Indeed, it does not reflect the precise discipline meted out to Smith, Riddle, Blair, or Birkle or the details of the charges or proceedings against any of them. Apparently, this gap in the record is a result of a compromise agreement between the parties which included a stipulation not to reveal such information in this proceeding.
Opinion

I find that the Company has met its burden of establishing the grievant's violation of three provisions of the Code of Conduct by clear, persuasive and convincing evidence. First, the record clearly establishes that on eighteen different occasions between February 4 and March 19, 1986 the grievant's time card was clocked in almost four hours before he actually came to work. The testimony of Dennis Smith, the Manager of Investigations of Pinkerton and the documentary evidence submitted herein is unimpeached and uncontradicted. Indeed, the grievant admitted that on some occasions when he was supposed to start work at 2:30 A.M., in fact, he began somewhere closer to 5:00 or 6:00 A.M. (Transcript at p.44) and the Union has not seriously contested the facts (Union's Brief at p.5). There is not substantial proof that the decision to place the grievant under surveillance was motivated by any personal animus. Rather, the record reflects that the Company merely took steps to investigate an allegation that someone fitting the grievant's description had engaged in a major theft of Company property. The sheer number of occurrences, the fact that each falsification resulted in double time pay to the grievant, the grievant's falsification of his pay vouchers for these days by reporting the exact number of ducts expected to be produced during additional hours, and his failure to deny any of the facts lead inevitably to the conclusion that the grievant was engaged in an intentional and knowing scheme to falsify his time cards. The fact that the Company received all of the vertical ducts expected from the rate regardless of the grievant's falsified work hours is no excuse. The uncontradicted testimony of Gary Wright, Manager of Manufacturing for Assembly, establishes that
the grievant was paid on the basis of his falsified hours over $600 more than he would have received for the same productivity had his hours been truthfully reported. The record reflects the strong possibility that had grievant accurately reported the number of ducts he produced when he actually produced them, there might have been less need to call workers in early at double time pay to maintain an adequate inventory. Thus, the grievant's knowing falsification of his time cards deprived the Company of its benefit from the incentive work system and constituted, in a sense, a wrongful taking of the Company's monies.

Second, I find that the Company has satisfied its burden of proving that for the eighteen days at issue the grievant knowingly falsified his own vouchers. On each of those days, the vouchers reflected that the grievant worked the additional four hours for which he was clocked in, but during which he was actually not at his job. As a result, he was unjustifiably paid more money than he should have been and the general integrity of the information on the vouchers, which is used by the Company for a variety of important business purposes, was breached.

Third, I find that the grievant intentionally left work early and without permission on February 27 and March 5, 1986. The Company's evidence on these matters is also uncontradicted. Indeed, the grievant admitted that there were occasions when he left early without clocking out (Transcript at p.74). Although his time cards were punched out at the end of his shift, I find it unnecessary to determine whether grievant authorized someone else to clock him out after he had actually left work. The Code of Conduct prohibits "leaving the building, plant or park with-
out permission," regardless of any document falsification. 4

Lastly, the Company's decision to impose the penalty of discharge for the grievant's conduct was not arbitrary or capricious. The grievant's activity reflected dishonesty and disloyalty at worst, and, at best, a flagrant disregard for the Company's work rules. The violations did not constitute isolated occurrences. Rather they reflected an ongoing scheme to defraud the Company into paying the grievant for hours he did not work. Indeed, the Code of Conduct explicitly recognizes that an employee can be discharged for any "single incident," if deemed serious enough. In this case, the grievant violated three sections of the Code during the course of 38 incidents (18 time card violations; 18 voucher violations; and 2 instances of leaving work without permission). The totality of the circumstances negates any charge that the penalty imposed was unduly harsh.

Thus, the Company has established its prima facie case that grievant was discharge for just cause. The Company's action must therefore be affirmed unless the Union has satisfied its burden of proving one of its three defenses; i.e. a denial of due process, uneven or disparate treatment, or a violation of the requirements of progressive discipline. A careful review of the record and arguments of the parties has persuaded me that the Union has not met its burden of proving any of these defenses.

