IMPARTIAL CHAIRMAN, LOCAL 100 TRANSPORT WORKERS UNION 
-AND- NEW YORK BUS SERVICE

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

OPINION AND AWARD

The stipulated issue is:

Was there just cause for the two day suspension of Michael Edmondson? If not what shall be the remedy?

A hearing was held on June 24, 1988 at which time Mr. Edmondson, 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.

I am not persuaded that the accident which triggered the grievant's suspension was "chargeable" to him. It is conceded that after the accident, an inspection of his bus disclosed the bus brakes to be "long."

It is a reasonable and logical conclusion that when confronted with the need to stop quickly, the brakes did not hold as well as they would have had they been in proper condition. I do not conclude that the collision would or could have been avoided regardless of the condition of the brakes. There is no evidentiary support to the Company's contention that the grievant was traveling too fast or that the circumstances leading to the accident did not confront the grievant suddenly, without his fault, requiring an emergency use of the brakes. I find therefore, based on the probative evidence before me, that the proximate cause of the accident was probably the "long" brakes, and not the grievant's negligence.
It is only speculation to argue that the grievant should have known of or experienced the "long" brakes during the earlier part of his run and therefore should have returned the bus to the garage or driven it with extra care. There is no evidence that his run prior to the accident was anything but normal and routine, or that any event took place which required the use of the brakes in any but a normal or routine manner. Under those normal circumstances, the long brakes were adequate for routine stops. There is no evidence that any other circumstance before the accident required the heavy use of the brakes comparable to the situation at the time of the accident.

In short, the Company has not shown by the requisite clear and convincing evidence, that the accident is chargeable to the grievant.

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

There was not just cause for the two day suspension of Michael Edmondson. The suspension is reversed and shall be removed from his record. He shall be made whole for the time lost.

DATED: August 4, 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.
In the Matter of the Arbitration between Local 100 Transport Workers Union of America and New York Bus Service

OPINION AND AWARD

The stipulated issue is:

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

A hearing was held on January 14, 1988 at which time Mr. Knight, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Each side filed a post-hearing brief.

In my Award of October 16, 1986, dealing with the grievant's discharge at that time, I reduced his discharge to a disciplinary suspension; I reinstated him without back pay; and I warned him "that future relevant violations, if proved, will result in his discharge."

The issue in the instant case is whether the grievant committed "future relevant violations," triggering and justifying his discharge.

I conclude that he committed at least one "future, relevant violation" within the meaning of my prior Award and that his instant discharge therefore was for just cause.

The record before me discloses that the grievant is charged with going off his route on January 17, 1987; leaving his double parked bus unattended on May 4th; thereafter not notifying the Employer within the required time of having twice received moving violations; reporting to work late on June 9, 1987 and August 3
1987; driving erratically and unsafely in August 1987; and November 16, 1987 parking his bus in front of a fire hydrant, and leaving it unattended while he had lunch in a nearby diner.

I find no need to rule on any but the last charge. There is clear and convincing evidence including the grievant's admission, that he parked his bus in front of a fire hydrant while he lunched in a nearby diner. The grievant parked it there for some forty minutes, and didn't even respond or see the bus's removal from that location, and return to the garage, by a spare driver at the Employer's direction.

The grievant violated motor vehicle regulations and by consequence, Employer operating rules. Standing alone, this may not be a dischargeable offense, but when viewed against the backdrop of the final warning I gave him only a year before, it constitutes a "triggering event" and a future relevant offense, constituting cause for the grievant's termination. Considering the opportunity I gave him a year ago, and the final warning then imposed, the grievant had a special duty to work in compliance with all rules and regulations and to scrupulously avoid violations. He failed to meet this duty. To wilfully violate a well known motor vehicle regulation, as the grievant did when he parked his bus in front of a hydrant, and left it while he went to lunch, is to knowingly disregard the final warning and to default on his final chance.

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

DATED: February 24, 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.

Eric J. Schmertz
Impartial Chairman
The stipulated issue is:

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

A hearing was held on January 14, 1988 at which time Mr. Gonzales, 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 grievant was discharged for "falsification of his employment application." The record establishes that in applying for a bus operator job with the Employer, the grievant did not include prior employment from October 19, 1979 to December 16, 1983 as a bus driver with Liberty Lines. He was hired by the Employer on November 5, 1985. During the hearing it became clear and undisputed that the grievant left Liberty Lines because of his misconduct there and did not disclose it in his application to the Employer for fear that he would not have been hired. It also became clear that the nature of his misconduct at Liberty Lines, if disclosed or uncovered, would have caused the Employer to reject his application. It is undisputed that the Employer has a duty "to perform an investigation of the driver's employment
record during the preceding three years. That the grievant and Liberty Lines may have reached a termination arrangement whereby the grievant would get a satisfactory reference, is immaterial to his willful failure to disclose that previous employment. Also immaterial is the fact that the Employer only recently learned of this omission.

Under the circumstances, it is obvious that the grievant's omission of that prior employment was a material omission and a material falsification.

The Employer's employment application, and the application for the Board of Education (which the grievant also filled out for his employment with the Employer and on which he also omitted his prior service with Liberty Lines) contain the following respective statements immediately above the grievant's signature:

"It is agreed and understood that any misrepresentation of information given above shall be considered an act of dishonesty, and cause for dismissal."

"To the best of my knowledge and belief the answers to the above questions are true."

The grievant's omission of his work with Liberty Lines is violative of those two statements, and, under the particular circumstances thereof, constitute cause for discharge.

Accordingly, the grievant's discharge is sustained.

However, I think this case warrants a recommendation from the Impartial Chairman. My recommendation, which of course is not binding and does not change my Award, is that the Employer and the Union give serious consideration to a joint agreement which would permit the grievant to return to work with the Employer.

I believe the grievant is contrite about his earlier misconduct and recognizes the serious mistakes he made. He has tried
to rehabilitate himself by tangible effort to rectify his earlier 
misconduct and by rendering satisfactory service to the Employer 
for over two years. Apparently he has tried to put his mistakes 
behind him and has shown a determination to be a good and pro-
ductive employee with the Employer. He seeks a chance at re-
demption and to "have a life of employment." His discharge, 
though justified, and basically because of his earlier misconduct 
may well dash those hopes irrevocably.

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

There was just cause for the discharge of 
Fernando Gonzales.

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.
In the Matter of the Arbitration
between
Local 100, Transport Workers
Union of America
and
New York Bus Service
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The stipulated issue is:

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

Hearings were held on May 10 and June 24, 1988 at which time
Mr. Farmer, Herinafter 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. Post-hearing briefs were filed.

The grievant was discharged for having three chargeable
accidents, within the approximately two years of his employment.

The first and third accidents, on December 15, 1986 and
January 25, 1988, though minor, are not disputed by the Union
with regard to the grievant's chargeability. The most serious
accident in which the grievant was involved and the center of
this dispute, was the second at West Point on July 18, 1987,
when the mirror of his bus struck a guard booth, and during
which a military guard was fatally injured.

The Union asserts that the Employer really discharged the
grievant based on its claim that the grievant "killed the guard."
The Union contends that this is an improper charge and not a chargeable aspect to the West Point accident because it has not been determined that the grievant's bus struck the guard or that the grievant has any culpability for the guard's injury and subsequent death. As the matter is still subject to investigation and litigation, the Union argues, the grievant's responsibility or lack of responsibility for that event connected with the accident, remains undetermined, and cannot be used by the Employer as a basis for his discharge.

My study of the record supports the Union's contention. I am persuaded that the Employer concluded that the grievant was responsible for the guard's death, and used that conclusion in deciding to discharge him. I find that but for that belief it is unlikely that the grievant would have been discharged. I so conclude because during this arbitration hearing, the Employer's position changed. At the outset it charged the grievant with three chargeable accidents, one of which "resulted in a fatality to a West Point guard." Also, there is evidence that at grievance meetings, the Employer expressed the view that the grievant was responsible for the fatality. Later in the hearing and in its summation, the Employer took the position that the guard's death had nothing to do with the decision to discharge the grievant. And that all that it considered in the West Point accident was the contact between the grievant's moving bus and the guard booth.

This is not to say that the three accidents as relied on by the Employer in its final position would not have been grounds
for the grievant's termination, especially in view of the findings of the Department of Transportation that the grievant drove at an excessive speed. But rather, considering the changes in the Employer's arbitral position regarding the West Point accident. I believe that the ultimate penalty of discharge included as an important ingredient, the Employer's original view, namely that the grievant was responsible for the guard's death.

Therefore, it is not a question of whether the three accidents were chargeable to the grievant without consideration of the West Point fatality, but what factors the Employer took into consideration in deciding on the penalty of discharge. If an important element considered has not been established, the discharge cannot stand as a result of this arbitration, even if it might have been sustained on a different basis.

Factually, the cause of the guard's death has not yet been determined. Apparently, from the DOT report, he was not in the guard booth when it was struck by the bus. Further investigation and litigation remain. That being so, the Employer's original reliance on the fatality as a key basis in the grievant's discharge was premature if not erroneous.

Yet, I cannot ignore the proven fact that the grievant has three chargeable accidents (without consideration of the West Point fatality) within the approximately two years of his employment.

Also, and of essential importance is the public safety. Frankly, if the grievant was responsible for the fatality, he
should not be driving a bus carrying public passengers. Indeed, again in consideration of the public welfare, until the question of his responsibility is established one way or the other, the necessary prudent step is that he not be re-assigned to driving or to an operating job. Yet, because the Company mis-relied, prematurely or erroneously on the fatality the discharge at this point cannot stand. Under these particular circumstances, I shall fashion a remedy which I have previously utilized under this contract, and which, I believe properly reflects the present status of the facts and evidence in this case.

