The stipulated issue is:
Was there sufficient and reasonable cause for the discharge of Rhonda Barber? If not, what shall be the remedy?

A hearing was held on January 15, 1988 at which time Ms. Barber, hereinafter referred to as the "grievant" and representatives of Local 153 O.P.E.I.U., hereinafter referred to as the "Union" and AFSCME, D.C. #37, hereinafter referred to as the "Employer," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharged for a cumulative record of chronic lateness. The disputed areas of this case are narrow. The grievant's extensive lateness record is not disputed, nor does the Union dispute that she was subjected to the various steps and procedures of the Employer's "lateness policy." Though unilaterally promulgated by the Employer the applicability and validity of that "policy" is not challenged by the Union. Nor does the Union challenge the fact that the grievant was previously warned and suspended, as a means of progressive discipline in the implementation of that policy. Those disciplinary penalties were not grieved and/or arbitrated by the grievant or by the Union on her behalf.

The Union's defense on behalf of the grievant is that the latenesses that triggered her discharge were of only a few minutes each, totalling nine minutes; were therefore de minimum and
insufficient to justify discharge, and that the grievant was
discriminately treated more severely than other employees simil-
arily situated with lateness records equally bad. Relying on the
well settled rule that discipline must be evenhandedly and uni-
formly applied to all employees similarly situated, the Union
argues that regardless of how chronic or cumulative the grievant's
record may be, the penalty of discharge is unreasonable and un-
fair, and should be set aside.

Let me deal with the de minimus argument first. Of course,
standing alone a series of latenesses of only a minute or so each,
totalling 9 minutes, is not grounds for discharge. But as the
last series of latenesses of a chronic lateness record that has
prevailed for an extended period of time, and which as here
follows the progressive disciplinary penalties of warnings and
a suspension and further warnings, does constitute the "trigger"
event for discharge, the final disciplinary step, because those
final latenesses represent reasonable evidence to the Employer
that the affected employee is unable or unwilling to correct his
failings. That is what we have in this case. Also, as the parties
well know, an employer is entitled to expect and insist on regular
and prompt attendance by employees, and records of excessive late-
ness and/or absenteeism, which continue uncorrected is and are
ultimately grounds for discharge even if the circumstances are be-
yond the employee's fault or control. Hence, the grievant's
transportation troubles are immaterial.

The Union has not adequately proved its principal assertion
that the penalty of discharge imposed on the grievant was discrim-
inatory, uneven treatment or excessive when compared to other
employees allegedly with equally poor records.
The Union contends that other employees who were given suspensions for lateness records as bad have not been fired; that other employees were given suspensions of one week whereas the grievant's suspension preceding her discharge was two weeks; and that at least one other employee was given a second suspension or multiple suspensions rather than suffering discharge after the lateness record continued subsequent to the first suspension.

That other employees have not been fired following their suspensions, is inapposite to this case, because the Employer has shown that those employees improved their records following their suspensions and therefore there were no subsequent incidents to "trigger" a discharge. In the instant case, the grievant's lateness record continued following her suspensions, thereby setting up the conditions for her dismissal that were not set up with regard to the others.

That the grievant was given a 2 week suspension whereas others got one week is satisfactorily explained by distinctions made by the Employer on the basis of "seniority and intensity" of the employees involved. In the absence of any evidence of arbitrariness and capriciousness, I view this distinction as a proper exercise of managerial authority, based on rational and reasonable differences. More important is the fact that the grievant's 2 week suspension was not challenged when imposed, and therefore must stand and cannot now be impeached. If the Union believed it was excessive when compared with others, the time to assert that charge was when the grievant suffered the 2 week suspension. To do so now is to open a prior disciplinary action that is no longer challengeable.

The Union has better, but not determinative grounds, in claiming that one employee Mr. Beckman and possibly others received
two or more successive suspensions, whereas the grievant was dis-
charged following her first, and that a distinction between Mr.
Beckman and the others cannot be made on the basis of seniority
or otherwise.

The record before me contains some evidence of an unclear
nature, that some few other employees including Mr. Beckman re-
ceived multiple suspensions, whereas the grievant was fired follow-
ing her first suspension. These examples are few in number, in
comparison to the total number of employees discharged, and, with
the exception of Beckman are explained by the Employer, without
refutation by the Union, to have involved employees who complied
with the Employer's request that they specify the reasons for their
lateness. By contrast the grievant refused or failed to do so
when asked or given the opportunity to do so, before she was fired.
Considering the questionable probative value of the references to
those other employees, I accept the Employer's explanation of
distinctions between them and the grievant as a legitimate basis
for different disciplinary treatment.

As for the Beckman situation, I find no specific differences
between his record and status and the grievant's at the time he
was accorded a second suspension, but as "one swallow does not
make a spring," I am not prepared to find that a single exception
to the employer's disciplinary process for the offense of chronic
lateness, is grounds to upset the grievant's discharge. The
grievant had adequate warnings and a proper suspension, and had
ample notice that her job was in jeopardy if her lateness record
did not improve. She failed to improve that record, leading to
the Employer's reasonable conclusion that she was and would be
chronically unreliable. Against this backdrop the Beckman situ-
ation is too thin a reed to cling to or on which to rely.
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 sufficient and reasonable cause for the discharge of Rhonda Barber.

DATED: February 10, 1988
STATE OF New York ) ss.
COUNTY OF New York )

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

Did the District violate Article I and/or Article VIII Section K of the 1986-88 collective bargaining agreement in assigning Eileen Weber and Cheryl Gallagher for the 1987-88 school year? If so what shall be the remedy under the contract?

A hearing was held in Poughkeepsie, New York on March 11, 1988 at which time Ms. Weber and Ms. Gallagher hereinafter referred to jointly as the "grievants" or separately as Weber and Gallagher, and representatives of the above-named Association and District 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. Each side filed a post-hearing brief.

During the 1986-87 school year, Weber, a special education teacher, taught one section of primary language in the LaGrange Elementary School.

During the 1986-87 school year, Gallagher, also a special education teacher taught one section of elementary language in the LaGrange Elementary School.

In the 1987-88 school year, at the LaGrange Elementary School, Weber was assigned to teach Level II language, and Gallagher was assigned to teach Intermediate Skills Development. Both carried out those assignments.

It is stipulated that Weber and Gallagher hold appointments in the Special Education Tenure area; are assigned within the...
special education tenure area and are certified to teach any special education class in New York State.

The Association claims that the 1987-88 school year assignments for the grievants represented "involuntary transfers" within the meaning of Article VIII Section K of the contract; that they were not unavoidable, and therefore were improper. And that this contract breach is inconsistent with the mutual purposes and obligations of the contract as set forth in Article I (Preamble).

The District's position is not that the new assignments were unavoidable, but that the contract language notwithstanding, subsequent statutes, and regulations, namely P.L. 94-142 and Article 89, New York State Education Law supercede the contract and are determinative in this case. The District explains that with the passage of those Federal and State laws; with their implementation under certain regulations, court decisions and the Individualized Education Plans, special education methodology and classes were changed and that the grievants' assignments for the 1987-88 school year reflected and were consistent with those changes.

The District points out that the external law referred to above was enacted some five years after the negotiated language of Article VIII (K) of the contract, and that the contract language "could not have contemplated the requirements of Individualized Education Plans for educationally handicapped children." Distinguished from prior school years the new assignments to Weber and Gallagher were to classes and students "grouped in atypically small classes, age grouped up to three years apart, and further placed in terms of physical needs, management needs and social adaptive skills."

Thus, as I see it, the District's case is based on its claim that the subsequently enacted statute and regulatory implementation
thereof are the controlling laws and that any contract language to the contrary or inconsistent is preempted. The District buttresses this view in its contention that quality education for educationally handicapped children is what is really at issue, and that the arbitrator should not overturn the modern procedures designed to meet that objective.

It should also be noted, that the external law notwithstanding, it is the District's position that the 1987-88 assignments to the grievants, within the special education tenure area, did not constitute re-assignment or transfer, but rather were consistent with what they taught the prior year, and as with the prior year, involved students "who functioned at different academic levels and who required different adaptive instructional approaches and progress at different rates." That the mix of ages may be different and the teaching methodology varied, is not, in the District's judgment a re-assignment within the language and meaning of Article VII(K).

I do not doubt the District's good pedagogical intentions with regard to the best methods to teach and train educationally and physically handicapped children. Indeed I have no quarrel with the "new approaches" in implementation of the above referred to laws. But the question is not what the best teaching methodology should be, but rather whether the grievant were re-assigned, and if so, whether the contract was breached. The best pedagogical methods are matters for other forums and persons other than arbitrators.

Indeed, the District's case for quality education for the students in the special education programs confirms, to my mind at least, that significant changes were made between the school years
of 1986-87 and 1987-88 in what was required of the grievants. In that respect I conclude that there was a sufficient different between the two years to conclude that for the latter school year they were "re-assigned" within the meaning of Article VIII(K).

The external law relied on by the District brought about a change in classroom structure and student mix. The way special education courses were organized was changed. The ages of the students in the grievants' classes changed. New teaching material was required, and new teaching techniques were to be employed. Weber had taught Kindergarten and first grade. She went to classes of a second and third grade level. Gallagher went from first and second grade level to third and fourth grade level; with a change in emphasis from language development to skills development. Each had new classroom preparations.

Absent a specific contract definition of the meaning of re-assignment in Article VIII(K), I am not prepared to conclude or agree with the District that the foregoing differences and changes in levels of teaching and instructional responsibility did not constitute a "transfer" or "re-assignment" within the meaning of Article VIII(K).

This is not to say that the District does not have the right and perhaps the duty under the new education laws, to restructure its special education class to bring together a different mix of students at different levels and with different educational accomplishments and potential including those physically handicapped. Indeed based on my reading of the contract there are no restrictions to the District's right to make the changes. The only restriction is a procedural one regarding the assignment of teachers to the new structure. And that, not the District's right to make changes, is what is at issue in this case.
I conclude therefore that the latter assignments of the grievants violated Article VIII (K) of the contract. I find they were "involuntary transfers" to a "re-assignment," and the District does not assert a defense of unavoidability.

The question therefore narrows to whether that violation is nullified by the aforementioned statues and educational refulations. I hold that I do not have the jurisdictional authority or competence to consider that question.

I agree with Arbitrators Rabin and Sands (cited in the Association's brief). My authority is confined to the collective bargaining agreement. The arbitration provisions of the contract caution the arbitrator "to limit his decision strictly to the application and interpretation of the provisions of the agreement and shall be without power or authority to make any decision contrary to or inconsistent with, modifying or varying in any way, of the terms of this agreement or of any applicable law or rules or regulations of the force and effective(sic) law" (emphasis added).

Here, if the contract and external law are in conflict, my authority as I see it, is to uphold the contract and confine my decision to the contract terms. To accept the District's view of the meaning and impact of the external law cited would be for me to interpret those laws, over which I do not believe I have jurisdiction and then to substitute those laws for the language of Article VIII (K). The latter would do violence to the contractual caveat on the arbitrator's authority. Also, under the arbitration provisions, the only consideration of external law by the arbitrator is the warning that he may not "modify or vary" it. Not before me is the replacement of a contract clause by an external law.
In short, external law which may vary and supersede the contract is not before me. If the external law preempts any finding or ruling confined to the collective bargaining agreement, it is for another forum to so decide.

I do observe however that my rejection of the District's argument that external law has been substituted for Article VIII (K), does not mean that that law and Article VIII (K) cannot be reconciled with mutual effectiveness. As I previously stated, the District may establish special education classes responsive to and consistent with external law and in the interest of quality special education, and still make appointments or assignments to those classes under the procedures and conditions of Article VIII (K).