The Union's claim that the nature of the charge against the grievant and the process of grievance resolution have resulted in a denial of due process are unsubstantiated both factually and

4. It is unnecessary to decide whether the grievant engaged in the "misappropriation of Company property" by his failure to return the parking sticker(s) with the permit numbers intact. As there is no evidence that the grievant ever attempted thereafter to gain entrance to the plant or that the Company could not otherwise protect itself against such an incident, any violation would appear to be de minimus. Thus, I need not and do not resolve the conflict in the testimony between the grievant and Elbert and McManigle that the latter authorized the grievant to return the sticker without the numbers. Nor is it necessary to resolve the parties' arguments relating to the Union's contention that it was led to believe that the parking sticker was no longer an issue in grievant's discharge.
legally. First, any argument that the grievant did not know what conduct was prohibited by the prohibition against "gross misconduct" is belied by the fact that the grievant violated and was charged with violating three more specific work rules contained in the Code of Conduct. He has not and cannot contend that he did not know that falsification of time cards and vouchers and leaving work before the end of his shift without permission constituted violations of the Code of Conduct. Second, the Union has not succeeded in proving that a reasonable employee would not have known that discharge was a possible punishment for the nature and number of offenses committed by the grievant. The evidence establishes only that the usual or general penalty for a single time card violation was a week's suspension and no witness could recall any incident wherein an employee was discharged for a time clock violation. That evidence does not, however, satisfy the Union's burden of proving that the grievant should not have reasonably expected that discharge was a possible sanction for eighteen time card and voucher falsifications, all of which were part of an intentional scheme which defrauded the Company out of double time pay. In addition, the grievant also left work early on two occasions without permission. Further the Code of Conduct explicitly states that any single incident could result in a discharge. Thus, any reliance by the grievant on the "general" or "normal" punishment for the typical time card violation is unfounded and not factually related to his offenses.

Third, the Union's claim that the Company withheld

5. Thus, it is unnecessary to decide whether a prohibition against "gross misconduct" is, standing alone, so vague and ambiguous as to lack fair notice to employees.
significant information during the grievance process is substan-
tially contradicted by the evidence and is, in any event, legally
irrelevant. Boone testified for the Company that at a meeting of
March 20, 1986 he advised the grievant and Elbert that the griev-
ant was charged with clocking in early on 17 to 20 occasions and
that Boone started to go through each such occasions when the
grievant left the meeting. Boone also testified that at a March
24th meeting with the grievant, Elbert and Mitchell, Boone stated
that the grievant was accused of between 17 and 20 time clock
violations and that he went through the specific dates involved.
Boone also advised the grievant and Union officials of the charge
that the grievant left work early and without permission on the
two dates in question. Mitchell essentially corroborated Boone's
testimony, except he denied that was advised of the specific dates
involved in the time card and voucher falsification charges.
Mitchell further admitted that he was advised that the witnesses
who observed the grievant coming into the plant were outside
contractors.

Essentially, the only information which was not transmitted
to the Union at the earlier steps of the grievance process was the
precise number of time card violations (18 rather than between 17
and 20), the identity of the observers, the details of their
method of surveillance and the reason for the initial decision to
place the grievant under surveillance. The Company's failure to
disclose such information, although questionable and perhaps un-
fortunate as a matter of good labor relations does not, however,
constitute a denial of due process or fundamental fairness. No
provision in the Collective Bargaining Agreement between the
parties obligates the Company to set forth all of the evidence
during the pre-arbitration grievance procedure. In the absence
of such a contractual obligation, the grievant and the Union are
only entitled to be protected against unfair surprise. All the information relating to the dates and times of the time card and voucher violations were transmitted to the Union before the arbitration hearing. The identity of the observers and method of and motivation for surveillance, were, of course, revealed at the hearings held in this proceeding. Neither the grievant nor the Union made any claim that they were unprepared to meet this evidence. Indeed, this Arbitrator specifically advised the parties that if the Union was surprised by anything offered by the Company, he would give the Union full opportunity to meet whatever it contended represented new information or new specifics that it did not have available during the grievance proceeding. (Transcript at p.178). The Union did not however, make any request for a continuance during the hearings. The Union's argument that it lacked sufficient information to rationally decide whether to pursue the instant grievance through arbitration is belied not only by the evidence discussed above, but also by Mitchell's own testimony that he voted to request arbitration of the matter because of the nature of the penalty, rather than by considerations of grievant's guilt or innocence. In any event, in this case the Union did request arbitration and vigorously contests the propriety of the Company's action. Thus, neither the grievant nor the Union has suffered any harm because of any failure of the Company to disclose any information at earlier steps of the grievance process.6