The Undersigned, impartial chairman under the collective bargaining agreement between the above named parties and having duly heard the proof and allegations of said parties makes the following AWARD:

The discharge of Antoine Farmer is reduced to a disciplinary suspension for the period he has been out. He shall be returned to the Company's employ, without back pay in a non-driving, non-operating job, at the rate of pay of any such job. When the issue of liability or culpability for the fatality at West Point is determined, the parties shall have the right to petition me for further action.

Eric J. Schmertz
Impartial Chairman

DATED: September 6, 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.
In the Matter of the Arbitration between
Local 100, Transport Workers Union of America

and

New York Bus Service

The stipulated issue is:

What are the obligations of the Employer to make payment of life insurance benefits to the husband and children of Betty Gilchrist under Paragraph 26 of the Collective Bargaining Agreement?

Betty Gilchrist, a bus operator employed by New York Bus Service died on July 26, 1988. Pursuant to Paragraph 26 of the Collective Bargaining Agreement the Employer is required to provide $10,000 of life insurance for each of its employees. There is no dispute that Mrs. Gilchrist was covered by such policy and her legally designated beneficiaries are entitled to receive the proceeds thereof.

The beneficiary designation card for such policy signed by Mrs. Gilchrist and submitted to the Employer on November 7, 1986 designated "John Gilchrist, husband, children." as the beneficiaries of the life insurance benefits. Mrs. Gilchrist was survived by her husband John
Gilchrist and the following children whose respective dates of birth are listed hereinbelow.

Annette Jamison April 8, 1970  
Lynette Jamison April 8, 1970  
John Gilchrist, Jr. October 10, 1975  
Jacqueline Gilchrist May 16, 1980  
Jennifer Gilchrist May 16, 1980

Stephen N. Erlitz, counsel for Mr. John Gilchrist and his children, has represented that it was the intent of the deceased that the proceeds of the life insurance be divided equally in six shares among her husband and children. Neither the Employer nor the Union are aware of any facts evidencing a contrary intent on the part of Betty Gilchrist. The Employer has noted however, that John Gilchrist, Jr., Jacqueline Gilchrist and Jennifer Gilchrist are minors and thus, legally unable to consent or waive rights in connection with the distribution of the proceeds of their mother's life insurance benefits. Because of the financial burden and time involved in submitting this question for resolution to the Surrogate's Court, the Employer, the Union and counsel for Mr. Gilchrist and his children have agreed to submit this matter to me for determination of the manner in which the proceeds of the life insurance policy should be distributed.

Accordingly, in order to effectuate the intent of Mrs. Gilchrist and to protect the interests of all parties to the extent possible at this time, it is my determination and award that the proceeds of the life insurance benefits due Betty
Gilchrist’s beneficiaries be divided into six equal shares. John Gilchrist, Annette Jamison, Lynette Jamison shall each receive one share. The remaining three shares shall be paid to John Gilchrist in trust for the benefit of each of the remaining three children, John Gilchrist, Jr., Jacqueline Gilchrist, and Jennifer Gilchrist. John Gilchrist, Annette Jamison and Lynette Jamison shall each as a condition to receiving the proceeds of the policy execute and deliver to the Employer a General Release in its favor, together with a signed and notarized statement consenting to this award and indemnifying the Employer against any claim or action which may be brought against it in connection with the distribution of the proceeds of the insurance policy by or on behalf of the infant children, John Gilchrist, Jr., Jacqueline Gilchrist and Jennifer Gilchrist.

I shall retain jurisdiction over this matter, in the event any question arises in the future with regard to the interpretation or implementation of this award.
Dated: November __, 1988

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Eric J. Schmertz
Impartial Chairman

STATE OF NEW YORK )
: ss.:
COUNTY OF
)

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
The Newspaper Guild of
New York, Local 3
and
New York Post

CONSENT AWARD

On August 4, 1988 the day of the hearing of the above matter, the above-named parties settled the dispute by direct negotiations. In the presence of the parties, the Undersigned Arbitrator reviewed the terms of the settlement with the grievant, Patricia Beddoe. Ms. Beddoe expressly agreed to and accepted said settlement. At the request of the parties, and with Ms. Beddoe’s agreement, said settlement is made my AWARD as follows:

1. Patricia Beddoe will be paid beginning Monday, August 8, 1988 at the Group VII B, one year experience sales rate which is $716.70 per week. Her anniversary date for experience level increases in that job is August 8th.

2. She will receive additional compensation by way of bonus and commissions, if any, in accordance with The Post Sales Policy generally applicable to sales people.

3. She will receive in addition, a one-time, lump sum "sign-on" bonus of $200, in a separate check, to accompany her pay check for the week beginning August 8, 1988.

4. She will be entitled to automatic assignment to the first Group VII B outside classified sales position that becomes available, subject to the contractual probationary period.

5. Within two weeks of August 8, 1988 she will be provided with a jointly agreed to job description for the position Sales Associate, and will assume such duties which will entail the performance by her of 75% of her time on present duties and 25% of her time on outside sales duties (on the average as to both). It is understood that the job Sales Associate is specially created for her and will not survive when she vacates it for any reason.
6. Within two weeks from August 8, 1988 she will be assigned a retail sales territory in which she will perform that 25% portion of her time involving outside sales. It is understood that this sales territory will be a representative sales territory substantively comparable to the sales territories of the other retail sales people. The performance of said duties described in paragraphs 5 and 6 hereof shall be subject to the contractual provisions with respect to the probationary period, provided that if she does not complete the probationary period satisfactorily, she will be returned to her present job, but shall continue to be paid at the Group VII B rate aforementioned.

7. This settlement is without precedent as to any other matter and without prejudice to the respective positions of the parties in this arbitration.

8. This settlement resolves all claims arising out of this dispute including those related to Article XX Section 1 of the contract. The grievant, Patricia Beddoe releases the Employer, the Union, their officers, agents and employees of any claim, including any claim of discrimination due to race, creed, color, sex, national origin, political belief or membership or activity in the Guild or any claim of alleged breach of the duty of fair representation.

9. The Undersigned Arbitrator retains jurisdiction to decide any and all disputes which may arise from this settlement.

Eric J. Schmertz
Arbitrator

DATED: August 9, 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 stipulated issue is:

Was the suspension of Gary Kacanich for just cause?

A hearing was held on July 19, 1988 at which time Mr. Kacanich, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The determinative question is whether the grievant pressure tested a repaired splice and if so whether he did it properly. It is the Company's position that if he did the assignment properly on August 25, 1986, the splice repair, made over the period August 22 to August 25, 1986, on a cable that previously failed could not have failed again, a few days later on September 4.

The grievant testified that he did the pressure test three times and no defects were disclosed. The procedure he stated he followed, was consistent with what is required when a pressure test is made. There is no direct evidence to the contrary.

The Company asserts that if done properly, the pressure test is infallible in discovering splice defects, and that therefore a subsequent failure of that splice because of defective repairs, will not occur. That this particular splice failed a few days after the repairs, means, concludes the Company that the grievant either did not pressure test it, or did so improperly.
The Company's evidence on this unequivocal point is not substantial enough to meet the clear and convincing standard in discipline cases. Indeed, standing unrefuted is the grievant's testimony that on four other occasions, pressure tests he ran on other splices showed no problems or defects with the splice, but a few days later leaks in the splice developed. I conclude that more scientific or engineering evidence of the infallibility of the pressure test is required to uphold the Company's absolute position, and that testimony, as in this case, limited to operating personnel, namely a field manager for installation and maintenance and an assistant manager of cable maintenance is not enough.

Also, it is clear that in this case the subsequent splice failure was due to an end plate that was not properly cleaned, and through which water entered. And that the failure to clean the end plate or its improper installation was not the responsibility or fault of the grievant, but had been done by some other member of the repair crew, and was in place and its defect hidden when the grievant took up his responsibilities on the splice. That being so, the Company's position on the infallibility of the pressure test, made the grievant an "absolute insurer" of the work of others. If he is to bear that responsibility especially where the direct splice failure is attributable to the negligence of someone else, the evidence on infallibility must be more conclusive than it is in this case.

In the face of the grievant's testimony that he pressure tested properly, his unrefuted testimony that leaks developed after other satisfactory tests on other splices; and in the absence of convincing evidence that all pressure tests are infallible with regard to disclosing defects at the time the pressure test is made,
the Company has not met its burden of showing, clearly and convincingly, that the grievant was proximately responsible for the second failure of the splice.

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

The suspension of Gary Kacanich was not for just cause.

Eric J. Schmertz
Arbitrator

DATED: August 5, 1988
STATE OF New York )
COUNTY OF New York )
In the Matter of the Arbitration:
between:
Communications Workers of America:
and:
New York Telephone Company:

OPINION AND AWARD
NYTel Case No. A87-23
CWA Case No. 1-87-31

The stipulated issue is:
Was there just cause for the five day suspension and final warning of F. Smith?

The contract provides the remedy in the event that the five day suspension is found by the Arbitrator not to be supported by cause. Section 10.04 of the contract reads:

No Arbitrator shall have power or jurisdiction to modify the Company's action. The Arbitrator shall either find that the Company's action was not without just cause, in which event the suspension, demotion or discharge shall be sustained in full; or that the suspension, demotion or discharge was without just cause, in which event the treatment of the case shall be as set forth in Section 10.03 of this Article.