I note that Article VIII (K) includes an important reference to "good faith efforts." That means to mean that reassignments to newly structured special education classes can be effectuated by good faith dealings between the District and the Association, and that the interests of both, new educational methodology and protection from involuntary transfers, can be accommodated.

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 District violated Article VIII Section K of the 1986-88 collective bargaining agreement in assigning Eileen Weber and Cheryl Gallagher for the 1987-88 school year.

The remedy the Association seeks is granted, namely that the District shall offer Eileen Weber a level I primary language special education position; and shall offer Cheryl Gallagher a level II primary language special education position, both at the La Grange Elementary School for the 1988-89 school year, provided such positions exist in said school year.

Eric J. Schmertz
Arbitrator
DATED: August 5, 1988
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.
In the Matter of the Arbitration: 
between 
Local Union 320, International: 
Brotherhood of Electrical Workers: 
AFL – CIO: 
and: 
Central Hudson Gas & Electric Corp.: 

OPINION AND AWARD; 
Grievance G85-32 

The stipulated issue is: 

Did the Company violate the collective bargaining agreement between the Company and Local 320 by assigning one Service Worker using aerial lift equipment to perform work in an elevated position? If so, what shall be the remedy?

A hearing was held in Newburgh, New York on November 19, 1986 at which time Dominick Padavano, 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. A stenographic record was taken and the Union and Company filed post-hearing briefs. The parties waived the Arbitrator's Oath.

The Union and the Company concede that the basic facts which underly this grievance are not in dispute. The grievant is classified as a Service Worker. As such, his duties include performing all line work and gas and electric service work, replacing street light bulbs and collecting over-due bills and other related commercial work such as turn-ons and turn-offs. Although a Service worker can and does, without dispute, perform many of these tasks alone, until August, 1985 at least two such workers were assigned to all jobs which required work in an elevated position. At that time, the Company directed that one Service Worker normally perform such work on secondary conductors from the
Company's bucket trucks in the elevated position. The Company made no mention of its new policy during the negotiations for the labor agreement between the parties which ran from July 1, 1985 to June 30, 1987. Indeed, the issue of the number of Service Workers assigned to do aerial work on secondary conductors was never discussed during any contract negotiations between the Union and the Company.

Bucket trucks, which can be operated by and are designed to accommodate one worker, are a relatively recent technological development. Prior to their introduction, aerial work required that Service Workers either climb poles or use less maneuverable platform trucks. The prior equipment necessitate more than one person crews. The Company began to replace the older equipment with bucket trucks in the early 1950's, but total replacement for line or bulb work was not completed until sometime in the 1970's.

Due to the widespread adoption of bucket trucks, in about 1980 the Company, without Union participation or notification, began to study the feasibility of reducing from two to one the number of Service workers required to do aerial work. In connection therewith, management personnel visited LILCO and CON ED, both of which assigned one Service worker to aerial work whether the work involved primary or secondary energized conductors. The Company's General Line Foreman's Committee then recommended that one Service Worker be assigned to work in the elevated positions on Secondary, but not primary conductors. The Committee was concerned about the possibility that a bucket might stall in the elevated position. It therefore recommended that each Service Worker be supplied with an auxiliary "Rat-pac" radio which permitted him to operate the truck's main communication radio and
to thus communicate with the Company's control center from the elevated position. LILCO and CON EDISON had implemented the same safety precaution. After the Foreman's Committee made its recommendation, the Public Service Commission adopted a new regulation which permitted municipalities to contract with other companies to install and maintain street lights and fixtures. Thus, the Company was threatened with the loss of its monopoly with respect to these tasks.

Based upon the Foreman's Committee's recommendation, and spurred by the Company's desire to reduce costs so as to compete with other businesses for installation and maintenance work on street lights, the Company implemented its new one-person assignment policy by phasing it in over several weeks. The evidence demonstrates that each Service Worker was instructed not to do aerial work unless he had an operating Rat-pac radio. They were also told that if they required additional help for any particular job, they should so inform the system control center and no reasonable request would be denied. Since the implementation of the new policy, the Company has never refused any request for back-up assistance.

1. The fact that Mr. Maher, President and Business Manager of the Union, did not receive any written guidelines from the Company or was not advised that employees were told that a Service Worker's reasonable request for back-up assistance would not be refused, is not probitive on the issue of whether workers received such information. The Company's witnesses testified that the Service Workers were so informed. Indeed, even the grievant testified that his foreman told him that if he called the control operator, they would send out assistance at any time. (Record at page 54) And he had subsequently requested such assistance and the Company had never refused his requests. He also admitted that he was permitted to raise any subject of safety at regularly scheduled safety meetings run by his supervisors every two months or so.
The Union did not produce any evidence of a serious safety problem which occurred as a result of the Company's new work assignment policy. Although in two incidents the bucket did not function properly and the workers in the buckets needed to await assistance (in one case, the wait was up to 45 minutes) to be extricated, both were helped to the ground without injury. One Union witness, Mr. Swanson, testified that in 1984, prior to the implementation of the Company's new assignment policy, his hand had been caught in the bucket control and he was unable, by himself, to stop the bucket from rising. A helper on the ground then operated back-up controls and lowered him to the ground. Swanson admitted that he did not report any such incident to the Company, nor did he require any medical treatment for any injury to the hand he claimed was caught in the controls. In addition, Swanson did not, at first, offer a persuasive explanation as to why he did not use his other hand to stop the bucket from moving.

The Union argues that the Company's past practice of assigning two Service workers when utilizing aerial lift equipment to perform work in the elevated position is an implied condition of the collective bargaining agreement between the parties. Accordingly, the practice which was in existence during the negotiations leading to the agreement which ran from July 1, 1985 to June 30,

2. First, Mr. Swanson testified that he was unable to push the hydraulic lift cutoff with his "free hand" because he was using it to free the hand that was caught in the controls. He later testified that that handle was also jammed with his other hand.
1987, is binding on the parties and must be continued for the life of the agreement, and the Company cannot unilaterally abrogate such a condition. In support of its position, the Union claims that the past practice is clear, consistent, unequivocal and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Both parties should have entered into negotiations with knowledge of such a practice and the agreement must have been executed on the assumption that the practice would remain in effect. Since the practice was unchallenged during the negotiations, the Company must be held to have adopted it and make it part of the agreement.

The Union further argues that the current matter does not present a crew size or manning issue. The Union does not contend that Service Workers must perform all of their work as a two-man crew. Rather the Union argues that two Service Workers must be assigned when working in the elevated position. Further, this case involves an attempt by the Company to unilaterally change the working conditions of Service workers. Any unilateral change in the past practice increases the amount of risk inherent in the job because with only one person aloft there is no one on the job site to assist in any emergency situation.

The Company argues that the explicit provisions of the Collective Bargaining Agreement between the parties expressly grants the Company the power to adopt the policy change at issue in this proceeding. Article IIA of the Agreement provides, in pertinent part,:

"The management of the Company and the direction of the working forces, including the right to ... determine the number and qualifications of employees required to perform the work, are recognized to be in the Company, except as otherwise provided for in this agreement." (emphasis added)
The Agreement does limit crew size to require that "at least two qualified employees" be assigned to any crew "working on energized primary conductors" and that "at least two employees will make energized secondary connections associated with URD (Underground Residential Distribution)." However, there is no such limitation on the work assignments at issue in this grievance. Past practice cannot repeal the effect of the express, clear and unambiguous language of the agreement. The only limitations on the exercise of its "management rights," is that the Company's action must be reasonable and undertaken in good faith. Those standards are satisfied in the instant case. The change in the manning assignment was implemented as a result of technological advances and new regulations which required that the Company reduce its labor costs to be competitive with other companies. It was made only after careful study had determined that the work could be properly and safely performed by a one-person Service Worker crew. Other utilities had the same practice. The only significant safety concern raised by the change is that there might be a lack of adequate communication between a man caught in a stalled bucket and the Company's control center. The requirement that no crew member working alone should go into the elevated position unless he had a working rat-pack radio eliminates that concern. Additionally, the Company advised that a rope ladder or rappellent device is provided for egress in the event that the bucket becomes stalled in an elevated position and the affected worker has to exit the bucket without assistance. Any other safety concerns have been eliminated by the Company's policy of advising each service worker that if he or she believes that more than one person is required for the particular job, the Company would provide back-up assistance. Since August, 1985, no such request has ever been refused and no injuries attributable to the manning
change have occurred. Therefore, the Union has failed to demonstrate that the Company's action has increased the amount of risk inherent in the job.

Further, asserts the Company none of the duties of the Service Worker has been changed nor has there been any lay-offs or reductions in the number of Service Workers employed by the Company. Thus, the change in past practice involved only a new direction to the working forces rather than a change in benefits or things of value to the employees, without any adverse impact on the bargaining unit.

OPINION

A careful review of the record and consideration of the arguments of the parties has led me to conclude that the Union has failed to satisfy its burden of establishing that the Company violated the Collective Bargaining Agreement by its decision to normally assign one Service Worker to work on secondary conductors in an elevated position on bucket trucks. Article IIA expressly grants to the Company the right "to determine the number ... of employees required to perform the work ... except as otherwise provided for in this agreement." No other provision of the contract limits the Company's rights with respect to Service Workers performing the work at issue in this proceeding. Indeed, the fact that the contract does restrict the Company's rights to determine the number of employees to perform work in primary conductors and URD tasks strengthens the Company's position in this grievance. Those limiting provisions make clear that when the parties intended to provide for minimum staffing levels they did so by express provisions in the written agreement. Their failure to do so with respect to the present matter indicates that the parties intended
no such limitation. Nor do I find persuasive the Union's argument that Article IIA is irrelevant. The contract language here is clear and unambiguous. The language of Article IIA does not limit the Company's right to determine the number of employees required for an entire job classification. Nor does it exclude from its coverage one or more specific tasks of a job classification. Its clear wording makes it relevant to either or both, as both encompass "performing the work."

It is well settled that past practice cannot effectively repeal or vary the clear and unambiguous language of express clauses which were contractually agreed to and in effect while the past practice was being followed. Indeed, no matter how long a practice has been jointly followed, either side has the right, at any time, to require that henceforth the contract language be followed. Only where the contract language is ambiguous or unclear, or where the contract is silent, does past practice prevail.

However, as the Company concedes, the management rights clause does not confer absolute power to the employer to make any changes which are authorized by its literal language. For example, the Company cannot act unreasonably or create a significant increase in the risk to the safety of its employees. The Union has failed, however, to prove that the Company's action has violated

3. The Union also contends that the matter at issue herein constitutes a change in the employee's "working conditions." If that argument is intended to raise the issue of whether there has been a unilateral change in the conditions of employment within the meaning of the National Labor Relations Act, the Union has raised it in the wrong forum. If the Union's argument is only another way of claiming that the past practice has contractual effect, it is dealt with in this Opinion.
these implied limitations on its management rights.

The Company's decision to adopt a one-person crew size for aerial work was motivated by legitimate business concerns. The record reflects that the Company's change in policy in this regard was an attempt to adjust its staffing in light of technological developments and new regulations which altered the Company's competitive position. Further, the new policy was adopted only after a thorough and careful review of all the consequences, including potential safety risks, and included an examination of the practices of similarly situated utilities. Although some Union input might have been desirable, I cannot conclude that the Company's failure to obtain it made its decision-making process unreasonable or improper.

Nor has the Union satisfactorily proved that the reduction of crew size has significantly increased the risk to Service Workers. The Union argues that a second man on the truck would act as a "second pair of eyes" for the worker in the bucket and help to avoid some unspecified or unlikely accidents. That argument is, however, unsupported by the record because there have been no accidents or injuries to any workers since the adoption of the new policy. More importantly, the issue is not whether a "second pair of eyes" would reduce a risk. Rather it is whether the "second pair of eyes" is necessary for safety, and the work performance is unreasonably unsafe without them. The logic of the Union's position would lead to the conclusion that the Company could not reduce the number of workers on any job, aerial or not, which involved any possibility of accident. Such a conclusion would unduly hamper the Company's ability to adjust to new technological and economic developments, and make it an absolute
guarantor of the safety of the job duties. Neither the contract, nor reasonableness requires that.