6. Similarly, neither the Union or the grievant has proven any prejudice which might have resulted from any statement by Shewmaker to the effect that Elbert and Smith shouldn't "worry about it." That statement is not enough to constitute a settlement or a waiver.
The Union has also failed to prove that the discharge of the grievant for the violations he committed constituted uneven or disparate treatment. That the general or usual penalty for a time card violation was a week's suspension or that no witness could recall an employee being discharged for such an infraction does not constitute sufficient proof that the grievant was treated more harshly than other similarly situated employees. No witness could even recall a disciplinary proceeding which involved time card violations on multiple occasions, such as the instant proceeding, which involved eighteen such violations, eighteen voucher falsifications and two occasions wherein an employee left work early and without permission. The Union offered no persuasive evidence tending to prove that any other employee who committed the number, nature and breadth of violations committed by the grievant was treated more leniently.

Neither the testimony of Blair nor Riddle leads to a different conclusion. Although both testified that they, and others, had developed "kitties," the issue in this proceeding is not whether having such a "kitty" violates Company work rules, at least if it is significant enough in size. The issue in this proceeding is whether an employee on a continuous basis, could lawfully build up a four hour kitty and then on eighteen days use it to cover up the falsification of time cards to earn double time pay for hours not actually worked. All Company witnesses denied

7. Shewmaker testified that if a worker built up a 15 or 20 minute kitty which he didn't turn in on the day it was produced, he wouldn't "make an issue of it." He also testified that a worker could usually use a small kitty to relax a bit on the end of the shift during which the excess was produced.
knowledge or approval of any such practice. Further, although Blair and Riddle both testified that they committed the same offenses as the grievant, but were not discharged, both admitted that they denied having done so during the course of the Company's investigation. Not only do the inconsistencies cast doubt upon the credibility of the witnesses' testimony, but the denials deprived the Company of any proof of their wrongdoing in terms of the kind of multiple violations committed by the grievant. Further, Riddle's and Blair's testimony that Shewmaker, the foreman, was aware of such practices is not credible. Blair's testimony that on one occasion he passed Shewmaker while driving on Bardstown Road during hours when he was supposed to be at work assumes that Shewmaker saw and recognized him and knew or should have known that Blair was, at that moment, clocked in. In addition, the testimony is undercut by Blair's failure to recall the date, season or even the year when the event occurred. Riddle's testimony that Shewmaker told him on one occasion not to come in early as scheduled, but to ask someone to punch his card is also not credible. Riddle, as well as Blair, told Company officials during the investigation that Shewmaker was not aware of any falsification or mutual time card punching scheme engaged in by the employees. Shewmaker, and Boone, both denied any knowledge of any such scheme, including denials that either noticed that employees' air guns were not connected when they were clocked in. The fact that Riddle told McManigle that on occasions the employees punched each other in does not constitute an admission that on those occasions the employee whose card was punched did not actually work, or that the "punch in" was designed to hide the type, magnitude and extensiveness of the course of conduct engaged in by the grievant.
Thus, the Union has failed to demonstrate any disparate treatment of the grievant, on the one hand, and Blair and Riddle on the other.