A hearing was held on March 3, 1988 at which time Mr. Smith, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Each side filed a post-hearing memorandum.

The foregoing contract clause means that to sustain the five day suspension in this case, the Arbitrator must be satisfied not just that cause existed for some discipline, but that a five day suspension and final warning, not a lesser penalty, was justified. This observation is important because in this case the Union does not claim that the grievant was blameless or that he should not have initially received any penalty. The Union does not challenge
the Company's case that the grievant made errors in attaching a boot on a splice in a manhole or that his error or poor workmanship caused the splice to fail a few days later, resulting in a power failure affecting more than twenty-five customers. Rather, the Union's position is that the grievant should not have been suspended more than three days, because that was the recommendation of his direct supervisor, Stephen Hilbert. And that Hilbert was the only member of supervision who had knowledge of events involved; that his recommendation was the one relevant to the facts; that his recommendation therefore should have been accepted by the Company; and that accordingly a five day suspension ordered by District Manager Hannan, who was not familiar with the event and who was unaware of the lesser recommendation of a three day suspension, was excessive and wrong. The Union argues, correctly, in view of the provisions of Sections 10.04 and 10.03 of the contract, that if the arbitrator agrees with that position, he must find the five day suspension to be without cause, resulting, by operation of the contract, in making the grievant whole for the time lost and in the revocation of the final warning. In short, the Union is correct in arguing that if cause cannot be shown for a five day suspension, and final warning, no suspension or warning can be imposed, even if, initially a three day suspension would have been proper.

The Union's case is based on the undisputed fact that Hilbert recommended a three day suspension; that it was increased by Hannan to a five day suspension and final warning based on an erroneous report of the grievant's prior disciplinary record, without knowledge or consideration of the grievant's diligent efforts over the two days following his installation of the boot, to cure
any mistakes (by returning to the manhole to pump out water) and without knowledge or consideration of the grievant's lack of experience in doing this type of work (characterized by Hilbert as "difficult") or the unusual difficulties he had with an inexperienced helper at the manhole.

The Union has shown that Hannan looked at a report of the grievant's prior disciplinary record which showed three prior suspensions, one on July 25, 1979, two on May 2 and 3, 1984 and five (with a final warning) from July 17 to July 21, 1984. But that report was in error because the suspensions of May 2 and 3, 1984 were either not imposed or were changed. The correct discipline for that period was only a warning on May 2nd. The Union contends that Hannan fashioned the five day suspension and final warning from an erroneous prior record and hence that penalty lacks cause on that basis. Also, the Union asserts that Hilbert's recommendation would or should have been accepted had Hannan known (as Hilbert knew) that the grievant attempted to mitigate his work errors by returning to the manhole twice to pump out water and possibly "finish the job." Also, Hannan did not know, but Hilbert did, that the grievant's helper on the job did not know how to use the furnace to melt the required metal or how to lower the metal bucket into the manhole, requiring the grievant to go up and down the hole doing those tasks, adding to his fatigue at the end of the work week. Those mitigating facts, the Union points out, known to Hilbert, but not to Hannan, add further support to the view that cause may have existed for a three day suspension, but not for five days and a final warning.

The flaw in the Union's theory in this case is that it admits, by its acknowledgement of the propriety of a three day
suspension, that the grievant handled his work assignment poorly and negligently. Therefore some disciplinary penalty was proper. The Company's decision to impose a penalty of five days rather than three can only be overturned if that decision lacked reasonable or rational grounds related to the events involved and the grievant's overall record.

As I see it, the critical fact is that the five day penalty and final warning was consistent with the requisite principles of progressive discipline. Hannan may have looked at an inaccurate prior disciplinary record, but that erroneous record contained enough correct information to make a five day suspension and final warning a reasonable and logical step in a progressive discipline sequence. The fact is that the "erroneous record," wrong as to the grievant's second suspension period, was correct with regard to his first suspension on July 25, 1975, and most importantly was correct with regard to his five day suspension and final warning from July 17 to July 21, 1984. The question therefore is whether following a one day suspension in 1979, a warning (but no suspension in 1984), and a five day suspension and final warning in July 1984, the instant five day suspension and final warning in April 1986 was unreasonable, illogical or arbitrary. In my view, it was not. Hannan's resort to a partially erroneous prior disciplinary record was not prejudicial to the grievant, in view of a prior, similar five day suspension and final warning two years earlier. And, as the instant penalty was consistent with the requirements of progressive discipline (and might even be considered lenient in that regard) the previously mentioned mitigating factors would have been significant in my view, only if the instant penalty had been discharge.
Standing alone, the penalty of a five day suspension and final warning for the grievant's work errors, after his supervisor recommended a three day suspension, may have been unsupportable and even arbitrary. But the event does not stand alone. It was viewed by the Company (Hannan) against the backdrop of a prior disciplinary record, especially the prior five day suspension and final warning. That being so, and in view of the Union's concession of the grievant's liability, I cannot find the Company's decision to impose a five day suspension and final warning, rather than the three day suspension recommended, to be unfair or improper. To decide otherwise would be for the Arbitrator to substitute his judgment on the magnitude of the penalty when both are proper, and the greater is neither excessive or unreasonable.

Finally, there is no claim that Hannan lacked the authority to decide the penalty. There is nothing in the contract, or in practice which requires the district manager to accept the disciplinary recommendations of an employee's direct supervisor.

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 five day suspension and final warning of F. Smith.

Eric J. Schmertz  
Arbitrator

DATED: March 15, 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.
In the Matter of the Arbitration:
between
Communications Workers of America:
and
New York Telephone Company:

AWARD
NYTel Case No. A-87-30
CWA Case No. 1-87-71

The stipulated issue is:

Whether Charles Hall committed the work-time violation for which he was suspended?

Hearings were held on July 9, July 10, September 30 and December 21, 1987. An extensive number of exhibits were submitted. Each side submitted a post-hearing direct brief and a post-hearing reply brief. As in the Cresser case, counsel for the Company and the Union tried this matter thoroughly and in great detail.

As in Cresser, this is a disciplinary case, with the burden on the Company to establish Hall's culpability by clear and convincing evidence. This standard must be met, especially where, as here, the charge against Hall is synonymous with "stealing time."

As with Cresser, the Company has presented a case of considerable circumstantial evidence which has raised understandable suspicions regarding Hall's whereabouts from whenever he was dispatched until 9:30 AM when he arrived at the location of his assignment on June 9, 1986. But, as in Cresser, it is my conclusion, after careful study of the entire record before me, that the Company's case falls short of meeting the "clear and convincing" burden.

The evidence and testimony on when he was dispatched is conflicting and unclear. And in the absence of direct or
compelling contrary evidence that he was in fact off the job, or that the time in question was improperly used, Hall's explanation of his whereabouts cannot be discredited.

In the absence of the requisite evidence, I cannot uplift the Company's circumstantial case to the required "clear and convincing" level.

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 has not clearly and convincingly shown that Charles Hall committed the work-time violation for which he was suspended.

Eric J. Schmertz  
Arbitrator

DATED: May 4, 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 stipulated issue is:

Did Harry Cresser commit the work time violation for which he was suspended within the meaning of Work Time Violations on page 22 of the Codes We Work By and as referred to in the June 9, 1986 Agreement and attached correspondence?

This case required four hearings. An extensive number of exhibits were submitted. Each side filed a post-hearing direct brief and a post-hearing reply brief. Rarely has this Arbitrator experienced respective cases tried by counsel for the Union and Company in such detail and with such thoroughness.

I have studied the record of the four days of hearing, the many exhibits and the briefs and I am confident that my decision is based on a most careful consideration and analysis of all that is before me. I have chosen to render my decision without an Opinion.

This is a disciplinary case. It is not for the grievant to prove his innocence. It is the Company's burden to establish his culpability of the work violation charged by clear and convincing evidence. Here the charge is synonymous with "stealing time."

The Company has presented a case of circumstantial evidence, and has raised substantial suspicions regarding the grievant's whereabouts between 1 PM and 1:55 PM on August 22, 1986. But it is my conclusion that that case falls short of meeting the "clear and convincing" burden. In the absence of direct evidence of the grievant's whereabouts during the time involved or direct evidence that he was in fact off the job, I am not prepared to dismiss his
explanations or find them so implausible and unbelievable as to uplift the Company's case to the required "clear and convincing" level.

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 has not clearly and convincingly shown that Harry Cresser committed the work time violation for which he was suspended within the meaning of Work Time Violations on page 22 of the Codes We Work By and as referred to in the June 9, 1986 Agreement and attached correspondence.

Eric J. Schmertz
Arbitrator

DATED: March 30, 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.
In the Matter of the Arbitration
between
The Transport Workers Union, Local 1400:
and
The Port Authority of
New York and New Jersey

OPINION AND AWARD
Grievance # 15T-87

The stipulated issue is:

Did the Authority breach the contract when it forfeited vacation pay of the following employees: Robin Lampariello
Felix Berfet
James Calalerese
James Gartmond
and others similarly situated, if any? If so what shall be the remedy?

A hearing was held on March 16, 1988 at which time representatives of the Port Authority of New York and New Jersey, hereinafter referred to as the "Authority" and the Transport Workers Union, Local 1400, hereinafter referred to as the "Union" appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken and the parties filed post-hearing briefs.