In an attempt to demonstrate that there is an increase in the risk to safety directly attributable to the fact that a Service worker will be working alone in an elevated position, the Union argues that the worker may be unable to see various hazards if he is working at night and the entire work area is not properly illuminated; and that he may be subject to a risk of accident related to the traffic in and around the vehicle. With respect to the lighting problem, the Company's witnesses testified, without contradiction, that all trucks are to be equipped with at least two lights, one of which is an adjustable flood light. In addition, the Company will make available to each Service Worker hard hats with lights. As to the problem of traffic control, as well as lighting, the Company has proved that each Service Worker has been advised to request back-up assistance if he or she believes that such help is required. Since the institution of the new policy, the Company has never refused any such request. Indeed, the Company's change in staffing is not to completely substitute one worker for all tasks previously performed by two. The Company has simply provided one worker as the norm or general rule, but will provide more if any risk so requires. The possibility of obtaining a back-up on any particular job eliminates any significant risk of harm to the Service Worker resulting from traffic, lighting or other problems.

The Union's claim that a Service worker may not be able to extricate himself from a stalled bucket is also unconvincing. The Company has directed that no Service worker is to go into the
elevated position unless he has a working Rat-pac radion which would enable him to call for help. The Union's argument that such radios may not properly work because a particular job may be in a "dead spot" is unpersuasive. Each worker is instructed to test his radio at a job site before going into an elevated position. If the radio does not work, the Company has directed that the worker not undertake the job. In addition, each worker is supplied with a rapelling line or a ladder to enable him to exit the bucket if he cannot obtain assistance or wait for help.

Lastly, the Union contends that the controls in the bucket may be caught up or hung up on trees or wires, thus preventing a worker in the bucket from controlling its movements. Although Swanson testified that he experienced such a problem while working on a two-man crew and was assisted by a second worker who stopped his bucket, one such incident during the more than 30 years Service Workers have worked at their tasks does not constitute a prevalent or even probable condition sufficiently significant to bar the crew size change. In addition, Swanson did not adequately explain why or how he put himself into a position where the bucket controls would become stuck on wires, or why he did not use his free hand to use the automatic shut-off system.

For the reasons stated here, the grievance is denied.

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

The Company did not violate the collective bargaining agreement by assigning one Service Worker using aerial lift equipment to perform work in an elevated position.

Eric J. Schmertz
Arbitrator
DATED: April 15, 1988
STATE OF New York }ss.:
COUNTY OF New York 

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

In the Matter of the Arbitration between

United Auto Workers, Local 405

and

Chandler Evans, Inc.

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OPINION AND AWARD
Case #12-30-0139-88

The stipulated issue is:

Was the December 11, 1987 discharge of Leon Mantoni for just cause? If not what shall be the remedy?

A hearing was held at the Company offices on June 29, 1988 at which time Mr. Mantoni, 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. Each side filed a post-hearing brief.

The essential charge against the grievant, primarily responsible for his discharge, is that he switched defective parts he produced with good parts produced by other employees, and took credit for the latter production. If this charge is sustained, the discharge must be upheld as a "falsification of Company records" and as fraudulent conduct. If not, the other attendant charges against the grievant are not enough to warrant dismissal.

On the basic charge the quantum of evidence and the burden of proof for a disciplinary case has been adequately met by the Company.

The evidence and testimony, based on a Company investigation, of the types, quantities, location, sequence, quality, and tagging (or failure to tag) of parts found in the grievant's production boxes and those found in the boxes of other employees doing the
same work raise serious suspicions about the grievant's conduct. When parts are in the respective boxes out of sequence; when one layer of parts or the total in another employee's box contain more than a quantity customarily defective, while the grievant's boxes contain out of sequence good parts; when the grievant has neglected to tag parts so that they cannot be identified with a particular employee; and when this takes place in the face of earlier warnings to the grievant that the Company believed he was switching work, the circumstantial evidence in support of the Company's position in this arbitration is substantial.

But if that is not enough, it is buttressed and made convincing by the testimony of Supervisor Thomas Marucki. Mr. Marucki testified that twice on December 4, 1987 he saw the grievant switch parts. Marucki was observing the grievant because two other employees had previously reported to him that they saw the grievant switching parts. The subsequent inventory of the boxes involved showed the unusual and suspicious facts previously stated.

Marucki's testimony was unimpeached and there is no evidence or reason why he would testify falsely. Considering all the facts and circumstances, I conclude that he did not err as to what he observed.

This offense by the grievant, who was a short service employee of about seven months, constitutes fraud and falsification of records. If overlooked or undetected, he would have received pay improperly. The justification for discharge is manifest, and there is no need to deal with any of the other subsidiary charges.

The Undersigned, duly designated as the Arbitrator, and having been duly sworn, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:
The December 11, 1987 discharge of Leon Mantoni was for just cause.

Eric J. Schmertz
Arbitrator

DATED: August 22, 1988
STATE OF New York )ss.:
COUNTY OF New York )

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

Did the Utility violate the collective bargaining agreement by discharging Richard Bentley? If so what shall be the remedy?

A hearing was held in Indianapolis, Indiana on September 9, 1988 at which time Mr. Bentley, hereinafter referred to as the "grievant" and representatives of the above-named Union and Utility appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Arbitrator's Oath was waived. A stenographic record of the proceedings was taken, and each side filed a post-hearing brief.

The grievant was discharged, when, in the opinion of the Utility, he failed to comply with the terms of a "Last-Chance Commitment." That Commitment signed by the grievant on October 5, 1987, with the participation and agreement of the Union, reads:

On 9-29-87 at 4:00 A.M., Richard Bentley #420, entered the Manufacturing facility during off-duty hours in an unauthorized vehicle. Mr. Bentley appeared to be under the influence of alcohol or other substances. For this reason and past performances, as a condition of employment Mr. Bentley must:

1] Leave this facility immediately and seek outside help for his apparent abuse problem.
2] Must gain permission from George Shell or his representative before returning to work. Permission to return to work will be based on showing proof, on a weekly basis, that he is following all of the doctor's instructions.

3] Upon returning to work, he will be put on probation for two years. During this period of probation he must be a "exemplary" employee in his work performance and attendance.

4] A failure to satisfy any of the above will be cause for immediate termination.

There is no dispute over the propriety and effectiveness of that Commitment. The grievant's work history prior thereto had been replete with work rule violations, misconduct, an unsatisfactory attendance record and problems related to alcohol abuse for which he had received numerous warnings and at least two suspensions. The Commitment itself was offered to the grievant following certain offenses and strange conduct by the grievant on September 29, at locations in and around the plant, where his presence was unauthorized. At this point (with these later offenses) the Utility concluded it had grounds to discharge him. Apparently however, because the Utility felt that his misconduct and behavior on and after 3:30 A.M. that morning (four and one-half hours after he clocked out from his regular shift) were due to his drinking problem, it decided to afford him a final chance at rehabilitation instead of dismissal.

Under the foregoing circumstances it cannot be seriously doubted that the "Last-Chance" agreement was reasonable and amply related to the facts of the grievant's work record.

I conclude also, that under those circumstances, and particularly because it was an alternative - and a last chance alternative - to discharge, the Utility had the right to require the grievant to comply with its terms strictly. Indeed, and
conversely, I find that impliedly but clearly the grievant and the Union on his behalf, understood that he was to exercise special care and prudence to specifically comply with each term of the Commitment.

The grievant failed to meet that duty and expectation. With regard to attending counseling sessions and submitting weekly reports thereof, he failed to do so in timely fashion, and in some instances missed scheduled sessions entirely despite further warnings, proddings and even extensions of time to do so, by the Utility. The record of his missed sessions and the delays in submitting reports are adequately documented in the record, and are not seriously contested. His explanations - illness and forgetfulness - and his attitude that he "didn't think it was that severe that the slips had to be in," are not acceptable excuses when strict compliance was properly required, and demonstrated an inappropriate and unacceptable cavalier response to a most serious and demanding commitment.

Though there is some dispute over the accurateness of his attendance record following the execution of the Last-Chance Commitment, it cannot be persuasively argued that that record was "exemplary" as required by Section 3 of the Commitment.

It is well settled that a record of chronic absenteeism and/or tardiness, is grounds for ultimate dismissal even if the absences and latenesses are due to circumstances beyond the employee's fault or control, like illness. Here, discounting excused absences, the grievant's absentee percentage was well in excess of the average, at a time when he was under a special duty not just to avoid absences or reduce them to the average, but rather to maintain a record that was "exemplary." Indeed, though
the Union defended the grievant well in this arbitration, and filed a commendable brief on his behalf, it nonetheless states in that brief:

"Although his absence record was not exemplary, it certainly wasn't as bad as the Utility witnesses described it..." (emphasis added);

admitting thereby that the "exemplary" test was not met.

Finally, in view of the terms and conditions of the Last-Chance Commitment, I find no requirement that the Utility treat the grievant's problems and unsatisfactory record as a matter exclusively for the Employee Assistance Program. That Program, a laudable approach to deal with employee problems, is not an absolute substitute for discipline. Here, the grievant was given ample opportunity for counseling and medical rehabilitation. He failed or was unable to respond to those opportunities. Nothing remained for him but the "Last-Chance" opportunity, and when he could not comply with its requirements, discipline in the form of discharge was proper.

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 Utility did not violate the collective bargaining agreement by discharging Richard Bentley.

Eric J. Schmertz
Arbitrator

DATED: December 27, 1988
STATE OF New York \ss.: COUNTY OF New York )

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

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

International Brotherhood of Electrical Workers, Local 1400

and

Citizens Gas & Coke Utility, Indianapolis, Indiana

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 just cause for the discharge of Ransom Jackson.

Eric J. Schmertz
Arbitrator

Dated: March 31, 1988
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.
This proceeding was instituted and conducted pursuant to the collective bargaining agreement, executed on July 1, 1985, between Citizens Gas & Coke Utility (the Company) and Local 1400, International Brotherhood of Electrical Workers (the Union). The proceeding involves the Union's claim that the Company wrongfully discharged Mr. Ransom Jackson (the Employee) on January 5, 1987. A hearing was held before the Arbitrator, Eric J. Schmertz, on December 17, 1987, at which both sides presented testimonial and documentary evidence and thereafter submitted post-hearing briefs. It was agreed that the stenographic record would be the official transcript of the proceedings.

The Issue

The parties have agreed that the following is the issue to be resolved in this proceeding (Hearing, p. 6):

Was there just cause for the discharge of Ransom Jackson, and if not, what shall be the remedy?
Facts

The Employee was hired by the Company on August 23, 1982, and discharged on January 5, 1987, on the grounds that he had an "unacceptable attendance record". During that period, he was suspended for performance problems for a period of 388 days (April 12, 1985, to May 5, 1986). Exclusive of that period of suspension, he worked for the Company for a total of 36 1/2 months.

During that 36 1/2 month period, he missed a total of 151 hours attributable to sickness (107), tardiness (13) and absence without permission (21). In 1982, he missed 8 1/2 hours due to sickness for one day (8 hours) and 1/2 hour tardiness. In 1983, he missed 25 3/4 hours due to one illness, 4 instances of tardiness and absence without permission on two occasions. As of April 15, 1984, he had missed an additional 14 1/4 hours during that calendar year due to 2 1/2 hours of tardiness and 11 3/4 hours attributable to illness. There are some minor differences between the Union and Company figures, but they do not affect the outcome.

The written warning.