Nor does the Company's failure to discharge Smith establish disparate treatment. Smith was observed punching in the cards of the grievant and Riddle on March 19. Even though Company policy was to punish the "puncher" equally as the "punchee," the only evidence the record reflects is that the Company had against Smith was his activities on a single occasion involving two employees. That is a far cry from the evidence which establishes the grievant's activities and culpability.

Similarly, the failure of the Company to fire Shewmaker, the foreman, is irrelevant to any claim of disparate treatment. First, it is well settled that an employer may treat union employees and management personnel differently. Second, Shewmaker persuasively denied any knowledge of the falsification scheme, and Blair and Riddle all supported Shewmaker's assertion during the Company's investigation of the matter. Thus, the failure to discharge Shewmaker does not reflect any favoritism towards him or animus towards the grievant.

Lastly, the Union has failed to offer any evidence tending to prove that the Company's actions were motivated by a personal dislike of the grievant rather than by a good faith attempt to enforce its work rules. The fact that the grievant had previously been disciplined for insubordination, but had obtained a reduced penalty during arbitration, does not establish any current animus towards him. Nor is there any evidence that the Company's actions were motivated by a previous verbal confrontation or an accusation of prior physical violence. These are mere allegations, unsupported by probative evidence. The fact
that only the grievant was placed under 24 hours surveillance is adequately explained by the fact that the foreman alluded to in the anonymous letter was not identified by any description and that any investigation of the grievant might have led to the discovery of the identity of the foreman. The pervasive nature of the grievant's wrongdoing and the irrefutable proof thereof also stands to negate any ill motive by Company officials.

Finally, the Union contention that the Company's action violated the requirements of progressive discipline is without merit. Company officials first became aware of the grievant's time card and voucher falsifications on February 21, 1986. By that time, eight such violations had already occurred. The Company did not, however, then discipline the grievant because of their fear of compromising an ongoing investigation of a possible major theft of Company property. By March 19, 1986, the Company's theft investigation was abandoned and shortly thereafter the grievant was discharged. By March 19th the grievant had committed eighteen time card falsifications, eighteen voucher falsifications and two violations of the rule which prohibited an employee from leaving early without permission. Clearly, as of March 19, the Company was justified in discharging the grievant pursuant to the express language of the Code of Conduct, as a result of the seriousness of the totality of offenses committed by him. Indeed, the Company would have been justified in discharging the grievant on February 21, as Boone testified he recommended, because of the intentional eight time card and voucher falsifications. The postponement of any discipline until the criminal investigation was completed was a reasonable and even necessary step by the Company to protect its business interests. In any event, that postponement did not prejudice the grievant nor his case in arbitration,
as he could and would have been discharged on February 21, 1986.

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 Joseph (Jody) Brown was for just cause.

Eric J. Schmertz
Arbitrator

DATED: August 21, 1987
STATE OF New York )ss.: 
COUNTY OF New York 

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

Was the discharge of Shirley Cmar on August 21, 1986 for just cause? If not what shall be the remedy?

A hearing was held in Cleveland, Ohio on October 20, 1987 at which time Ms. Cmar, 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. Both parties filed a post-hearing brief.

This is a discharge case, with the burden on the Company to establish its case. Also, as the parties well know it is a "civil" and not criminal procedure, with the standard of proof less than "beyond a reasonable doubt."

Considering the entire record before me, together with the requisite standard of proof, I am satisfied that the Company has shown that the grievant falsified her production totals upward, in violation of the Work and Conduct Rules. But, confined to the particular circumstances of this case, I conclude that the penalty of discharge was too severe.

Certain facts raise significant suspicions which point to the grievant's culpability. Among them is the fact that the production she reported exceeded a physical count by supervision on
the four consecutive work days of August 15, 18, 19 and 20. I do not think that inadvertent errors can account for an "over report" within such a consecutive proximate period. Moreover, neither the grievant nor the facts in this case provide an acceptable explanation.