The aforesaid employees, hereinafter referred to as the "grievants," all incurred documented injuries on the job which kept them out of active employment for extended periods of time during the 1987 vacation year. Each received full pay for the entire period of their absences under a supplemental sick leave plan. But the Authority reduced the maximum vacation allowances of each grievant by five days. It is this latter action that is grieved herein.

The Authority asserts that its five day reduction of each grievant's 1987 vacation allowance was pursuant to the express
language of Section III C of the Operating Rules set forth in the collective bargaining agreement.

That Section reads:

III. Vacation in Connection with Sick Leave

C. An employee who is absent for an extended period because of illness or injury, whether work connected or not, and who received paid sick leave for a part or all of the period of absence, may be required to forfeit a portion or all of his normal vacation allowance. Department heads will recommend to the Personnel Director for his approval, the appropriate action to be taken in such cases.

Additionally, the Authority argues that its action was pursuant to a long standing, unvaried practice which has been consistently applied not only during the term of the collective bargaining relationship but which predated that relationship.

The Union contends that the controlling language is that of the following paragraph of Exhibit I [Sick Leave Absence Plan], also set forth in the collective bargaining agreement. That Section reads:

Days lost as a result of a documented injury on duty shall result in both a diminution of the employee's bank and count as sick absence days except the first occurrence, and only the first occurrence of day or days lost as a direct result of such injury on duty.

Juxtaposing the two aforesaid contract provisions the Union asserts that the grievants' absences, as "the first occurrence" within the meaning of Exhibit I and which are not to be used to diminish an employee's bank for sick leave, cannot therefore be deemed an absence "because of illness or injury" under Section III C of Attachment I. Hence, under that circumstance, concludes the Union the grievants' absences due to injuries on the job do not qualify as absences under Section III C, for which forfeiture of
Moreover the Union claims that the loss of five days vacation allowance was a forfeiture and hence a penalty. It reasons that as a penalty it constitutes a form of discipline, and cannot be imposed without a hearing as required by PAI20-3.01, "Disciplinary Proceedings - Permanent Classified Employees." The Union asks that the Arbitrator void the reduction in vacation allowances because no hearing was held.

It is a well settled principle of contract law that contract clauses which may appear to be in conflict or inconsistent should be reconciled if reasonably possible. And if not, then any resultant conflict or ambiguity is to be resolved by past practice, if there be one.

In the instant case either approach supports the Authority's action. Section III C of Attachment 1, standing alone, is clear and unambiguous as applied to this case. It calls for a reduction of vacation allowance in the case of an employee with an extended absence from work because of a work-connected injury. And it is applicable to such an employee who received paid sick leave during that absence. Here the grievants were absent for that reason and I conclude that the compensation they received during the period of their absences was sick leave compensation within the meaning of III C.

There is however the question of whether those absences should not be so deemed for the purposes of III C because they were the "first occurrence" within the meaning of the aforesaid Section of Exhibit I [Sick Leave Absence Plan]. I conclude that those absences are not exempted from III C.

Exhibit I is entitled "Sick Leave Absence Plan." The
contract language relied on by the Union provides not for the preservation of a vacation allowance but rather for the preservation of the employee’s sick leave bank and sick leave entitlement. What it does is to prohibit the first occurrence of an absence due to a documented injury on the job from being used to reduce sick benefits and sick pay. It neither mentions nor does it provide for any impact on vacation allowance. Here the grievants did not suffer a reduction in their sick leave bank or in their sick leave entitlement, but rather received full pay under a supplemental sick leave plan for the entire periods of their absences. Hence the two contract provisions referred to above are not in conflict, and therefore I must reject the Union’s claim that Exhibit I [Sick Leave Absence Plan] controls or affects the application or interpretation of III C.

I do not agree with the Union that the Authority’s action was disciplinary in nature or a penalty falling within the discipline sections of the contract. The grievants were not disciplined. They did not lose vacation time as a result of a disciplinary penalty. Rather, their loss of some vacation allowance was under the Operating Rules—Vacations [Attachment I] of the contract, and was the consequence of their extended absences due to job-related injuries. The contract provision which enumerates loss of vacation as discipline is obviously for use when an employee has committed some misconduct or some breach of the contract warranting discipline. In that event the contract permits the Authority to use the diminution of the vacation allowance as a disciplinary penalty. But at the threshold is the requirement that it be a disciplinary case. The instant case is not disciplinary. Put another way, there are two contract provisions permitting a reduction in the vacation
allowance. One, applicable here, where the employee has been out of work for an extended period of time due to a job related injury and during which time he received sick pay. The other, which is not present here, is when there is cause to discipline an employee and the Authority elects to impose as a penalty a loss in vacation allowance. I find that the instant facts fall under the former, not the latter.

The Union has also raised the question of disparate treatment. It claims that other employees who were absent because of job-related injuries and who received sick pay did not have their vacation entitlements reduced. Moreover the Union questions the Authority's formula under which it decided on a five-day vacation allowance reduction for each grievant when their respective absences were of significantly different durations.

The record before me establishes that those employees who suffered no vacation losses were absent for short periods, all less than 30 days, and that under the Authority's procedures and practice only employees with absences in excess of thirty days had their vacation allowances reduced. Though the periods of absences of the grievants differ, they all exceeded 30 days. I cannot find the Authority's decision to reduce each grievant's vacation allowance by five days to be arbitrary, or an unreasonable exercise of the Authority's discretionary power implicit in the provisions of III C. The language that "an employee...may be required to forfeit a portion...of his normal vacation allowance," and the final sentence which accords Department heads the power to recommend appropriate action to the Personnel Director vests the Authority with reasonable discretionary rights in deciding on the amount of the vacation reduction. I cannot find that the Authority's
decision to uniformly reduce each grievant's vacation allowance by five days is inconsistent or wrong under that contract language, especially where as here all the grievants were absent for extended periods. As I do not find that a five-day reduction in the vacation allowance was improper for the grievant with the least amount of time absent I obviously cannot fault it for the grievant with the most time absent.

Even if the aforesaid contract clauses are not reconciled and consequently an ambiguity is raised, the uncontroverted evidence and testimony by the Authority that its practice consistent with the action taken in this case has been applied regularly and uniformly not only during the life of the collective bargaining relationship but even before that relationship began, resolves the dispute and any contract ambiguity favorably to the Authority.

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

The Authority did not breach the contract when it forfeited vacation pay of Robin Lampariello; Felix Berfet; James Calalerese; James Gartmond and others similarly situated.

DATED: June 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.
The stipulated issue is:

Are the individuals named below entitled to any fringe benefit or wage compensation from Richard Sachs Interiors, Inc.? If so, what is the amount thereof?

Roseanne Scarpelli, Bruce Sachareff, Thomas Kelly, Ruth Bird, Herman Malberg.

The parties agreed that the arbitrator would decide the threshold issue of whether Richard Sachs Interiors, hereinafter referred to as the Company or as Richard Sachs Interiors, has any liability to the above-named grievants under individual employment arrangements negotiated with the grievants when the Company tried to operate non-union, and before it was found to be the successor to Sachs, New York.

A hearing was held on February 18, 1988 at which time representatives of the grievants and the above-named 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.

There is no serious dispute over the fact that the Company offered certain employment conditions to the grievants which caused them to leave Sachs, New York and join the Company. I find that the grievants' switch of employment from Sachs, New York to the Company, the testimony about those verbal offers; the reliance
of the grievants on the conditions offered and the grievants' performances, constitute persuasive evidence of bilateral employment agreements between the Company and each grievant.

The initial question is whether those oral individual employment arrangements or contracts are valid and enforceable with Company liability thereunder, or whether they were voided by the NLRB proceeding and settlement under which the Company was deemed the successor to Sachs, New York and the collective bargaining agreement covering Sachs, New York was made applicable to the Company, retroactively covering the period of the individual agreements.

Critical to the determination of the legal question of liability in this arbitration, is the fact that the parties to this arbitration are the grievants individually, and the Company. Local 888 UFCW, the union involved, is not a party to this case. Hence, matters which require the Union's participation if not initiative, are not jurisdictionally before me in this arbitration.

Thus, though the individual contracts or work arrangements may theoretically constitute a breach of the collective bargaining agreement or the Union's representational rights thereunder, and may violate the general principle that without the consent of the bargaining agent, an employer may not make separate agreements with bargaining unit members covered by a collective agreement, that question is not within my jurisdiction in this case. Such a case requires a union complaint of contract breach. This is not a case of alleged breach of a collective agreement, and that question cannot be decided in the absence of the Union's object to the individual contracts and its absence as a party to this arbitration case. Indeed, in this case it is impossible to tell whether the Union agreed to or acquiesced in the arrangement or whether
it does or does not object.

Based on the settlement reached by the Company and Local 888 in the NLRB proceeding, it was agreed that the collective bargaining agreement originally covering the employees of Sachs, New York (including some of the grievants) was applicable to Richard Sachs Interiors, Inc., as the Sachs, New York successor, and to its bargaining unit employees (including the grievants and/or their job classifications).

Accordingly, those individual contracts may also theoretically constitute an unfair labor practice if honored by and enforced against the Company because they may represent a failure by the Company to bargain with the certified bargaining agent over the conditions of employment covering the grievants and/or their jobs.

But that question is a matter for the NLRB and for application and interpretation of the National Labor Relations Act. As such, it is beyond the jurisdictional competence of this arbitration, and again, the Union's unfair labor practice charge and/or at least its participation in any such action is needed. Neither are part of this arbitration, nor in the absence of the Union can the parties give the arbitrator the authority to decide a Labor Board issue. Also, it should be noted, that the NLRB the agency with authority over unfair labor practice charges, is not a party hereto and has not participated in any way which would give me authority to bind it.