On April 19, 1984, the Company issued a written warning to the Employee in the presence of the Steward. The warning stated:

Mr. Jackson is being warned that the above absence record including excessive tardiness and absence without permission, is unacceptable. We will continue to monitor his absence record and failure to make satisfactory improvement or any more absence without
permission will be cause for further review and possible further disciplinary action.

No grievance was filed challenging this warning.

The three days suspension.

On November 30, 1984, received a three-day disciplinary suspension on the grounds of excessive absences. Since the warning on April 19, 1984, to the time of the suspension on November 30, the Employee had an additional 11 absences (48 3/4 hours) due to sickness on six occasions (42 hours), tardiness on four occasions (1 3/4 hours) and absence without permission on one occasion (5 hours). The absences included an absence for sickness just prior to the April 19 warning which was not covered by that warning and was carried over into the period covered by the suspension.

The written record of suspension shows that the Employee received a warning similar to the one he had previously received with the additional advice that his attendance record was "unacceptable" and that "failure to make satisfactory improvement or any more absence without permission will be cause for further disciplinary action up to and including discharge." As was the case with the warning, no grievance was filed with respect to this disciplinary measure.

Counseling.

The Company's records indicate that the Employee received counseling on December 10, 1984, a few days after he returned to
work after the suspension. The "summary" of the counseling session states:

Discussed the absence policy with Mr. Jackson & how it is implemented. Explained to him that it is his responsibility to be at work each day on time & that if his record did not show immediate improvement he would be terminated.

Absences after suspension and counseling.

It appears that from the time of his return in December, 1984, after the 3 days suspension, until his previously referenced 388 days suspension for performance reasons on April 12, 1985, the Employee at most had a 1/2 hour absence in February, 1985, for tardiness, 1/4 hour for tardiness in March and one day for illness in April. He returned to work from the 388 day suspension on May 7, 1986.

Thereafter, from May 7, 1986, until December 15, 1986, when he was assigned to light duty due to an on-the-job wrist injury, the Employee had a record of additional absences which occurred during May 13 to November 11. His absences during that period totalled 50.7 hours and involved 16 separate absences for sickness (6 occasions, 44.2 hours) and tardiness (10 occasions, 6.5 hours).

While assigned to light duty, the Company presented testimony and documentary evidence that the Employee was late on several occasions and had to be admonished for disturbing employees who were on a set schedule of duties. During that period, the Employee claimed on at least one occasion that he failed to clock in because he could not find his time card.
According to the Company, his time card was where it was supposed to be, but the supervisor gave him the benefit of any doubt and only clocked him as having been two minutes late.

The discharge and the grievance.

The Employee's conduct during this light duty assignment alerted his supervisors that there might be an "absences" problem, and upon examining the record, they learned that during the 12 1/2 month period in which the Employee actually worked after the three days suspension, he had 22 absences for tardiness and sickness. The Company decided to discharge him, and on January 5, 1987, he was discharged. The Union grieved the discharge under the collective bargaining agreement, and after the company denied the grievance in the first two steps, the Union demanded arbitration under the terms of the agreement.

The relevant contract provisions and rules.

The collective bargaining agreement reserves to the Company (except as limited specifically by the agreement) the "exclusive right to exercise the duties of management, to plan, direct, and control the working operations and force, including...discharge for cause..." (par. 2.1). It also limits the arbitrator to decisions consistent with the terms of the agreement (par. 7.2.2).

Paragraph 7.3.2 of the agreement requires the Company to "publish Work Rules covering proper cause for disciplinary action and forms of disciplinary action. [The Company] further agrees
to discuss any additions or amendments to such rules with the
Union's Executive Board prior to effecting any such changes."
The paragraph also provides that disciplinary reports are
returned to the Union two years after they are originated, except
for "[a]bsence reviews indicating discipline and disciplinary
reports for absenteeism/tardiness [which are to] be returned to
the Union, if for a period of five (5) years since the most
recent" of such reviews and reports concerning absenteeism, the
employee has maintained a clean record with respect to
absenteeism.

Work Rules were published, effective October 1, 1970, and
revised as of November 15, 1971. The published Work Rules, in
relevant part, provide that "being repeatedly absent or tardy"
"will constitute proper cause for disciplinary action" (Art. I,
par. 12). Article III of the Work Rules provides for warnings,
suspension and discharge.

Through 1975, there were several memoranda developed by and
issued to management personnel concerning Work Rules enforcement
policy. They dealt with guidelines for flagging employees who
presented an absenteeism problem and for keeping appropriate
records to enable such employees to be recognized by management.
It does not appear that these memoranda were discussed with the
Union prior to adoption by management and they were not
distributed to employees. However, there was evidence that new
employees were advised of the Company's strict approach to
absenteeism and this was frequently reinforced at meetings with
employees. Moreover, the Union appeared to be familiar with Company policy regarding absenteeism.

The Contentions of the Parties and Discussion

The Union's contention concerning the memoranda.

The Union has claimed that the adoption of the memoranda violated the collective bargaining agreement provision which require consultation with the Union prior to adding to or amending the Work Rules. However, the memoranda did not take the form of "additions or amendments" to the Work Rules, and I do not find on the basis of this record that, in substance, they were amendments or additions.

The quoted Work Rules are stated in very general terms which did not meet with objection from the Union. The memoranda appear to be guidelines for management implementation of those very general Work Rules. There appears to have been no objection by the Union to the memoranda after it became aware of their content. Moreover, since the generation of the memoranda, no changes in the collective bargaining agreement concerning absenteeism were negotiated, except that, in 1985, the requirement was added that absences review and disciplinary documents relating to absenteeism be returned to the Union after five years, where there had been no previous time limit with respect to absence reviews.

I find that on the basis of this record that the conduct of the Company and the response of the Union to the memoranda
reflected their mutual understanding that the Company had the power to use the memorandum method to instruct management personnel on how the Company wished to implement the Work Rules, and the memoranda do not constitute additions or amendments to the Work Rules within the meaning of the agreement.

The claim of disparate treatment.

The Union claims that the Employee was subjected to disparate treatment when compared with similarly situated employees. The Union launched a two-pronged attack under this heading. It relied on the manner in which other employees were treated in comparison with Mr. Jackson and urged that in the absence of more specific limitations on Company power the system of discipline is inherently one in which there will be disparate treatment.

Turning to the last point first, the short answer to the Union's position is that the collective bargaining agreement does not require that the Work Rules establish specific numbers with respect to absences as a condition for imposing discipline for excessive absenteeism and tardiness. The rules and the agreement necessarily contemplate the exercise of discretion based on relevant facts. One key relevant fact established by the record is that the Company has established a "no-fault" absenteeism policy based on the Company's assessment of managerial needs. This is not an arbitrary or capricious conclusion by management based this record, and in any event, it is clearly within its power to do so. However, no matter what
the absenteeism policy may be, it cannot be implemented in a disparate manner. This means simply that employees in the same situation should not be treated differently.

The Union and the Company submitted the records of employees as a basis for comparison and contrast with the treatment accorded Mr. Ransom Jackson. The Company notes that the employees' records relied on by the Union are distinguishable from Mr. Jackson's in that they were employees whose employment began before Mr. Jackson, they did not immediately compile a record of excessive absenteeism, and in some instances, the disciplinary process was different at the time those persons were disciplined, there having been a change in 1981/82, before Jackson was hired. On the other hand, the Company presented records of employees disciplined during the same time period as Mr. Jackson and based on the record, there is no evidence of disparate treatment when those records are compared with Mr. Jackson's. In summary, they show:

<table>
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<th>Hrs. Occasions</th>
<th>Hrs. Occ.</th>
<th>Hrs. Occ.</th>
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<td>S----</td>
<td>37</td>
<td>24.25</td>
<td>4</td>
<td>12.5</td>
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</table>

**Conclusion**

The Company did not abuse its discretion in discharging Mr. Jackson on the basis of excessive absenteeism. He was
subjected to progressive discipline which was not grieved until
he was discharged. His absenteeism, although attributable mostly
to claims of illness in terms of hours, when measured in terms of
occasions, tardiness and AWOL outnumbers sickness by practically
2-1. Moreover, the record shows that many of the days attributed
to illness were either before or after a two day weekend. There
was ample cause for the Company to discharge Mr. Jackson for
excessive absenteeism. Moreover, there was a failure to
establish that imposition of this penalty on Mr. Jackson resulted
in Mr. Jackson being treated in a materially different manner
than other similarly situated employees. Consequently, the claim
of disparate treatment fails.

Based on the foregoing, I conclude that the Company had just
cause for discharging Mr. Ransom Jackson.

March 31, 1988

ERIC J. SCHMERTZ,
Arbitrator
The stipulated issue is:

Was discontinuation of the scheduled monthly overtime for relief operators in April 1987 a violation of the collective bargaining agreement? If so, what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association in White Plains, New York, on March 2, 1988 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The determinative question is whether the relief operators are shift employees or non-shift. The Company takes the position that, past practice notwithstanding, the relief operators are non-shift employees under the third paragraph of Section II Work Week of the contract.

The first three paragraphs of Section II, which I deem relevant in this case read:

The work week for shift employees covered by subsection A of this Section shall commence on Monday and end on the following Sunday. Such employees shall during each four (4) week period be scheduled to work three (3) weeks of five (5) 8-hour days and one (1) week of six (6) 8-hour days.

The work week for Maintenance Men, Relief Operator - Helper and for Helper shall commence on Monday and end on the following Sunday. Such employees shall be scheduled to work five (5) 8-hour days between Monday and Friday, inclusive, except that one (1) week each month they shall be
scheduled to work six (6) 8-hour days between Monday and Saturday, inclusive.

The work week for all other non-shift employees covered by subsection A of this Section shall commence on Monday and end on the following Sunday. Such employees shall be scheduled to work five (5) 8-hour days between Monday and Friday, inclusive.

The Company argues that because the relief operators work about 75% of their time on maintenance work which is a non-shift work assignment, they are not "shift employees" within the meaning and coverage of the first paragraph. And, because they are not classified as Maintenance Men, Relief Operators - Helper (conceded not the relief operator involved in this proceeding), or as Helpers, the second paragraph is inapplicable to them.

The Company concludes that as the only remaining classification not referred to or covered by the first two paragraphs, the relief operators must perforce be covered by the third paragraph, as "non-shift employees," otherwise the third paragraph would have no meaning or reason to be in the contract.

On this basis, the Company concluded that it was contractually erroneous to schedule the relief operators to work an average of 42 hours a week each month and to be paid a "guarantee" of wages in that amount, (i.e. they had been scheduled to work 40 hours for three weeks, and 48 hours the fourth week, averaging 42 hours a week over each month), and, in April 1987 changed their work schedules and pay to that of a regular 40 hour week.

I agree with the Company, with Arbitrator Benewitz and with the well settled rule that clear and unambiguous contract language pre-empts any practice that is different or contrary. And that under that circumstance an employer has the right to unilaterally end the practice and require adherence to the contract language.
However, in the instant case, I do not find the contract language to be as clear or unambiguous as the Company asserts, or as is required to invoke that rule. The fact is that the relief operator is a "hybrid." He works on maintenance duties about 75% of his time, but, as his job title suggests, relieves shift operators and assistant operators when they are absent. There is no dispute that during the time the relief operator relieves an operator or assistant operator he adopts the operator's or assistant's work schedule. That schedule is a shift schedule, and during the period of any such relief, the relief operators are paid wages as shift employees. So for some of his working time, he is a "shift employee" within the meaning and application of the first paragraph above.

At other times, i.e. the 75% of his time that he performs maintenance duties, he works a regular set of hours, and in that latter respect, he is a "non-shift employee." Hence his hybrid status.