The fact that on a particular day, the grievant's report exceeded an audit, and a claimed incompletely tray of "mounts" inexplicably disappeared, raises suspicions. Unless there is some acceptable explanation for the disappearance of that partial tray, other than the speculative and uncorroborated answer that it may have been removed to be sealed, I find frailties in an argument that it was part of the grievant's production on a day when what she reported exceeded a physical count.

I am further suspicious because of the Company's testimony that at certain times the grievant's operating partner in the work process also reported more production than work tagged in her name, and that a Company investigator concluded that the grievant's higher production was because she took as her own, some of her partner's productivity.

My suspicions are aroused by the single incident of an obvious erasure and overwriting a production tag, giving the grievant production credit (or a claim) for the work so tagged.

As I have stated, the foregoing has raised suspicions. But suspicions or speculative conclusions drawn therefrom are not enough to support a finding of culpability. And if this was all there was to the Company's case, I would find that the Company's burden of proof has not been met.

However, there is more. I find this additional evidence and testimony credible and determinative in support of the Company's case and it represents the critical point that turns suspicion and speculation into adequate proof.
It is the rebuttal testimony of fellow employee Shirley Zele. Her uncontroverted testimony was that when she worked beside the grievant (as a team partner in the operation) she suspected that the grievant took credit for some of her (Zele's) work. To confirm her suspicions she twice marked her own trays with a colored crayon as well as her ticket. The next day she found the marked trays bearing the grievant's ticket.

This unrefuted testimony, when added to the foregoing "suspicious" circumstances, plus the grievant's own admission that she often retained some productivity "to carry over to the next day" thereby providing inaccurate productivity reports for the two days affected, leads me to conclude that the Company has satisfactorily shown that the grievant willfully inflated her productivity on the days and over the period charged.

However, the penalty of discharge should be reduced to a disciplinary suspension for the following reasons, expressly limited to the facts and circumstances of this case. The grievant had worked for the Company for fourteen years, and aside from an attendance infraction has had a satisfactory disciplinary and production record. Not before has she been charged with this type of offense. Also, the specific days on which her production reports significantly exceeded the audit, immediately followed her return from sick leave and should be viewed in the frame of another proximate event—word from her supervisor that her production had slipped below the expected daily productivity and that she had to increase it. I think it reasonable to conclude that her illness, her slipping productivity and the fear generated by her supervisor's warning, caused her foolishly to inflate her production. This is not to excuse her, but rather to point to a mitigating circumstance.
Additionally and importantly, the grievant did not gain monetarily from her action. She was not paid by the piece and her pay did not vary by the quantity of her production. Again this does not excuse her but rather serves to reduce the impact on the Company by her actions. I recognize that false production reports can be and are injurious to the Company and for that severe discipline is in order. But in this case a lengthy suspension for the period of time she has been out, is sufficient.

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

Shirley Cmar committed the work rule offense charged. However the penalty of discharge is too severe, under the particular circumstances of this case. Her discharge is reduced to disciplinary suspension for the period of time she has been out. She shall be reinstated, but without back pay.

DATED: December 21, 1987
STATE OF New York )
COUNTY OF New York ) ss.:  

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

Eric J. Schmertz
Arbitrator
Pursuant to a letter agreement dated October 27, 1987 and signed by Sylvia Grant-Gutierrez, Vice President, Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU/AFL-CIO, hereinafter referred to as "Local 1199", the American Arbitration Association, hereinafter referred to as the "Administrator", agreed to conduct a referendum election.

Eric Schmertz, Dean, Hofstra University School of Law was designated as the Special Master and Arbitrator to oversee the election.

On October 28, 29 and 30, 1987 all interested parties were afforded the opportunity to view the list of eligible voters.

Local 1199 provided the Administrator with lists of persons who were eligible to vote.

Seventy seven thousand one hundred eighty-eight (77,188) ballots were mailed to eligible voters on Saturday, October 31, 1987.

During the course of the election, an additional two thousand one hundred ninety-five (2,195) ballots were issued at the request of Local 1199.