Therefore, as between the grievants and the Company, the only parties to this arbitration, I must find the individual employment contracts to be valid and enforceable, and the Company liable thereunder to the grievants. They were entered into in
good faith by both sides; the grievants relied on them in changing their employment; and all the requisite elements of a valid contract were present. Absent a ruling by another forum, The Company may not in this proceeding avoid those agreements on grounds based on the collective bargaining agreement or the National Labor Relations Act.

The rights of the grievants, Richard Sachs Interiors, Inc., and Local 888 in any such other proceedings are expressly reserved.

If the parties wish, they may jointly refer back to me questions and issues on the specific obligations of the Company to the grievants under the individual agreements, if such matters cannot otherwise be resolved, or if other proceedings in other forums are not dispositive of the issues.

DATED: June 16, 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.
In the Matter of the Arbitration
Between
SEA CREST HEALTH CARE CENTER
-and-
LOCAL 144, SEIU, AFL-CIO
Grievance of Marie Edouard

The above-described parties are presently before me in a grievance arbitration with regard to the discharge of Marie Edouard. A hearing was held on June 16, 1988, at which all parties had an opportunity to present all relevant testimony.

After the conclusion of the hearing on June 16, 1987, the parties informed me that they had reached settlement in this case and had agreed to resolve it as follows: Sea Crest is to rescind Ms. Edouard's discharge; Ms. Edouard's grievance against Sea Crest is withdrawn, with prejudice; Sea Crest is to pay Ms. Edouard six thousand dollars ($6,000.00) in back pay, less deduction for FICA, in settlement of all claims against Sea Crest; Ms. Edouard is to begin employment at Shore View Nursing Home in a per diem capacity, working at least three (3) days per week, to include Sundays, but not to include Saturdays.
I find this resolution to be responsible and sensible and therefore made it my Award as follows:

The discharge of Marie Edouard by Sea Crest Health Care Center is rescinded; Marie Edouard’s grievance against Sea Crest is withdrawn, with prejudice; Sea Crest shall pay to Marie Edouard six thousand dollars ($6,000.00) in back pay, less deduction for FICA, in settlement of all claims against Sea Crest, said payment shall be made within ten (10) days of the date hereof; Marie Edouard shall become an employee at Shore View Nursing Home in a per diem capacity, working at least three (3) days per week, to include Sundays, but not to include Saturdays.

Eric J. Schmertz
Arbitrator

DATED: September __, 1988

STATE OF New York )
COUNTY OF __________)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 144, SEIU

and

Seacrest Health Care Facility

OPINION AND AWARD

The stipulated issue is:

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

Hearings were held on April 19 and May 3, 1988, at which time Mr. Peart, 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. Each side filed a post-hearing memorandum.

Let me come right to the point. The Employer has clearly and convincingly shown that the grievant committed the offenses which caused his discharge. I find, contrary to the Union's defense, that the grievant was not justifiably provoked nor is there an acceptable explanation to excuse his conduct.

I find that the grievant, angrily and purposefully spilled soup on the steam table, causing it to run over the top and down the sides of the steam table. I do not accept the explanation that this is a common or unavoidable occurrence when pouring soup into the steam table receptacle.

I find that the grievant, angry because that incident was
reported to supervision by employee Anesta Bryant, confronted Bryant in a threatening and frightening manner, used obscene language to her and acted towards her in a way that caused her to reasonably believe that he might assault her physically. Her resultant hysteria and crying was an understandable and logical consequence of the grievant's abusive language and direct threats.

The Employer has also established that the grievant left his post before his scheduled quitting time on the day of the conference.

In view of the foregoing I find no need to determine whether his "punchout" at his normal quitting time was fraudulent, and, because it was not a reason for the discharge, I find no need to determine whether the grievant "bribed" a fellow employee to give false testimony in this matter.

What has been proved is adequate and sufficient grounds for discipline. The question is whether it is grounds for discharge. The Employer relies in part, in support of discharge, on the grievant's prior disciplinary record, asserting that there have been previous incidents where the grievant engaged in "uncontrolled" behavior.

By doing so, I conclude, that impliedly, the Employer believes that the discharge penalty was the culmination of a process of "progressive discipline" and that progressive discipline is applicable in this case. I accept that theory. But in doing so, I find that though the Employer points to earlier incidents of outbursts and verbal abuse of others by the grievant, it never suspended the grievant for that behavior. A suspension is a
required step before discharge where progressive discipline is applicable.

Therefore I deem the appropriate penalty in this matter to be a disciplinary suspension.

However, in restoring the grievant to work without back pay and by treating the period between his discharge and reinstatement as a disciplinary suspension, I also impose on him another condition.

It may be that the instant facts and his prior record resulted from the particular locale at which he works and may be triggered by his inability to get along with certain other employees with whom he works or comes into contact with at that locale. Therefore I also direct that the grievant be transferred to some other facility owned or operated by this Employer, and that his reinstatement without back pay be to and at that other facility.

DATED: November 21, 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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

Local 282, I.B.T.
and
Southampton Lumber Company

The stipulated issue is:

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

A hearing was held at the offices of the American Arbitration Association on August 31, 1988 at which time Mr. Cowell, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The grievant was discharged for what the Company alleges were various violations of the Company work rules and policies, to wit:

1. Removing five panels of sheet rock from the Company's yard without authorization or required documentation;
2. Use of and removal of a Company truck from the yard without permission;
3. Failure to stop the truck at the gate booth upon leaving the yard for inspection by the guard;
4. Upon questioning, falsified the planned use of the sheet rock that was removed from the yard.

This is a discharge case, with the burden on the Company to prove the grievant's culpability by evidence that is clear and convincing. The Company has done so with regard to charges 2, 3,
and 4 above, but not with regard to charge 1.

The Company's evidence and testimony that the grievant used a Company truck and took it off Company premises without authorization is clearly established. The Company Manager's testimony that he did not give the grievant permission to do so, was unequivocal and unimpeached. The best the grievant could say to this charge was that he "thought he had asked for permission" and "thought that the Company Manager said OK" (emphasis added). I accept the Manager's version.

It is undisputed that upon leaving the yard, the grievant did not stop the truck for inspection by the gate attendant. It is also undisputed that the grievant knew the Company rule requiring the stop. Indeed, the requirement to stop, is prominently posted on signs at the gate. The grievant's explanation is that he did not see the attendant in the gate house; and therefore continued through and out without stopping. That explanation is unacceptable for two reasons. The gate attendant, who apparently is a friend of the grievant, and who would have no reason to testify falsely, stated that he was in the gate house; that he saw the grievant exit at an accelerated speed and that he whistled and yelled at him to stop, unavailingy. I find no reason to discount that testimony. Also, whether the grievant saw the guard on exiting is immaterial. It was his duty to stop and then to make certain whether or not the guard was present. I do not believe that the grievant could have been certain that the guard was not there by not stopping. Under the Company's rules, a stop is mandated, whether or not the guard is immediately noticeable.

The grievant concedes that upon initial questioning he falsified the reason for removing the sheet rock. At first he
claimed it was for his own personal use, and later admitted it was for a friend. The grievant also admits that he knew of the Company rule allowing employees to buy material from the Company only for their own personal use, and not for anyone else or for any commercial venture. At the hearing the grievant disclosed that the sheet rock was for a profit-making project (the installation of a ceiling for a third person) that he and a friend were working on. So, by his own admission, the grievant planned to use the sheet rock for a purpose proscribed by Company rules, and initially falsified his response.

The most serious charge is the first. Though founded as a violation of Company rules and policies, it is obvious that the Company is charging the grievant with theft. The grievant's culpability with regard to charges 2, 3 and 4 raise significant suspicions with regard to charge #1.

And although charge #1, and even the charge of theft can be established by circumstantial evidence, that evidence, because the charge parallels a crime, must be demonstrably clear and convincing. Here, the Company's case falls short of that standard.

Employees may remove material (for their own use) provided they get a purchase ticket, made out by another employee with authority to sell or charge the material to the employee before leaving the yard. In the instant case, the Company asserts that the grievant did not get a ticket before he left; that upon his return, and apparently after he learned that the Company was inquiring about his conduct, he obtained a ticket from a Company salesman. The Company contends that this after-obtained ticket was a coverup of his improper removal of the sheet rock and an effort to legitimatize a theft.
The evidentiary problem with the Company's case in this regard is two fold. First, upon returning to the yard, immediately after entering the gate, and upon questioning by the guard, the grievant produced the purchase ticket showing that five pieces of sheet rock were charged to him COD. The guard so testified. Absent evidence to the contrary, I must conclude that because the grievant produced the ticket at that time without any opportunity to first go into the office, he must have had the ticket when he left the yard with the sheet rock. It is only speculative, and unsupported by evidence to think that some way while he was out of the yard, he got back into the office and obtained a ticket before his official re-entry.

Secondly, the Company's position that the grievant obtained the ticket at about 3:30 PM, at least an hour after he left the yard, is based on what the manager testified he was told by the salesman who issued the ticket. But that salesman, a Mr. Perry, was not called to testify as a witness by the Company. So, not only is that critical information hearsay, and not subject to the adversarial test of cross-examination, but I think, simply, it may have been a mistake as to the time.