I find nothing in the foregoing contract provisions, or in the contract generally, which define whether a "hybrid" status is "shift" or "non-shift." Indeed, it can be argued either way. The relief operators are shift employees because they work the shifts of operators and assistant operators when they relieve them, or are "non-shift" employees because they perform "non-shift" maintenance duties. Therein lies what I view to be a manifest ambiguity. Obviously, if they are deemed to be "shift" employees, they would be covered by the first paragraph, and the Company would have erred in reducing their work week and pay. And if covered by the first paragraph, they are excluded from the third paragraph.

Absent an express provision including the relief operator (by name or classification) in the third paragraph, and considering
the "hybrid" nature of the classification, I am not prepared to conclude that the third paragraph covers them. And that is so, to my mind, even if there may be no other use of or explanation for the presence of the third paragraph in the contract.

In short, the determinative contract sections are unclear and susceptible to different and divergent interpretations. That being so, the rule for interpretation and meaning is also well settled. The arbitrator looks to past practice to determine what the parties meant and intended, and the practice, if sufficient, becomes contractually enforceable.

Here, the past practice is undisputed and supports the Union's case. It was stipulated that from 1959 to 1987 the relief operators worked and were paid for Saturday overtime (i.e. an average 42 hour workweek). It was also stipulated that up until April 1987, the job postings for relief operators listed the working hours as 42, and that those postings were consistent with the first stipulation on the Saturday overtime.

These stipulations are undisputed evidence of a long standing practice to schedule work for and pay the relief operators as "shift employees" under the first paragraph of Section II. This practice obtained each month, whether or not the relief operators worked on maintenance duties or in relief of operators and assistant operators. This unvaried and extensive past practice serves to clarify the ambiguities of Section II regarding the work schedule and pay guaranties of relief operators.

As the other argument in this case would not change the foregoing holdings, I need not recite or review them herein.

The Undersigned, duly designated as the Arbitrator and having been duly sworn, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:
The discontinuation of the scheduled monthly overtime for relief operators in April 1987 violated the collective bargaining agreement. The affected relief operators shall be made whole for wages lost, and the Company shall restore their scheduled monthly overtime.

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Eric J. Schmertz
Arbitrator

DATED: March 7, 1988
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.
In the Matter of the Arbitration
between
International Association of
Machinists and Aerospace
Workers, AFL-CIO, Local Lodge 
No. 645
Chicago Pneumatic Tool Company :

The stipulated issue is:
What shall be the disposition of grievances
dated May 27, 1986 and September 8, 1986

A hearing was held at the Company offices in Utica, New
York on January 6, 1988 at which time representatives of the
above-named Union and Company appeared and were afforded full
opportunity to offer evidence and argument and to examine and
cross-examine witnesses. The Arbitrator’s Oath was waived.

In both grievances the Union complains about the Company’s
order requiring employees not classified as Runner/Laborers to
perform clean-up work at or around their work areas. The Union
contends that the clean-up work belongs to employees in the
Runner/Laborer classification and that its assignment to others
infringes on that job classification and prejudices the job
security of employees in that classification.

Absent a jointly agreed to issue covering the general
circumstances in dispute and absent any joint request for a
declaratory judgment on the right or lack of right of the Company
to assign employees of all or different classifications to do
clean-up work, I am confined to the grievances submitted and to
the particular facts of those grievances.

Hence my findings and Award shall obtain only to those
particular circumstances and to circumstances similar thereto.
On that basis, the grievance of May 27, 1986 is granted and the grievance of September 8, 1986 is denied.

Let me deal with the latter first. It arose from the Company's direction that all employees clean up around their work areas on the date involved to make the plant presentable to visiting representatives of a prospective buyer.

The record shows that the Company had very short notice of the visit (i.e. the day before) and that the plant was especially untidy and uncleaned just prior to that visit. I find that the Company did not have enough notice to effectuate the clean-up in any way other than to have all the employees work at it. I also conclude that the Company's effort in this regard was beneficial to it, to the continued job security of the employees and to the continued representation rights of the Union. For, as it turned out, the Company was purchased. New funds provided by the new owner were infused into the plant, and the Company's future was made more secure. Under those special circumstances I think the Company's action for that single or non-continuing circumstance, and under what bordered on an emergency need, was a reasonable exercise of its managerial authority, and is therefore sustained.

The grievance of May 27, 1986 however is different. For several months employees classified as Clerk-Stock Selectors were (and may still be) required to sweep and clean-up the narrow aisles adjacent to and between the stock bins where they work.

The Union claims that by practice and by job description this sweeping and cleaning had been done by Runner/Sweepers; that a large scale layoff of Runner/Sweepers left the Company short
handed prompting the assignment of those duties to the Clerk-
Stock Selectors. It asserts that there was enough sweeping and
cleaning of aisles to make up a full day's work for a Runner/
Sweeper and that by denying that classification the assignment
(even if a recall was necessary) violated the recall rights of
those employees and damaged that classification.

The Company contends that by long standing practice,
employees have been required to and have cleaned up their work
areas including floors and aisles; that the "cleanliness" and
"good housekeeping and cleanliness" provisions of the Company's
Safety Code Manual and Employee's Guide Book support that posi-
tion; that the merit wage increases granted the particular griev-
ants in this case included consideration of how clean they kept
their work areas (implying a responsibility for that cleaning);
that under common industrial practice employees are expected to
and do "clean up the mess they make;" and that the requirement
to do so is a proper exercise of management's rights.

The facts of this grievance are not consistent with the
Company's arguments. By practice, the Clerk-Stock Selectors have
not cleaned the narrow aisles by their bins as a regular part of
their duties. What one or more of them did, if anything, was
voluntary and casual. The regular cleaning had been done by the
Runner/Sweepers and by the operator of the sweeping machine.

The practice the Company relies on is and has been the
practice in machine shop areas and has been confined to machine
operators. They have cleaned scrap metal chips and shavings from
their machines, work benches and the floor immediately surround-
ing their machine. I agree with the Company that that type of
clean-up by machine operators is common in machine shops. But
that type of clean-up is logically related to the nature of machine work, and can be reasonably expected of machine operators. But it is not a practice which establishes a precedent for the non-machine operator Clerk-Stock Selectors, especially when the latter group has not done it before on a regular basis and where the nature of the work does not create the scrap and debris attendant to the operations of grinding, milling, cutting and drilling machines. In machine work we are talking of the very byproduct of the operator's production; for the Clerk-Stock Selectors we are talking of paper and cigarette butts which are not an inevitable consequence of the job duties of the Clerk and which may or may not have been left or deposited by the Clerk.

So, in short, the "practice" relied on by the Company is inappropriate to the Clerks, and does not support the new and extended requirements that Clerks sweep and clean up the aisles.

I do not interpret the "cleanliness" sections of the Safety Code and Guide Book to establish a job duty of clean-up for the grievants in this grievance. The Code is for "safety and health" purposes. The Guide Book is a "guide." They state generalized propositions about the importance of cleanliness in the plant. But they do not establish job classifications or job descriptions. The "expectations" that employees "do (their) part in maintaining a clean plant," cannot serve to extend the specific clean-up duties of one classification (Runner/Sweeper) to other classifications whose job descriptions do not include those duties. The Code and Guide are commendable instructions but they do not mandate work assignments.

Indeed, in this regard, the job descriptions are pre-eminent. The job description of Runner/Sweeper (a classification that combined the jobs of Runner and Laborer) provided for (as
part of the original Laborer function) "cleaning of work places and other areas... Sweep floors... remove rubbish."

Additionally, I find that the job descriptions prevail over the general consideration of "cleanliness" in the merit rating plan. Obviously it is one thing to consider an employee's neatness and the cleanliness of his work area as one (and a minor one) of the ingredients in merit pay increases and something quite different to graft a clean-up work assignment on his set of job duties, not previously required. The Clerk-Stock Selector job description (or the separate predecessor jobs combined into that classification) make no mention of "clean-up" as a regular and expected duty.

Finally, the Company's argument that it is a well accepted and common industrial practice for employees to be required to "clean-up their own mess," is inapplicable here. My tour of the work areas involved, with representatives of both sides, disclosed that the grievant in this grievance was required to sweep and clean aisles in an area in which he did not work. His regular work duties covered stock binds and aisles in a location different from the aisles he was assigned to clean. So what he was required to clean-up was not "his mess."

For all the foregoing reasons I find that the clean-up work assigned the Clerk-Stock Selector was not part of his job duties. Absent the agreement of the Union, such assignment belonged to an employee in the Runner/Laborer classification. The Union's grievance and the remedy it seeks, are granted.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:
The Union's grievance dated September 8, 1986 is denied.

The Union's grievance dated May 27, 1986 is granted. The Company shall cease and desist from requiring Clerk-Stock Selectors to perform the particular clean-up work involved. That work is to be assigned to the Runner/Laborer classification.

Eric J. Schmertz
Arbitrator

DATED: January 21, 1988
STATE OF New York )ss.:
COUNTY OF New York )ss.:

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

Under the collective bargaining agreement dated April 1, 1986 through April 1, 1991, what if any would be the appropriate changes in wages and pension benefits for Clerical Employees to be effective April 1, 1988 and for the balance of the contract?

A hearing was held on October 5, 1988 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing statements.

Mr. Ross Houser, who testified for the Company, stated that the clerical group consists of six (6) employees encompassing diverse skills. From Company Exhibit A, it can be seen that these employees support either the sales staff or the administrative personnel.

Mr. Houser, who is the plant manager at the Ridgefield facility, stated that a 5% per year increase over the next three (3) years was budgeted for all classifications. However, due to a wage disparity existing within the clerical group, he suggested that two (2) employees, Linda Mychajluk and Terri Giovannone, would be entitled to additional wage increases.

Based upon my analysis of the testimony and the briefs of the parties, I conclude that annual increases of $20.00 per year
are proper and that, in addition, Linda Mychajluk be awarded a further adjustment of $20.00 per week effective April 1, 1988 and a further adjustment of $20.00 per week effective April 1, 1989, and that Terri Giovannone be awarded a further adjustment of $20.00 per week effective April 1, 1988. Hence, all new employee's weekly and hourly rates would be as follows:

<table>
<thead>
<tr>
<th>Names</th>
<th>Effective Weekly/Hourly</th>
<th>Effective Weekly/Hourly</th>
<th>Effective Weekly/Hourly</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>April 1, 1988</td>
<td>April 1, 1989</td>
<td>April 1, 1990</td>
</tr>
<tr>
<td>Linda Mychajluk</td>
<td>$320.34 (9.15)</td>
<td>$360.34 (10.29)</td>
<td>$380.34 (10.87)</td>
</tr>
<tr>
<td>Terri Giovannone</td>
<td>$439.42 (12.55)</td>
<td>$459.42 (13.13)</td>
<td>$479.42 (13.70)</td>
</tr>
<tr>
<td>Rose Mastromauro</td>
<td>$429.03 (12.26)</td>
<td>$449.03 (12.83)</td>
<td>$469.03 (13.40)</td>
</tr>
<tr>
<td>Barbara Mosher</td>
<td>$269.38 (7.69)</td>
<td>$289.38 (8.26)</td>
<td>$309.38 (8.84)</td>
</tr>
<tr>
<td>Marie Mundy</td>
<td>$394.23 (11.26)</td>
<td>$414.23 (11.84)</td>
<td>$434.23 (12.41)</td>
</tr>
<tr>
<td>Amy Tracy</td>
<td>$397.30 (11.35)</td>
<td>$417.30 (11.92)</td>
<td>$437.30 (12.49)</td>
</tr>
</tbody>
</table>

**AWARD**

The clerical employees shall receive wage increases as follows: $20.00 per week, effective April 1, 1988; $20.00 per week, effective April 1, 1989; $20.00 per week, effective April 1, 1990. In addition, two (2) clerical employees will be entitled to wage increases as follows: Linda Mychajluk - $20.00 per week, effective April 1, 1988 and $20.00 per week, effective April 1, 1989; Terri Giovannone - $20.00 per week, effective April 1, 1988.