To be counted, ballots had to be received by the Administrator no later than 5:00 p.m., Friday, November 13, 1987.
Of the twenty seven thousand eight hundred twenty-seven (27,827) envelopes received by the Administrator, eight hundred thirty-three (833) envelopes were neither opened nor counted for the following reasons:

- **680** No identification
- **3** Labels no signature
- **21** Ineligible
- **30** Eligibility challenged
- **15** Mutilated control number
- **5** Unidentifiable
- **6** Issued to one voter returned by another
- **73** Not on list of eligible voters (status verified)

In addition, the Arbitrator ruled that four hundred twelve (412) envelopes be set aside for the following reasons:

- **18** Duplicates (9 sets of two envelopes)
- **48** Hand delivered by persons other than voters
- **37** Received in one envelope via mail
- **83** Not on list of eligible voters (status not verified)
- **138** Eligibility challenged
- **88** Issued to one voter returned by another

The counting of ballots took place at the offices of the Administrator, 135 West 50th Street, New York, New York on Saturday, November 14, 1987 in the presence of observers.
During the counting of ballots:

3 Envelopes were found to be empty
10 Envelopes were found to contain material other than a ballot
1 Envelope was found to contain two (2) ballots. Inasmuch as both ballots were voted the same, one (1) ballot was counted.

Secrecy of the ballot was maintained at all times.

The results are certified to be as follows:

TOTAL NUMBER OF BALLOTS COUNTED: 26,569

You have previously received proposed amendments to the constitution of Local 1199. If you approve the amendments mark an X in the YES box. If you disapprove the amendments mark an X in the NO box.

YES 13,884
NO 12,601
BLANK 35
VOID 49

Ballots were tallied by chapter. To preserve the secrecy of the vote the Arbitrator ruled that any chapter which had a return of less than five (5) ballots each be counted and recorded as one group.

In addition, the Arbitrator ruled that one hundred seventy-four (174) ballots be counted without chapter designation.

The chapter breakdown is as follows:
## LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU/AFL-CIO CERTIFICATION OF RESULTS
PAGE -4-

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Inasmuch as the four hundred twelve (412) envelopes set aside could not affect the outcome, they were neither ruled on nor opened and counted.

DATED: NOVEMBER, 1987
STATE OF NEW YORK
COUNTY OF NEW YORK ss:

On this day of November, 1987 before me personally came and appeared ERIC SCHMERTZ, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 677

and

Mack Trucks, Inc.

FINDINGS OF FACT and AWARD

Case #14 300 0260 87 J

The Undersigned, in accordance with the Order of Judge Edward N. Cahn dated July 24, 1987 remanding this matter to Arbitrator Arthur Stark for "clarification" of his Award of June 19, 1987, with specific authority to determine the "manner, procedures and time limits" of the transfer of employees from Allentown, Macungie, Hagerstown and Somerset to the Company's plant in Winnsboro, South Carolina, and in my capacity as the Arbitrator selected by the above-named Union and Company to replace Mr. Stark, and per force therefore confined to the authority given to Mr. Stark by the aforesaid Court Order, and having duly heard the proofs and allegations of said parties at hearings on August 8 and 9, 1987, makes the following Findings of Fact and Award:

FINDINGS OF FACT

1. Mr. Stark's Award clearly establishes the priority rights of employees in the Allentown, Macungie, Hagerstown and Somerset plants to jobs at Winnsboro, over the hiring of "outsiders." The pertinent parts of the Award read:

If all Winnsboro jobs are not filled by the Appendix D canvass at Plant 5-C the Company shall make job offers to persons on the Master Recall List (Article 6 Section 9(b)(2). Included in that group are the persons laid off from Macungie as a result of the Plant 5-C closing.

Jobs at Winnsboro which remain open after the above contractual procedures have been followed may be filled by the hiring of persons from the "outside" (emphasis added).

I also take notice of Judge Cahn's Bench Opinion in which
he remanded the case for "a determination of the manner, procedures, and time limits within which Mack will offer to its employees the first opportunity for employment at the Winnsboro facility (emphasis added).