Therefore, as the Company's case on charge #1 is primarily based on the grievant's removal of the sheet rock without proper documentation it is fatally undermined by the evidence that the grievant did have the proper documentation in the form of a COD ticket. Therefore the charge of improper removal of the sheet rock, or theft or mis-appropriation has not been clearly and convincingly established, the other circumstantial evidence notwith-
standing.

Based on the foregoing, I do not find enough to sustain the charges, but there is enough to justify and sustain a disciplinary suspension.

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:

There was not just cause for the discharge of Gary Cowell. There is just cause for a disciplinary suspension. The discharge is reduced to a disciplinary suspension for the period of time Mr. Cowell has been out. He shall be reinstated, but without back pay.

Eric J. Schmertz
Arbitrator

DATED: September 6, 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.
In the Matter of the Arbitration:

between

Local 702, Motion Picture Laboratory Film Technicians

and

Technicolor

The stipulated issue is:

Has Technicolor violated Section 9(a) of the contract by denying overtime to a night shift operator and by temporarily transferring an employee into the applicable classification? If so, what shall be the remedy?

A hearing was held on July 22, 1988 at which time representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's Oath was waived.

It is the Union's contention that my Award of June 19, 1985, in which I upheld an employer's right under the industry-wide contract, to use temporary transfers to cover work in positive developing, without the need to offer that work on an overtime basis to employees in the department, was varied by a subsequent verbal agreement between this Company and the Union. The Union asserts that under the verbal agreement, the Company would first offer the available, uncovered work to other employees in the positive developing department on an overtime basis, and would only use temporary transfers if the overtime offers were refused.
The evidence shows that the arrangement the Union claims applicable was at one time agreed to between representatives of the parties for the printing department, and has been a consistent practice in the negative developing department.

However, the evidence on whether there was such an agreement applicable to the positive developing department, the situation in the instant case, is unclear, offsetting and hence inconclusive. The Union testimony is that the discussions regarding the procedure for coverage of vacant work (resulting from absences, vacations, etc.) went beyond the printing department and negative developing, and included positive developing. The Company testimony is contrary. It is to the effect that the agreement was limited to the printing department (superseded thereafter by the reclassification of an employee to provide a regular positive developer when needed).

It is undisputed that the arrangement in the negative developing department pre-dated the verbal discussions and is not claimed to have been part of those talks.

The aforesaid testimony was respectively by the two persons who held those talks, namely the Union President and the Company Vice President-Operations. No other testimony or evidence was adduced to support either position.

The burden is on the grieving party, the Union, to prove its case clearly and convincingly. I cannot conclude that it has met that burden, under these circumstances. I am fully satisfied that the respective testimony was the honest recollection of both men. I just don't think they communicated well with regard to
the positive development department. Also, it seems to me under that circumstance where misunderstanding is quite possible, that if my prior Award and therefore the interpretation of the contract was to be changed, some written confirmation of a matter of that consequence should have been made. Or it would have been memorialized in some more probative and conclusive manner.

Therefore, while there may have been a verbal agreement to offer overtime first before using temporary transfers in the positive developing department, it has not been adequately proved in this proceeding.

The Undersigned Permanent Arbitrator under the collective bargaining agreement between the above named parties and having duly heard the proof and allegations of said parties, makes the following AWARD.

Technicolor did not violate Section 9(a) of the contract by denying overtime to a night shift operator and by temporarily transferring an employee into the applicable classification.

Eric J. Schmertz
Permanent Arbitrator

DATED: July 26, 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 an who executed this instrument, which is my Award.
In the Matter of the Arbitration
between
Air Line Pilots' Association
and
Trans World Airlines, Inc.

The Undersigned, duly designated as the Trans World Airlines, Inc. - Pilots' System Board of Adjustment, and having duly heard the proofs and allegations of the above-named Union and Company, make the following AWARD:

The Company had just and sufficient cause for disciplining Victor Collin and John Coote for the reasons assigned in Captain W. J. Moran's letters dated to them August 24, 1987.

DATED:
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.

DATED:
STATE OF
COUNTY OF

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

DATED:
STATE OF
COUNTY OF

I, Sal J. Fallucco do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED:
STATE OF
COUNTY OF

Donald H. Brown, Jr.
Dissenting

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

DATED:
STATE OF
COUNTY OF

Paul Sedlak
Dissenting

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

Whether or not the Company had just and sufficient cause for disciplining the grievants for the reasons assigned in Captain W. J. Moran's letters dated to them August 24, 1987. If not, what shall the remedy be?

Hearings were held in London, England on February 3 and February 4, 1988 at which time the grievants, Victor Collin and John Coote, and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Board of Arbitration consisted of the Undersigned as Chairman, Captains Donald H. Brown, Jr. and Paul Sedlak, the Union designees, and Captain Rex A. Pitts and Mr. Sal J. Fallucco, the Company designees. The Arbitrators' Oath was waived; a stenographic record was taken, and each side filed a post-hearing brief. Thereafter the Board met in executive session in New York City.

Collin and Coote were respectively the First Officer and Flight Engineer on Flight 700 (B747) from JFK Airport in New York City to Heathrow Airport in London, England on July 16 and 17, 1987. Commanding the flight was Captain Conrad Ereon. Collin flew the flight on assignment from Ereon. Ereon retired from his employment with the Company following the incident which gave rise to the discipline and this arbitration case, and hence was not
disciplined. He is not a grievant herein, but he was a witness and testified.

The letters from Captain W. J. Moran to the grievants, which set forth the charges against them read respectively as follows:

"Dear Mr. Collin:

The investigation you were informed of by letter dated July 17, 1987 has been concluded. The results of this investigation are as follows:

You were second in command of Flight 700 on July 16, 1987 from JFK - LHR. You were flying this leg of the flight. During the approach to LHR, you failed to request that the landing gear be lowered or 25 degrees of flaps selected. You also failed to call for the completion of the landing final check list. The Captain and Flight Engineer failed to cross-check these items and provide the necessary backup.

As the aircraft descended through 500' AGL, the GPWS warning activated. Although you were unable to detect the cause of these warnings, you continued the approach. The LHR Tower Controller, who was working your flight, observed that your landing gear was not extended and stated first "TWA 700 check gear," and then, "TWA 700 go around." The aircraft descended to an altitude of less than 100' with the landing gear retracted and the flaps not properly positioned for landing.

Your position during our discussion of this incident was that you would not have landed with the GPWS warning sounding; however, I find no evidence that a go-around was initiated until instructed by the tower controller.

Operation of a TWA flight in this manner is contrary to a multitude of policies and procedures which have been established to ensure a safe operation for our passengers and aircraft.

You are charged with the following violations of TWA policy and procedures:

1. Failure to extend the landing gear and flaps in accordance with the procedures as described in the Flight Proficiency and Standards Section and Chapter 2 of the Boeing 747 Flight Handbook.

2. Failure to execute the Landing Final Check List as prescribed in Chapter 2 of the Boeing 747 Flight Handbook."
3. Failure to follow proper procedures relative to the Ground Proximity Warning as prescribed in the Boeing 747 Flight Handbook, page 2.40.03.

4. Failure to comply with F.O.P., Chapter 4, Personnel Regulations, B.l.b., B.l.c and B.l.d.

5. Failure to comply with F.O.P., Chapter 6, Flight Crew Member's General Responsibilities, A.3., Chapter 6, Flight Crew Operating Policy, L.l.t, L.l.ee and L.l.gg.

6. Creating an incident which caused TWA adverse publicity.

Your operation of Flight 700 on approach to London violated safety policies of a most serious nature. The total breakdown of crew coordination and lack of vigilance on the part of the entire flight crew could have resulted in a disastrous situation. A lapse of cockpit discipline and awareness which allows a Boeing 747 to descend to less than 100' above the ground with the landing gear still retracted and the flaps not in the landing position constitutes dangerous and reckless operation of an aircraft, and cannot be tolerated.

The facts and circumstances of this incident clearly warrant termination of the flight crew; however in consideration of your previous record of employment, I intend to effect the following discipline:

You will be suspended from the payroll of Trans World Airlines for a period of twelve (12) months.

The above action will be subject to the time limits specified in Section 21 of the current Working Agreement.

very truly yours,

w. J. Moran
General Manager
Flying
JFK"

"Dear Mr. Coote:

The investigation you were informed of by letter dated July 17, 1987 has been concluded. The results of this investigation are as follows:

You were the Flight Engineer on Flight 700 of July 16, 1987 from JFK - LHR. The First Officer was flying this leg of the flight. During the approach to LHR, the First Officer failed to request that the landing gear be lowered or 25 degrees of flaps selected. The First Officer also failed to call for the completion of the landing final check list. You and the Captain failed to cross-check these items and provide the necessary backup.
As the aircraft descended through 500' AGL, the GPWS warning activated. You were unable to detect the cause of these warnings. The LHR Tower Controller, who was working your flight, observed that your landing gear was not extended and stated first "TWA 700 check gear," and then, "TWA 700 go around." The aircraft descended to an altitude of less than 100' with the landing gear retracted and the flaps not properly positioned for landing.

Your position during our discussion of this incident was that you were expecting the crew to go around; however, you were unable to diagnose the course [sic] of the warnings nor detect that the landing gear and flaps were not in the proper position for landing. As Flight Engineer, you are responsible for the final check of these items.

Operation of a TWA flight in this manner is contrary to a multitude of policies and procedures which have been established to ensure a safe operation for our passengers and aircraft.