There shall be no changes in the pension benefits.

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**DATED: December 27, 1988**

**STATE OF New York**

**COUNTY OF New York**

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The issue to be decided first is:
Is the Association's grievance of May 5, 1987 arbitrable?

Hearings were held on June 6 and July 6, 1988 at which time representatives of the above-named parties, hereinafter referred to respectively as the "District" or "Board" and the "Association" appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The District and the Association filed post-hearing briefs on the arbitrability issue. The Arbitrator's Oath was waived.

On at least two grounds, the District claims that the grievance is time barred from arbitration. Determinative, in my view, are the time limits and requirements of Article VI (Grievance Procedure) Section E paragraph 1 of the collective bargaining agreement. It reads:

1. If the Association is not satisfied with the decision of the Board, the grievance may be submitted to arbitration under the rules and procedures of the American Arbitration Association, provided, however, that the arbitration proceeding must be instituted within thirty days after receipt of the written decision of the Board by the Association, or if no written decision is rendered, within forty-five days after the meeting with the Board or its committee.

For me to find the grievance arbitrable, I would have to conclude that the references to "thirty days" and "forty-five days" mean or are intended to mean "thirty school days" and "forty-five school days," and that the Board did not give the Association a "written decision" within the meaning of that provision of the contract.

To find that the above referred to time limits really mean "school days" is logically possible. Other time limits in the contract use "school days," so
that it may have been a ministerial oversight not to correspond the grievance and arbitration time limits to the others. At least, absent evidence of legislative history, the critical time limits, when viewed with the other time constraints in the contract, could be logically deemed ambiguous, and therefore insufficient as a bar to the arbitration of the grievance on the merits.

But that would make the Association's grievance arbitrable only if the latter part of Section E applied, namely, the provision that the "arbitration proceedings must be instituted...if no written decision is rendered, within forty-five days after the meeting with Board or its committee."

Here, assuming the forty-five day limit means "school days" the Association's grievance was filed for arbitration with the American Arbitration Association, on October 28, 1987, just forty-five school days after the meeting with the Board on June 15, 1987.

But, assuming arguendo, that I hold contrary to customary contract language, that "forty-five days" did not mean calendar days but rather "school days," I find no basis upon which I could reasonably or logically conclude that that part of Section E applied in this case. Rather, the facts establish that following the Board meeting of June 15, 1987, the Superintendent of Schools wrote the Chairman of the Association's grievance committee that the Board "found little merit to your presentation on the 'Bahret' grievance. Therefore ... grievance(s) were denied."

Absent evidence of practice or agreement, it would be stretching the contract interpretation too far, with inappropriate distortions as a result, if I held not only that "forty-five days" meant "forty-five school days" and that the Board's letter of June 25, 1987 was not a "written decision" within the meaning of Section E.

Though the Association found that letter to be an unsatisfactory answer to its grievance, and though it felt that it should have "reasons" for the denial of the grievance, I cannot conclude that it did not meet the contract agreement of a "written decision," nor could I conclude that the statement that the Board "found little merit" in the presentation of the Bahret grievance, was not a reason for the denial.
That being so, the applicable part of Section E is the "thirty day" time limit for instituting the arbitration following receipt by the Association of the written decision. Obviously that thirty day limit, whether thirty calendar days or thirty school days was not met. If, as the Association argues, it filed the grievance for arbitration on the forty-fifth school day, it did not, under any theory meet the "thirty day" limit following the written decision.

The parties are reminded that the arbitrator is bound by the contract that the parties negotiated and wrote. The parties, not the arbitrator, used the word "must" in Section E, with regard to the time limits therein, making those limits mandatory and statutes of limitation. There is no evidence of a waiver of the time limits in this case or evidence of a disregard of time limits as a practice. Also, the case law is well settled that arbitrability may be raised for the first time when the grievance is ripe for arbitration. The Board did so in the instant case.

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

The Association's grievance of May 5, 1987 ("Bahret") is not arbitrable.

DATED: September 14, 1988

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.
I. The Court's Order of October 9, 1987

In the course of this action between two groups competing for control of a Union local (Local 1199), the Court rendered an opinion with findings and conclusions on October 8, 1987, and on October 9, 1987, it issued an Order and Preliminary Injunction which plaintiffs claim defendants violated. The order enjoined a Union election for the purpose of approving or disapproving proposed amendments to the Union's constitution from being held, as originally scheduled, on October 13 through October 17, 1987, and rescheduled the election for October 28 through November 3, 1987.

The Order also limited the parties' conduct with respect to the election, as follows:

(1) prior to and during the week of October 13, 1987, Local 1199 President Georgiana Johnson ...[was] entitled to prepare and mail a document expressing her views regarding the proposed amendments to each member of Local 1199 in accordance with the terms of this Court's order of September 25, 1987[;]

(2) during the week of October 19, 1987, the parties
The Court further ordered that disputes concerning the order and claims of violations first be reported to and heard by the Special Master.

II. The Civil Contempt Claim

The rescheduled election was held and the proposed amendments were approved. Plaintiffs, who opposed approval, claim that the defendants violated the order in several respects and instituted this proceeding charging defendants with civil contempt. As a remedy they seek to have the election and its results nullified.

A. Plaintiff's factual allegations.

The allegations of the claimed contempt are contained in an affidavit, dated March 10, 1988, by Georgiana Johnson, one of the plaintiffs in this action. She alleged:

(1) Defendants caused 75,000 copies of a brochure ("Fraud Exposed") paid for with Union funds to be mailed to Union members "on or about October 28" (Affidavit, par. 1);
(2) Defendants caused paid Union employees to distribute an additional 35,000 copies of the brochure "subsequent to October 25, 1987" (Affidavit, par. 2);

(3) Defendants, acting through an organization called "Save Our Union", using Union "credit and resources":

(a) caused to be printed and mailed to Union members, 12,500 flyers on October 12, 1987, 12,500 flyers on October 30, 1987, and 15,000 postcards on November 2, 1987 (Affidavit, par. 3, 4 and 5);

(b) on November 2, 1987, caused to be printed and distributed to Union members 20,000 copies of an advertisement in the Amsterdam News and 30,000 copies of "vote yes" cards (Affidavit, par. 6 and 7);

(c) "on or about October 29, 1987 or thereafter", caused to be produced and distributed to Union members 15,000 "vote yes" buttons (Affidavit, par. 8); and

(d) ran advertisements in the Amsterdam News and the City Sun (no date alleged) (Affidavit, par. 9 and 10);

(4) acting through "Save Our Union", defendants used Local 1199 mailing labels supplied by Standard Data Inc. and a Local 1199 mailing list to mail materials to members of Local 1199 on October 22, 29 and November 2, 1987" and (without an allegation of the time the conduct took place) mailed materials to Johnson (Affidavit, par. 11 and 12); and

(5) "On October 30, 1987, Local 1199 employee Eric Eidus distributed materials at St. Luke's Hospital which were received
by Local 1199 members, Virginia Canty and Vernyce Porter. In addition to other materials, Eric Eudus [sic] distributed several hundred copies of the brochure "Fraud Exposed" produced by Philmark Lithographers for the Union***" (Affidavit, par. 13).

B. The of the terms of the Order allegedly violated.

Some of plaintiffs' allegations can be read as charging a violation of paragraph (4) of the Order that there be "no campaigning by paid staff members of Local 1199 on time that is paid for by the Union", but the substance of plaintiffs' charges is that defendants violated paragraph (3) of the Order.

Paragraph (3) of the Court's October 9, 1987 Order limited the parties' use of Union facilities and resources when communicating with members of Local 1199 to the mailings described in paragraph (2) of the order. Thus, according to the plaintiffs, instead of complying with the Court's order that the mailing during the week of October 19, 1987

(3) *** shall be the sole means of communication by the parties, or those acting in concert with them, with the Local 1199 membership regarding the proposed amendments that employ any union facilities, resources, or personnel[,

the defendants "employ[ed] union facilities, resources, or personnel" with respect to "means of communication...with Local 1199 membership regarding the proposed amendments" other than those described in paragraphs (1) and (2) of the Order.

III. The Evidence, Findings of Fact and Conclusions of Law

A hearing on the allegations was held over several days, and
after the plaintiffs completed their case in support of a finding of civil contempt in the form of sworn testimony and documents, the defendants moved to dismiss and deny the contempt motion. The plaintiffs must establish that defendants violated the order and committed a civil contempt by clear and convincing evidence, "and a bare preponderance of the evidence will not suffice". Wright & Miller, Federal Practice and Procedure: sec. 2960, p. 591.

1. The allegation concerning the mailing on October 28, 1987 (Affidavit, par. 1). It was conceded by defendants' counsel in oral argument that brochures ("Save Our Union") were mailed to Union members at Union expense on behalf of defendants' on October 28, 1987. Paragraph (2) of the Order restricted such mailings to the "week of October 19, 1988" which would mean that, under paragraph (3) of the Order, the last permissible day for a mailing paid for by the Union would have been October 26, 1987.

The reason for the late mailing was provided by the printer, a witness called by plaintiff. The mailing would have been within the allotted time except that an error was discovered in the first run of the brochures which necessitated reprinting the brochures with the consequent delay in mailing. It also appears that defendants advised plaintiffs and the Court of the problem and that the mailing would be late. There was no response by defendants to plaintiffs' advice. It is doubtful that this evidence supports a finding that the Order was violated, and in any event, it does not support a finding that if there was a
violation it constituted a civil contempt. The evidence of record portrays a good-faith effort to reasonably accomplish what the Court ordered. At most, there was a technical violation of its terms despite defendants' efforts to comply. There is no basis to believe that the delay was deliberate or that the lateness of the mailing had any effect on the election or that defendants were damaged. If there was an effect, it was de minimus. Therefore, I find that although there was a mailing of brochures on October 28, 1987, the mailing involved substantial and good-faith compliance with the Court's order.

2. The allegation concerning Mr. Eidis and the meeting at St. Luke's Hospital (Affidavit, par. 13). The plaintiff presented evidence that on October 30 at a meeting of the Union local scheduled to be held at St. Luke's Hospital, Eric Eidis [or Eudis (Eitis in the transcript)], was present. In addition, there was a stack of "vote yes" cards on the table before the meeting began. Two Union members testified that Eidis was present and that he was a Union organizer. They also testified that he said he was there to urge them to vote "yes" on the propositions to amend the Union constitution. The Union members could not say with certainty that more than four members (including themselves) were present. They also testified that when Eidis was told to leave before the meeting that he did so and took the materials with him. The witnesses recalled that Eidis told them that he was on vacation at the time they saw him and it appears that they conceded on an earlier occasion, they
might have made this statement in writing.

Apparently honoring a prior stipulation between the parties (or for other, but not apparent, reasons), plaintiffs' counsel stipulated that plaintiffs were "not introducing [the foregoing evidence] to prove any kind of staff campaigning." (Hearing transcript, April 26, 1988, p. 19). The only other relevance of this testimony would be to establish the defendants' use of Union resources to communicate with the membership after the deadline established by paragraphs (1) and (3) of the Order. However, the record contains no evidence that at the time Eitis was present at the October 30 meeting that he was acting on behalf of the defendants or that he was being paid by the Union for the time involved. Indeed, the evidence on this point is that he was on vacation, i.e., Eidis' statement--hearsay to be sure--elicited from plaintiffs' witness by defendants' counsel on cross-examination and subjected to neither objection nor a motion to strike by the plaintiffs. (Ibid, pp. 46-7). In sum, the foregoing does not constitute clear and convincing evidence that the Court's Order was violated, and indeed, the affirmative evidence that Eidis was on vacation strongly tends to rebut the claim of violation. Therefore, I find that there is not clear and convincing evidence that defendants violated the terms of the order as alleged in paragraph (2) of the affidavit.