2. Mr. Stark did not put a specific time limit on the exercise of transfer rights by contractually eligible employees, nor a time limit on the transfer procedures outlined. Therefore, within the meaning and intent of his Award and the Remand Order, I find it a logical and reasonable clarification of that portion of his Award that transfers of employees be made up to the point and time that the Allentown plant is closed. The only contract restriction and the only restriction in Mr. Stark's Award is that "no more than the number of employees equal to the number of employees (sic) operations at the new plant shall be granted by the Company the right to transfer directly to the job on the transferred work."

I find that the latter restriction further supports the priority rights of Allentown, Macungie, Hagerstown and Somerset employees over new hires, because it obviously contemplates that the full complement at Winnsboro could be made up of transferees.

I find therefore that the Company's canvass, which put short time limits on the exercise of transfer rights, was inconsistent with that reasonable intent and clarification of the Award and inconsistent with the priority of employment at Winnsboro accorded UAW members at Allentown, Macungie, Hagerstown and Somerset. This conclusion is further supported by evidence in the record of hardships and other burdensome circumstances which prevented or inhibited employees from seeking transfers within the short time allowed.
3. The date of October 21, 1987, by which the Company wanted the Winnsboro plant fully or substantially manned, and which the Company relies on in justification of its imposed time limits, is no longer compelling. At the time of the hearings before Mr. Stark and the proceedings before Judge Cahn, the Company stated that the full complement it sought by that date was 850 employees. The Court first allowed the Company to hire 273 "outsiders" (who are now at work). And I take judicial notice of the Court's recent ruling allowing the Company to hire a "second class" of approximately 250 "outsiders." With 237 transferees who reported on or about August 3, 1987 from the original canvass and who are now in place at Winnsboro, the Winnsboro complement is or imminently will be at about the total complement specified by the Company during the arbitration before Mr. Stark and during the Court proceedings leading to the Remand Order. Therefore the production of trucks at Winnsboro on and after October 21, 1987, in the event of a strike at other plants at or around that date, is not jeopardized by a slower pace of transferring employees from Allentown, Macungie, Hagerstown and Somerset.

4. I find that employees at Allentown, Macungie, Hagerstown and Somerset now know the relevant terms and conditions of employment at Winnsboro if they transfer, so that in view of the provisions of my Award below, a wholly new canvass by the Company or jointly with the Union, which would contain

1. In subsequent proceedings in Court, the Company raised its desired complement at Winnsboro to over 1300 employees. However, as that figure was not before Mr. Stark when he made his Award, and not before the Court when the Remand Order was issued, it is not a fact within my jurisdiction for consideration in clarifying the Stark Award.
specific information of said terms and conditions of employment, is not needed, the flawed original canvass notwithstanding.

AWARD

1. In addition to the transfers already made and until the Allentown plant is closed, the Union may refer contractually eligible employees from Allentown, Macungie, Hagerstown and Somerset, and the Company shall accept such transfers and employ said transferees in the Winnsboro plant. Referral of transferees shall follow the sequence and procedures set forth in Sections 3, 4 and 5 of the Stark Award. All such transfers shall be completed by no later than two weeks after the Allentown plant is closed. For this purpose those employees contractually eligible for transfer under and at the time of the Stark Award shall continue to enjoy transfer eligibility.

Said transferees shall be placed in and shall occupy open jobs at Winnsboro. If open jobs are not available, said transferees shall have the right forthwith to displace any of the "outsiders." In the event that the total number of employees seeking transfer exceeds the total complement at Winnsboro at the time the Allentown plant closes, the excess shall constitute a pool of "attritional replacements" under the provisions of Letter #11. Disputes if any, over the "contractual eligibility" of employees for transfer shall be resolved by this Arbitrator (or another arbitrator mutually selected by the parties) under expedited procedures, and I shall retain jurisdiction for that purpose.