You are charged with the following violations of TWA policy and procedures:

1. Failure to cross-check flaps and landing gear and call to the Captain's attention any discrepancies [sic] noticed as prescribed on Page 2.01.01 in the Boeing 747 Flight Handbook.

2. Failure to execute the Landing Final Check List as prescribed in Chapter 2 of the Boeing 747 Flight Handbook.

3. Failure to follow proper procedures relative to the Ground Proximity Warning as prescribed in the Boeing 747 Flight Handbook, Page 2.40.03.


6. Creating an incident which caused TWA adverse publicity.

The operation of Flight 700 on approach to London violated safety policies of a most serious nature. The total breakdown of crew coordination and lack of vigilance on the part of the entire flight crew could have resulted in a disastrous situation. A lapse of cockpit discipline and awareness which allows a Boeing 747 to descend to less than 100'
above the ground with the landing gear still retracted and the flaps not in the landing position constitutes dangerous and reckless operation of an aircraft, and cannot be tolerated.

The facts and circumstances of this incident clearly warrant termination of the flight crew; however, in consideration of your previous record of employment, I intend to effect the following discipline.

You will be suspended from the payroll of Trans World Airlines for a period of twelve (12) months.

The above action will be subject to the time limits specified in Section 21 of the current Working Agreement.

Very truly yours,

W. J. Moran
General Manager
Flying JFK

I conclude that several disputed matters need not be decided. I need not decide if the aircraft pulled up and came around because the ground proximity warning system was activated or because the crew was notified by a Heathrow Air Traffic Controller that the landing gear and wheels were not down, or whether the pullup was initiated simultaneously with both.

I need not decide whether Collin, who was flying the plane had the duty to respond immediately to the ground proximity warning system, by pulling up immediately, or whether he was correct in hesitating momentarily at the command of Ereon (who acknowledged he stayed the pull-up momentarily to attempt to determine if the warning was a "false alarm").

Also, I need not determine to what exact altitude the plane descended before it pulled up. I need not determine if Coote had a duty, albeit without technical qualification to be prepared to take over the flight and execute a pull-up if Ereon and Collin failed to do so.

I need not determine if the plane was "in danger" at any point during its descent and until the pull-up, the come around, the lowering of the gear and the subsequent successful landing
had been accomplished.

I need not decide, speculatively whether the plane would have landed with its landing gear up, if the air controller had not seen the problem and communicated it to the crew.

I need not decide these things because none of them would have happened or come into issue if the crew had properly carried out the prescribed landing procedures and regulations. And I need not decide them because I conclude that the discipline imposed on the grievants was contractually proper for the offenses which the grievants (and Ereon) admit they did commit, and that the one year suspension for each grievant for those offenses was not excessive, discriminatory or disparate.

The grievants and Ereon admit that they failed to lower the landing gear and wheels, and to adjust the flap settings at the prescribed altitude in the course of the landing approach. They admit they did not go through the prescribed landing check list prior to and during the descent and approach to landing, and admit that had they done so, they would have discovered that Ereon failed to order and activate lowering the landing gear.

All three, the grievants and Ereon are therefore responsible for that threshold and critical failure, which then led to the aforesaid consequential events. Had each and all three met their separate and collective threshold obligations with regard to the rules and procedures for landing, the wheels would have been lowered, the flaps properly set, and none of the subsequent events would have happened.

They admit that the plane had descended to as low as 173 feet from the ground, with a landing a matter of seconds away, before the pullup was executed.
Frankly, I do not know whether the plane was technically or in fact "in danger," or whether the pull-up could be executed safely at whatever its altitude was when executed, or even if it can be done at 100 feet or even lower. What I do conclude however is that the plane was being flown under "unsafe" conditions in violation of and within the proscription of the Company's rules and regulations for flight and landing operations. I conclude that the several hundred passengers aboard were "at risk" under conditions to which they should not have been subjected.

Manifestly, the requirements and regulations cited in Captain Moran's letters are designed and needed to insure the safe operation of the flight. Equally manifest and incontestable is the fact that those rules and regulations are reasonable for and relevant to a passenger airline, and like any other employer, the Company has the right to make and enforce rules for safety. The nature of this industry; the fact that responsibility for the lives and well being of hundreds of passengers are placed in the hands of the airline and its crews, makes the promulgation and compliance with rules for the safe operation of flights, including landing procedures, so compellingly proper as to defy serious dispute.

By neglecting to lower the landing gear; by neglecting to go through the check list for landing, by descending to 173 feet or less with the gear still up and the flaps unset, the grievants were responsible for flying or permitting the plane to fly, with passengers aboard, in a manner that was egregiously unsafe (whether or not the plane was "in danger") because their failures were in direct violation of a compellingly proper safety rule. Unfortunately that the grievants and Ereon could give me no
explanation for what happened, compounds their errors. It means that nothing unusual or distracting was going on at the time to divert their attention from carrying out each prescribed step of the landing check list. They made a mistake but can offer no explanations in mitigation.

In the absence of a reasonable explanation, I must conclude that they were grossly negligent, and that severe discipline for that negligence was appropriate.

I do not find that the one year suspensions are excessive or disparate. The other cases cited by the Union, in which less severe penalties were imposed were not subjected to adversary analysis in the hearing before me, so that I cannot assess, on a probative basis, any substantive similarities between them and the instant matter. Nor, on the information given, can I find the facts to be sufficiently similar or whether they remain relevant after the passage of many years. In the instant case, I have found that the grievants were responsible for putting hundreds of passengers at fearful and unnecessary risk. I do not know whether the other cited cases carried the same potential risk.

But most significant, in the instant case, and to the grievants prejudice, they had no mitigating explanation for their negligence. I do not know if such a degree of negligence was present in the other matters cited by the Union. The absence of evidence of unexplained negligence in the cited matters, makes them inapposite to the instant case.

I personally agree with part of the "Epilogue" in the Union's brief. I am certain that the grievants will never again fail to lower the landing gear and set the flaps at the proper point in the landing procedure; and will never again fail to go through
the landing check-list. Assuredly they have learned their lesson, and will not know it any better after a one year suspension.

I also agree that after a one year suspension each grievant may not be as good a pilot as now, and may need re-training. But consideration of such matters are for the Company in deciding the degree of penalty. If, as here, discipline is proper, the arbitrator may not substitute his judgment regarding the extent of the penalty because of those factors, for the judgment of the Company, when the penalty decided on by the Company is not excessive, arbitrary or discriminatory.

Also, discipline is what the word means - a penalty. A penalty may be imposed as "punishment" or for rehabilitation, as a deterrent, or even as an example for others. So, on those bases, even if I believed that a lesser penalty would have been enough to achieve these objectives, I cannot disturb the Company's right to suspend the grievants for a longer period.

DATED: May 17, 1988

Eric J. Schmertz
Chairman
The Undersigned, duly designated as the System Board of Adjustment, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Company's inversion of 767 bid Captains and First Officers and DC-9 bid First Officers at the St. Louis domicile during the September 1986 bid period violated the Agreement and the decision of neutral Richard Block in NY-168-83, D. S. Moir.

The pilots inversed shall be paid at the rate of time and one-half for the period(s) of their inversions.

DATED: February 15, 1988
STATE OF New York) \ss.
COUNTY OF New York) Chairman

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

DATED:
STATE OF
COUNTY OF

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

DATED:
STATE OF
COUNTY OF

I, M. H. Brenan, Concurring

DATED:
STATE OF
COUNTY OF

I, D. Grimm do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED:
STATE OF
COUNTY OF

W. D. Johnson, Dissenting
In accordance with the arbitration provisions of the collective bargaining agreement between the Air Line Pilots Association, hereinafter referred to as "ALPA" and Trans World Airlines, Inc., hereinafter referred to as the "Company," the Undersigned was selected as the chairman of a System Board of Adjustment to hear and decide, together with the ALPA and Company designees to said Board, the following stipulated issue:

Whether or not the Company's inversion of 767 bid Captains and First Officers and DC-9 bid First Officers at the St. Louis domicile during the September 1986 bid period violated Sections 10(b)(7), 9(h)(1), 12(E)(3) and other related Sections of the Agreement and the decision of neutral referee Richard Block in NY-168-83, D.S. Moir.

Hearings were held in New York City on August 25 and 26, 1987 at which time representatives of ALPA and TWA appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Captains D. Grimm and W. D. Johnson served as the TWA Board members. Captains D. H. Brown and M. H. Brenan served as the ALPA Board members. The Oath of the Board was waived.

A stenographic record was taken and both sides filed a post-hearing brief. Subsequently, the Board met in executive session.

As the stipulated issue recognizes, critical to a determination of this matter is the Opinion and Award of neutral referee Richard Block in the Moir case. That decision interprets the relevant contract section(s). It is to that decision and the
interpretations therein that this Board is bound. Indeed, the Company not only does not challenge that decision or its interpretation herein, but asserts instead that it has complied with it.

Put another way therefore, the issue is whether the inversions involved in the instant case were due to "unusual circumstances" within the meaning not only of the contract provisions, but particular within the meaning of the Moir award. Furthermore as mandated by that decision, the Company has "the obligation to provide justification" for the inversions. I deem this as a burden of proof required of the Company.