3. The remaining allegations.

Evidence in support of the remaining allegations is either weak and ambiguous, at best, or non-existent in the record. With
respect to each of the remaining allegations, I find that there is not clear and convincing evidence that defendants violated the terms of the Order as alleged in the remaining paragraphs of the affidavit.

(a) The claim in paragraph (2) of the affidavit concerning the distribution by Union employees of 35,000 pieces of literature. There is no evidence that 35,000 pieces were distributed by anyone, and to the extent there is some evidence that a small amount was available to the membership beyond the October 28 mailing, there is no evidence that it was distributed by defendants using Union resources.

(b) The claims in paragraphs 3, 4 and 5 of the affidavit concerning the use of Union resources to print and mail additional literature and in paragraphs 11 and 12 concerning the alleged use of Union mailing lists and labels to distribute defendants' literature. There is no evidence in the record that Union resources were utilized and, in fact, the record shows the mailing permit used to mail the items in question was different than the one used to mail those items for which the Order permitted the use of Union resources. The permittee of the different mailing permits was never identified in the record. The record was totally devoid of evidence concerning the prohibited use of Union labels on mailings.

(c) The claim that in paragraph 8 that defendants' used Union resources to produce and distribute buttons. The allegation claims that this occurred on or after October 29,
1987. There apparently were three button orders placed and only one was on or after October 29. There is no evidence as to who placed the order and whether the Union paid for it. The manufacturer's records are unclear. There is similarly ambiguous evidence concerning the orders placed before October 29. There was no attempt to introduce Union records on this (or any other issue) and no witnesses were called who could have testified with respect to the transactions. As with the claims described in (a) and (b), plaintiffs simply did not produce evidence with respect to the key elements of their claim—evidence tying the defendants to the transactions and evidence concerning who made payments.

(d) claims in paragraphs 9 and 10 concerning newspaper advertisements. These allegations involve advertisements in the City Sun and the Amsterdam News. There is no evidence in the record with respect to the placement and payment for the advertisement allegedly appearing in the City Sun. Plaintiff offered a copy of the Sun advertisement, but having failed to comply with discovery requirements by producing the advertisement in advance of the proceeding, his offer was rejected subject to being renewed after defendants were afforded discovery opportunities. The offer in evidence of the advertisement was never renewed and no other evidence on the subject, i.e., who placed it and who paid for it, was addressed by plaintiffs' evidence.

As for the Amsterdam News, one part of a flyer concerning that newspaper was received in evidence, but what appears to be
an advertisement placed by "1199 Officers, Staff, Delegates and Members to Save Our Union" was not received because of plaintiffs' failure to comply with notice and discovery requirements. Here, too, plaintiffs presented no evidence concerning payment for the advertisement and there was no evidence in the record concerning who placed the advertisement.

4. Conclusions. The only failure to comply with the terms of the Order established by the evidence is the mailing of the pieces of literature on March 28, as alleged in paragraph 1 of the affidavit, and discussed at length above. I find that this failure to comply did not constitute a civil contempt because it was at most a technical violation which occurred despite the good-faith efforts of the defendants to comply with the terms of the Order. Moreover, the likely effect of the failure to comply on the election was de minimus.

Plaintiffs' had the evidentiary burden to establish its allegations by "clear and convincing evidence". It is clear that it has not done so. The evidence presented was wholly insufficient for the purpose and there was a failure to explore important evidentiary avenues which clearly were relevant and to which plaintiffs had access. Based on the foregoing, the defendants' motion to dismiss should be and is granted and plaintiffs' motion to hold defendants in contempt should be and is denied.

May 6, 1988

ERIC J. SCHMERTZ
Special Master
The stipulated issue is:

Did the Company violate the collective bargaining agreement by assigning workers not classified as Plantmen C to work as pier B Dockmen? If so, what shall be the remedy?

It was stipulated that the classifications Plantmen C and Dockmen are synonymous.

A hearing was held at the offices of the New Jersey State Board of Mediation on September 28, 1988 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The critical question is whether the Company may contractually man Pier B differently than it mans its other piers.

On its other piers, when more Dockmen than are working a particular shift are needed, the Company offers overtime work to Dockmen scheduled on other shifts and calls them in or holds them over from a different or previous shift to meet the work needs. Only if no such Dockmen respond affirmatively does the Company assign the extra work to Fieldmen or others in classifications different from the dockman's job.

On pier B, when extra workers are needed beyond the regular
complement of Dockmen assigned on that shift to pier B, the Company offers the extra work only to Dockmen working that shift on other piers, at regular pay. It does not call-in or hold over Dockmen scheduled on different shifts. And if not enough additional Dockmen are available on other piers, and on the shift involved, the Company calls on Fieldmen or workers of other classifications and temporarily transfers them from their original assignments on that shift to pier B. It is conceded that by doing so, the Company substantially avoids overtime pay in the manning of pier B.

The Union's case is basically the assertion that the Company's practices on all piers but pier B require it to follow that practice on pier B, and that the Company's contractual right to make temporary transfers has been narrowed and constrained by that practice.

As sympathetic as one might be to the equities of the Union's case, the contract does not support a ruling in its favor.

It is clear that there is no contractual guarantee to overtime. Therefore, any claimed right to overtime by Dockmen of other shifts when additional manpower is needed on pier B, is not contractually sustainable.

Article XII (Management Rights) of the contract contains a specific provision supportive of the Company's actions in this case. Among the expressed management rights is the right to:

Determine the hours of work, the numbers and classification of employees required, work schedules and the assignment of work to be performed by employees of whatever nature....

(emphasis added).

This provision accords the Company the right to use the "employees of whatever nature" to work on pier B, including Fieldmen as well as Dockmen. And I find nothing in the contract that
gives that work exclusively to Dockmen, or otherwise restricts that management right.

The Union argues that this managerial right is restricted, as is the temporary transfer provision of Article VI of the contract, by the practice of first using Dockmen regardless of what shift they may be assigned to, to man piers, before resorting to non-Dockmen classifications. But another express provision of Article XII Management Rights is that the Company may:

"modify..., discontin(ue)...types of operations, policies, practices and procedures." (emphasis added)

So, with the contractual right to modify and/or discontinue practices, the Company is obviously not bound to the practices it has followed on the other piers, and is not required to follow that practice on pier B. What it did on pier B, insofar as it is inconsistent with its manning practices on the other piers has been to "modify or change" that practice, as Article XII allows it to do.

That the Company offered testimony on the type, frequency and scheduling (or non-scheduling) of work on pier B in servicing tugs and barges, that is different from the requirements on the other piers, adds a business explanation if not a justification of its different manning practices on pier B. But in view of its contractual right to man pier B differently when the circumstances presented in this case occur, a business explanation or a justification would not be controlling either way.

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

The Company did not violate the collective bargaining agreement by assigning workers not classified as Plantman C to work as Pier B Dockmen.
DATED: October 17, 1988
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 Jacqueline Shillingford for just cause? If not, what shall be the remedy?

A hearing was held on October 6, 1988 at the offices of Local 153, at which time Ms. Shillingford, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

In my Award of April 4, 1988 I upheld the Employer's charges against the grievant at that time, but reduced her discharge to a disciplinary suspension because the Employer had failed to follow the applicable procedure of "progressive discipline." In that Award, I also ruled:

"If henceforth her work record does not become and is not maintained on a satisfactory level, she shall be subject to discharge."

Pursuant to that Award, the grievant returned to work on May 2, 1988. On May 20th, 1988, the Employer discharged her again. In its letter to the Union dated May 19, 1988 notifying the Union and the grievant of the discharge effective the next day, the Employer charged the grievant basically with the same failings and unsatisfactory work as charged in the earlier termination, plus
some others. Summarized, the charges are:

1. Insubordination.
2. Defiance of supervision and directives.
3. Unauthorized use of the telephone.
4. Highly unsatisfactory work performance as to both quality and quantity.
5. Unauthorized and wrongful handling of "printouts," and the unauthorized copying of material covered by the Privacy Act.
6. Abuses and confrontational relations with fellow employees.
7. Failure to return monies not hers.
8. Industrial sabotage.

At the hearing I dismissed the charge of industrial sabotage, as unproved. I find that the charges relating to "unauthorized use of the telephone" and "abusive and confrontational relations with fellow employees" have not been proved by the "clear and convincing" standard required in discharge cases. But, as in the original decision, I again find that the charges relating to "insubordination," "defiance," "unsatisfactory work performance" have been proved, as has the charge relating to "wrongful handling of printouts and material covered by the Privacy Act." There is not enough evidence in the record to determine one way or the other, the charge relating to "failure to return monies."

Though there are enough sustained charges to constitute a continued unsatisfactory work record, within the meaning of my prior Award and the words of final warning of that Award, I think this case should be decided primarily on the grounds of "irreconcilable incompatibility" between the grievant and the Employer.

It is apparent to me that there is a total alienation between the two. The grievant believes, erroneously I conclude, that the
Employer is engaged in a conspiracy against her. She is so angry, and so accusatory toward, and so intractable in her dealings with the Employer's representatives, that I see no basis whatsoever for a resumption of the employment relationship. Similarly, the Employer is equally angry, and exasperated, and so despairing and unconditionally opposed to her continued employment, as to make any resumption of the employment relationship unrealistic, counterproductive, and unhealthy for both the grievant and the Employer.

I have repeatedly held, in many cases before me over the years, that irreconcilable alienation between an employee and his employer, is proper grounds for the termination of the employment relationship. That condition exists in this case, and that holding is applicable here.

Because some of the charges, including the serious charge of "industrial sabotage," on which in part the discharge was based, have not been proved, and because of the mutual antagonism, I conclude that though the termination of the grievant's employment shall stand, the Employer shall grant some consideration for that result. My Award shall particularize that concept.

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

The discharge of Jacqueline Shillingford was for just cause and is sustained. However, in addition to any benefits to which she may be entitled
as a result of her discharge, the Employer shall pay her "severance pay" in the amount of two weeks pay at her regular rate of pay.

DATED: November 3, 1988
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
Impartial Chairman
In the Matter of the Arbitration:

between

Local 153, Office & Professional: Employees International Union

and

International Ladies' Garment: Workers' Union

The stipulated issue is:

Was there sufficient and reasonable cause for the discharge of Jacqueline Shellingford? If not, what shall be the remedy?

Hearings were held on January 17, and March 14, 1988 at which time Ms. Shellingford, hereinafter referred to as the "grievant" and representatives of Local 153, hereinafter referred to as the "Union", and of International Ladies' Garment Workers' Union, hereinafter referred to as the Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

If there is any well settled arbitral rule, under collective bargaining agreements, it is that an employer may discharge an employee for unsatisfactory work performance including attendance violations, but to do so it must utilize the process of progressive discipline, by warnings and a suspension prior to termination.

This case fits squarely into that universally accepted principle. The Employer has made out a clear and convincing case showing the grievant's unsatisfactory work performance and attendance irregularities over an extended period of time. The evidence establishes that she was unable or failed to properly perform her assigned duties regarding checking and processing Blue Cross, Blue Shield, optical and hospital benefit applications and that, in excessive amounts absented herself from the job by reporting in
The stipulated issue is:
Was there just cause for the discharge of Robert Conroy? If not what shall be the remedy?

A hearing was held at the offices of the New York State Board of Mediation on February 17, 1988 at which time Mr. Conroy, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharged for a cumulative record of offenses and work rule violations, culminating in an alleged offense on April 30, 1987, which "triggered" his termination.