2. Subject to their being displaced by transferees the Company may hire "outsiders."

3. The terms and conditions of employment at Winnsboro as set forth in the record by the Company, shall obtain. However, in addition to transferees carrying or retaining their seniority for "inside benefit purposes" at Winnsboro, said transferees...
shall have seniority over any and all of the "outsiders" for purposes of layoffs from and recalls to the Winnsboro plant.

4. With the foregoing, all the provisions of the Stark Award are affirmed. Mr. Stark's Award is expressly incorporated herein and made a part hereof.

5. In addition to retention of jurisdiction for the purpose set forth in Award #1 above, I shall also retain jurisdiction to resolve disputes, if any, over the application and interpretation of all the foregoing. (Alternatively, this retained jurisdiction may be exercised by another arbitrator mutually selected by the parties as my replacement, for that purpose).

Eric J. Schmertz
Arbitrator

DATED: August 30, 1987
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 my interim Award of August 26, 1987, I stated inter alia:

The parties will make a good faith effort to close on October 20, 1987, but in no event later than November 19, 1987. Said closing to take place in Florida (emphasis added).

Subsequently all parties were notified that the closing was scheduled for 3 PM on November 19, 1987 at the offices of the Warranty Title Insurance Agency, 494 No. Harbor City Boulevard Melbourne, Florida.

On the date and at the time and location of the duly scheduled closing, representatives of The Hammock Land & Development Corp. ("Hammock"), specifically Donald J. Scogna and Carol Thomas appeared, together with Carlos L. Nuñez Assistant Vice President of the Intercontinental Bank of Miami, Florida, Trish Matarazzo, principal of Warranty Title Insurance Agency and the Undersigned Arbitrator.

Hammock was ready, willing and able to close at that time. Representatives of Melbourne Exchange ("Melbourne") including David Rubenstein, did not appear, nor did they communicate with the Undersigned, with Hammock or its representatives, or with the Title Company. Also, John Rice, Frederick Greenberg and Richard Greenberg of First City Equities of New York City did not appear nor did they communicate with the Undersigned, with Hammock or its representatives or with the Title Company.
Messrs. Scogna, Nuñez and the Undersigned and Ms. Thomas and Ms. Matarazzo waited a reasonable time beyond 3 PM for an appearance by or word from Melbourne and the other persons aforementioned following which the Undersigned determined that Melbourne and those associated with Melbourne for purposes of the closing would not appear.

Accordingly the Undersigned, duly designated as the Arbitrator makes the following Findings and Rulings. Said Findings and Rulings constitute my Award in this matter.

1. Melbourne Exchange and David Rubenstein have defaulted on their contractual obligation to close no later than November 19, 1987.

2. Those in guarantor or signatory capacities on behalf of Melbourne Exchange and David Rubenstein, namely First City Equities, John Rice, Frederick Greenberg and Richard Greenberg are also in default in connection with Melbourne's obligation to close.

3. Due to said default, the contract between Hammock Land & Development Corp. and Melbourne Exchange/David Rubenstein, is terminated.

4. On account of said default, all deposits are deemed liquidated damages to Hammock, including a release of the escrowed assignment and satisfaction of the $250,000 Morgan Commercial Mortgage and releases of any liens upon the Garrison, North Carolina and Melbourne Properties owned by Donald F. Scogna and Theresa Scogna. Therefore all properties owned by Donald J. Scogna and Theresa Scogna which were involved in this transaction, including the Garrison property, North Carolina and the Melbourne Beach property shall revert to them unconditionally and unencumbered.

5. The provisions of paragraphs 2, 3, 4 and 5 of my Interim Award shall constitute liabilities and obligations of Melbourne, John Rice and First City Equities to Hammock, and monies due and payable thereunder shall be paid forthwith by Melbourne/Rice/First City Equities, to Hammock.
6. the Arbitrator's total fee and expenses are assessed against Melbourne. Therefore Melbourne/Rubenstein shall also pay to Hammock the sum of $6,893, previously advanced by Hammock.

Eric J. Schmertz
Arbitrator

DATED: December 7, 1987
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.