On August 28, 1985 the grievant was given a warning for "abuse of sick leave." On April 24, 1986 he was suspended two days for being 'absent without permission while on duty." On September 18, 1986 he was suspended three days for being "unfit for duty." On December 13, 1986 he was "threatened with a five day suspension" for failure to provide written proof of professional care. That suspension was not imposed when the proof requested was provided. On February 4, 1987 he was suspended for two days for "leaving the premises...without permission." On
April 8, 1987 he received a warning for "absence from work" on April 3, 1987 and "failure to notify department." On April 24, 1987 a memo was placed in his file noting that he "did not show up for work on April 23" and that he did not "try to call sooner than 10:30 AM."

The foregoing, to the extent that they involved disciplinary actions, were not challenged or contested by the grievant or the Union on his behalf at the time imposed or since. Hence, they must stand as an uncontroverted disciplinary record, and may not be impeached in this proceeding.

Therefore, the question in this arbitration is whether the grievant committed a subsequent offense, which, considering his overall record, would "trigger" and justify his discharge.

The subsequent offense charged is that on April 30, 1987, the grievant came to work unprepared to begin his shift at 7 AM. The Employer claims that he did not punch in; that until 7:45 he was still in street clothes; that he told a supervisor, for the first time at about 8:05 (when he was in work uniform) that he had wanted to take the day off, but then changed his mind; and asked the supervisor to sign his time card as of 7 AM. It is the Employer's contention, based on a subsequent investigation, that the grievant did not arrive at work until 7:20 AM; that he was in the cafeteria from then until 7:45 when he first changed into his uniform; and that his request that the supervisor sign him in as of 7 AM was fraudulent.

The grievant's explanation and the Union's case on his behalf regarding the April 30th event, is that he had learned only the night before that his son's confirmation was on the 30th; that he came in to ask for the day off and dressed to go to the con-
firmation, but, upon thought or realization that the day off would not be granted, changed into his work clothes and decided to work instead. He asserts he was at the Hospital by 7 AM.

The evidence does not support the grievant's explanation. During the course of his own testimony, he admitted that he knew a month or so earlier that his son was to be confirmed. I conclude not only that he knew that, but also knew, well in advance, the actual date of the confirmation. Also, the credible evidence, based on the Employer's investigation supports the Employer's conclusion that he did not get to the Hospital until about 7:20 AM and that therefore his request that he be signed in as of 7 AM was a falsification on his part. That he spent from then until 7:45 AM before deciding to change into work clothes and go to work is an obvious violation of rules of attendance and work rules, without any acceptable explanation.

Under the circumstances of his prior disciplinary record, it is clear that the grievant was on notice by warnings and suspensions, that his record, and particularly his attendance was unsatisfactory, and that a continuation of that record would result in discharge. Therefore, he had a special duty and was legitimately expected by the Hospital, to take extra measures and precautions to report to work promptly; not to be off the job without permission; and to give timely notice of any absences or planned absence. Clearly, on April 30th he did not meet that duty or responsibility. He did not report to work on time. He knew in advance of his son's confirmation, but failed to make a timely request for time off; and he compounded his errors by wasting time he should have been at work, by locating himself in the cafeteria, in street clothes when he should have been at work. And,
as indicated, I must conclude, that his request to have his time card signed showing his reporting time as 7 AM was an effort to gain pay for time he did not work and to which he was not entitled.

Against the backdrop of his prior disciplinary record, the April 30th event constitutes an offense that justifiably triggers further discipline, and under these circumstances, the further discipline of discharge was warranted and proper, under the well settled principles of progressive discipline.

The Union asserts that the grievant's difficulties were due to a "drug problem;" that the Hospital knew of his drug problem, tolerated it and even gave him a leave of absence for rehabilitation; and that in any event, the grievant's absences from work, did not exceed the contractual sick leave limit.

This defense is rejected. The grievant was not discharged because of a drug problem. He was discharged for the violation of work rules and attendance rules referred to in each warning notice suspension and in the discharge notice. He was not fired because he was ill, but largely because he failed to notify the Employer of his whereabouts or of his absences within the time required by the contract. The final incident of April 30th, cannot be interpreted as related to his "drug problem." He simply refused or failed to act responsibly about what he was to do that day - go to his son's confirmation or work, and his attempt to "cure" his late arrival and get paid was an act of falsification that had nothing to do with a "drug problem."

The Hospital did not "tolerate" his drug problem in any way that prejudices its right to take disciplinary action. It tried to help him. It gave him a leave of absence to rehabilitate himself. In so doing, however, it did not waive its right to discipline him and terminate his employment if rehabilitation failed.
It cannot be punished or prejudiced by its magnanimity. The prior warnings and suspensions preserved the Hospital’s right to impose the final step of discharge if the grievant’s offenses and infractions continued.

Finally, that the contract provides for a specific number of sick days, does not mean that those days can be taken off, or that portions of days may not be worked, or that time away from a work station may be taken during working hours without proper notice and/or permission. Also, chronic attendance problems, are grounds for discipline and discharge, regardless of the reasons for the absences, and even if the reasons are due to illness or otherwise beyond an employee’s fault or control. And that applies where the poor attendance record persists on a chronic basis and in violation of specific rules, even if it may not exceed the number of sick days provided in the contract. In short, in the instant case, the grievant’s poor record simply does not fall within the permissable or contractual number of sick days. His offenses, even if drug related, but uncontested except for the final event of April 30th, add up to a chronic series of work rule violations on his part, traditionally subject to and justifying termination.

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 just cause for the discharge of Robert Conroy.

Eric J. Schmertz
Arbitrator

DATED: March 7, 1988
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.
In the Matter of the Arbitration:

between:

I.B.E.W. Local Union 2100:

and:

Louisville Gas & Electric Company:

The stipulated issue is:

Did the Company violate Article 25, Section 25.07 of the collective bargaining agreement? If so what shall be the remedy?

A hearing was held in Louisville, Kentucky on September 29, 1988, at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Each side filed a post-hearing brief.

What is not in dispute in this case is the Company's decision to reduce the truck crew size from at least two employees consisting of a Senior Cable Splicer and the other(s) from the three Helper classifications (i.e. Helper C, B or A), to a one man "crew" from the Cable Splicer A classification. That question is the subject of a different grievance and not part of this case.

What is in dispute in this matter, is the Union's claim that when one man from the Cable Splicer A classification is assigned to take out the truck alone, and to perform the cable-splicing duties involved for an eight hour day, he should be paid at the Senior Cable Splicer rate of pay for that assignment.

Article 25 Section 25.07 reads:
Section 25.07. An employee who is temporarily assigned to a higher job classification for at least one (1) day, shall receive the rate of pay for the classification at the time of the assignment. An employee assigned to fill a temporary job vacancy in a lower job classification shall suffer no reduction in pay. This section shall not be construed to modify or restrict any other provision of this Agreement.

I am not persuaded that assignment to the truck alone constitutes a per se "assignment to a higher job classification..." within the meaning of Section 25.07. The record does not show that driving or handling the truck, and the equipment thereon has been solely performed or is the sole responsibility of the Senior Cable Splicer.

What is determinative, in my judgment, is whether under the one man assignment, the Cable Splicer A so assigned, performs the duties or assumes the responsibilities of the classification, Senior Cable Splicer.

The evidence shows that the principal duty of the Senior Cable Splicer when a crew of two or more men were assigned, was to lead, direct and control the employees from lower classifications. Obviously, when the "crew" is made up of a single Cable Splicer A, there are no others to lead, direct or control, and hence that responsibility and duty is not performed in the reduced crew circumstance.

The question narrows to whether the single Cable Splicer A performs or is required to perform other duties that, by practice, or job description, have been performed exclusively or overwhelmingly by the Senior Cable Splicer. Based on some questions I asked
of Joseph E. Wenger, a Cable Splicer A, and Mr. Wenger's answers to those questions, I must conclude that he, in the capacity from which this grievance arose, did not perform duties exclusive to or primarily done by the Senior Splicer to an extent that would warrant an upgrading. The questions and answers, as follows, are found on pages 35-38 of the transcript.

THE ARBITRATOR: Let me ask you a question, just again for clarification. No inferences should be drawn from Arbitrator's questions.

There's a time then when you were one of two men on the truck?

THE WITNESS: Yes, sir.

THE ARBITRATOR: And then there's a time that you are the only person on the truck?

THE WITNESS: Yes, sir.

THE ARBITRATOR: Could you tell me when you were on the truck with a Senior Cable Splicer, what did he do, and what did you do?

THE WITNESS: Well, of course, every job varies; but generally each man has -- will do approximately half of the work. Which exact part you do can vary from job to job, and it can overlap. But generally you both split up the work. You may be doing the same thing at the same time.

THE ARBITRATOR: Did he do some actually splicing work?

THE WITNESS: Oh, yes, sir.

THE ARBITRATOR: And tell me what kind of supervisory function he had with regard to your activities? Did he lay out the work? Did he instruct you? Did he inspect that work? What, if anything, did he do?

THE WITNESS: Generally no to all of those questions, generally, except for the inspection; and it's not really an inspection. But the Senior man is the one that will be disciplined if the work is not done right. And he should make sure that the work that
he didn't actually do was done right, for his own protection.

THE ARBITRATOR: So therefore does he look at the work you do?

THE WITNESS: Not always, but it should be.

THE ARBITRATOR: Now, let me take you to the later situation, when you've been on the truck by yourself. Have you done things at that time that are different, or were different from what you did when you were a second man on the truck? And if so -- if so, what were they?

THE WITNESS: As far as the actual work involved, no; there is no difference between what I did, or what an A or a Senior did.

The only difference when I had a truck is the paperwork, and making sure everything I needed was on the truck.

THE ARBITRATOR: Did you do the paperwork when you were the only one on the truck that you did not do when you were the second man on the truck?

THE WITNESS: Yes, sir.

THE ARBITRATOR: Tell me what that paperwork was that you now do, or you did when you were the only one on the truck, that you did not do when there were two men on the truck.

THE WITNESS: All right. Let me clarify something I had said earlier, that at one time I had done paperwork for a Senior Splicer. He is no longer with the company, but he couldn't -- he was functionally illiterate; he couldn't read. I did the paperwork for him.

Other than him, I haven't done the paperwork per se for a Senior Splicer.

THE ARBITRATOR: When there were two on the truck?

THE WITNESS: When there were two on the truck, And when there's one on the truck, all that paperwork -- DAR, time sheets, trouble reports, meter tickets, and so forth -- are done by me, if I'm the only man.
THE ARBITRATOR: Is it your testimony that that's the actual difference in practice between the duties you performed when a Senior Cable Splicer was with you, and the duties that you performed when you were alone?

THE WITNESS: That's the main difference in the duties.

By his own testimony, the only significant set of duties he did alone which he did not do when he worked with a Senior Splicer is the "paper work" mentioned.

The job description of Cable Splicer A lists among "General Duties" Item #10: "Employee will compile information and generate reports, forms and documents as required."

That duty is also listed in the Senior Cable Splicer job description. So, it appears to me that the paper work in issue here, is a concurrent responsibility and duty of both classifications, and therefore it cannot be successfully argued that it is not a proper assignment to the Cable Splicer A, or that if he does it he is doing higher rated work. (Significantly, this duty is not included in the Splicer Helper classification).

As no circumstance of any imposed discipline on a Cable Splicer A for mistakes when he handled the truck and the assignments alone, has been set forth in this case, I find no basis to deal with a hypothetical disciplinary consequence, as a basis to support the upgrading claim.

Finally, the Union's claim that for the Cable Splicer A to stock the truck is the work of the Senior Cable Splicer, has not been adequately supported by the evidence. Indeed the testimony shows that the truck has been stocked by the crew members of lower
classifications, under the instructions of the Senior Cable Splicer.

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

The Company did not violate Article 25 Section 25.07 of the collective bargaining agreement.

Eric J. Schmertz
Arbitrator

DATED: November 21, 1988
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,