The Company argues that its staffing for the September 1986 bid period was "historically reasonable." It states that the Moir decision interpreted "unusual circumstances" to mean circumstances that were not "reasonably foreseeable or avoidable." Those latter arguments suggest that a "test of reasonableness" is all that need be applied to the Company's reserve pilot staffing for the September 1986 bid. The Moir decision rejects that view. It states:

"Nor is the term unusual circumstances to be equated with "reasonable necessity." ... the term reasonable necessity is nowhere contained in these [contract] provisions. It may well be that due to the existence of unusual circumstances, it will be reasonably necessary to inverse, but one may not ignore the clear impact of Section 10(B)(7) which says that established scheduling policies - and one may only read this as including the assumption of avoidable inversions - will be maintained except in "unusual circumstances."

In my view, "reasonably foreseeable and avoidable" as used in the Moir decision, is not the same as staffing on the basis of "historical reasonableness." The Moir award makes that clear. It states that the inquiry is "to whether the facts relevant to the series of inversions in August 1983 were such as would have been
reasonably foreseeable and avoidable" (emphasis added).

Applied to the instant case, it is not enough for the Company to say that it staffed reserves on an "historically reasonable" basis. It has to go further and show that the "unplanned occurrences" (i.e. short term absences) were, for the September 1986 period, not reasonably foreseeable and avoidable.

I conclude that the Company has failed to meet that burden of proof. The formula it used to staff for the September 1986 bid period to meet the burden imposed on it by Moir, to "avoid inversions in the normal course of scheduling bid holders," does not meet the test of Moir.

The Company used, as a measurement and guide for reserve staffing, the statistics of the two or three prior months. Based on the quantity of absences and other unplanned occurrences during that period, it made its staffing plans and schedules for the September 1986 period. The record does not adequately support a reliance on that two or three month period. With the burden on the Company to justify the inversions, and to show "unusual circumstances," it has not adequately explained why a longer period was not more relevant and significant; why the prior two or three months is the most relevant period; why, for example an entire year was not used; or why the same period of the prior year(s) was not also considered. This is not to say that the prior two or three months is not the most relevant measuring period, but rather that the Company has the burden of showing that, and has not done so to my satisfaction. Indeed it seems to me that when inversions are due primarily to short term absences for illness and Union business (the two circumstances here that the Company claims were unforeseeably high, causing the need for inversions). There must be some convincing evidence introduced to rebut a
normal and logical view that a longer period of time, with a broader showing of experience should have been used, including the same "season" or month of prior years. The Company has not provided that requisite evidence in this case.

Under the present record, the arbitrator cannot judge whether the number of absences during the September 1986 bid period were in fact "unusually high" or "unforeseeably high." Also, only by inference, and not by convincing evidence, can it be presumptively concluded that all the absences were of pilots scheduled for duty. The Company's burden to show a proximate relationship between the numbers of absences and those scheduled for duty, also falls short of the convincing standard required. I note that the Company did not make the connection in the Moir case either. Mr. Block wrote:

"However, the evidence...in this case fails to indicate whether the absences were attributable to pilots who had in fact been assigned flights during that time. Accordingly, the Board is unable to determine whether the absences had any impact at all on scheduling."

At the executive session of the Board, some light was shed by the Company Board members on both the use of the prior two or three month period and the connection between absences and scheduling. But this cannot be used as evidence or for probative resolution of the issue in dispute.

As for the absences due to Union business, I am frankly sceptical about the Company's claim that it did not know of any special Union activity at that time and that the absences for Union business were therefore unforeseeable and an unusual circumstance. The parties have a highly professional and sophisticated labor relations relationship. And while the Company was not directly involved in any unusual collective bargaining activity with ALPA at that time, I think it highly probable that the Company knew, or should have known of matters going on at that time within
ALPA which would and did take the time of more pilots than customarily. Again, pursuant to Moir, it is the Company's burden to show that "union business" which caused absences, was unforeseeable. And that those absences interfered with scheduling. Neither has been satisfactorily shown.

A further quote from the Moir decision is in point:

"The Company, not the Association has access to the facts and figures concerning the scheduling and claimed necessity for the reversal and, in a dispute over the necessity for such move, it is the Company's obligation to provide justification by demonstrating that the underlying circumstances requiring such action were "unusual" (emphasis added.

That the staffing for the period exceeded the contract minimums is immaterial as is the fact that additional personnel were added to some pilot categories. What is needed, with the burden on the Company, is to staff the reserve force sufficiently to avoid reversals, except in unusual circumstances. Mere staffing at or above the contract minimum or an increase in some pilot categories are not themselves defenses to nor justifications of reversals. I believe the Company tried and wanted to staff adequately, but it did not do so to satisfy the requirements of Moir.

In short, I do not find that the bulk of the "unplanned occurrences," namely absences due to short term illness and Union business have been adequately demonstrated to have been "unusual circumstances" within the meaning of the contract and the Moir decision, to justify the reversals.

It should be obvious that this decision is based on the facts and circumstances of this case, and is confined therefore to the reversals for the September 1986 bid period. Factually, it does not purport to, nor could it have a precedential effect on any other case challenging reversals. Indeed, as I see it, each case will have to stand and be decided on its own facts and events.
However in the instant case, considering that the Moir decision ordered a "cease and desist", I deem it proper that some monetary award be included in the instant Award.

Eric J. Schmertz
Chairman

DATED: February 15, 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.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

National Association of Broadcast Employees and Technicians, Local 15

UA-Columbia Cablevision of New Jersey

The stipulated issue is:

Whether the Company violated the collective bargaining agreement by promulgating a lateness and absentee policy and by the manner by which it has been applied and implemented? If so, what shall be the remedy?

Hearings were held on August 27, October 30, 1987 and May 31, 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 Union and the Company each filed a post-hearing brief.

The Company unilaterally promulgated and implemented a lateness and absentee policy, under which lateness and absences are recorded or can add up to "occurrences or one-half an occurrence" and which fixes quantitative and cumulative permissable levels for those occurrences. Beyond those limits, affected employees are subject to discipline, including, ultimately, discharge.

It is well settled that an employer may unilaterally make, promulgate and implement work rules including rules related to lateness and absenteeism as a managerial prerogative, provided the rules are reasonable, proximately related to the jobs involved, well noticed to the employees affected, and uniformly
and non-discriminatorily applied. I find, any contrary "past practice" notwithstanding, that the Company had and has the managerial right to unilaterally install a lateness and absence policy. I am satisfied that it was adequately noticed to the employees and the Union and that it related properly to the jobs and employment setting covered. There is no evidence that its application has been uneven or discriminatory.

I find however, that in one material respect, it is unreasonable, inconsistent with a provision of the contract, and hence, in that respect, violative of the contract.

Section 6.3 (Sick Pay) of the contract accords employees sick leave and sick leave pay in a specified annual quantity. It reads:

(a) Each Employee shall be entitled to receive Company-paid Sick Leave at Straight Time Rates for eight (8) days per calendar years, cumulative year to year, up to a maximum of fifty (50) days. All employees may at their option, be paid for the unused portion of their sick leave. This is to be paid on the last pay day of the year.

But the lateness and sick leave policy records as or toward an "occurrence" absences due to sickness, from the first day and for all such days, even if that or those absences are for bona-fide illnesses and fall within the sick days allowed and paid for under Section 6.3. Those absences are counted towards the cumulative point where discipline may be imposed for "excessive absenteeism." In short, the policy penalizes an employee and puts him at risk for discipline, for his utilization of a negotiated and express contract benefit.

The contract Management Rights clause (Article XVII) specifically prohibits the Company from exercising its managerial
rights contrary to the express provisions of the contract. Article XVII reads:

The Union recognizes that subject only to the express provisions of this Agreement, the supervision, management, and control of the Employer's business and operations are exclusively the functions of the Employer. (emphasis added)

Here, this disputed application of the lateness and absenteeism policy is in conflict with Section 6.3 of the contract. And because, in my view a contract benefit cannot at the same time or conversely be treated as a penalty or a material component in a process that is punitive, and because the express contract is preeminent, that part of the lateness policy cannot be sustained.

Of course, this is not to say that the Company may not discipline employees for unexcused absences, for abuses of the sick leave benefit; or for false claims of illness; or even for chronic illnesses which, even if beyond the employee's fault or control, result in excessive absenteeism. The Company may do these things. But these well recognized circumstances, under which the Company may take disciplinary action, are not conditions or limitations on the recording of "occurrences" by the Company under the present policy. Instead, without any showing of or premise that an absence for alleged illness was falsified, or was part of a chronic practice or pattern, or was otherwise an abuse of the sick leave benefit, such absence for illness is routinely and automatically recorded and added into the cumulative totals leading to discipline, I deem that unreasonable and contrary to the contract.

Also, this is not to say that employees are entitled to "take" the full sick leave benefit, or even a substantial part thereof, each year, year in and year out. The contract maximum is obviously designed to cover unusual and long term illnesses,
and is not an unconditional annual entitlement on a continuing basis. Therefore, an employer may view with suspicion, and require medical certification of claimed illnesses which year in and year out equal or approach the contract maximum. Any such situation may result in a proper determination that an employee is unreliable as a regular employee, and discipline, including ultimate termination is proper. But again, that circumstance is not present in these instant situations where employees who were absent for a single illness or some illnesses, had those absences recorded under the present policy, and counted towards an "occurrence" and towards any allowable maximum. In the instant case, without any showing of a chronic use of all or most of the sick leave benefit, each year, for a series of years, the individual absences were nonetheless recorded and so used by the Company in a manner adverse or potentially adverse to the employee. Several named grievants in this case were or may have been so affected.

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

The Company had and has the right to make, promulgate and implement a lateness and absentee policy, provided it is reasonable, job related, well noticed to the affected employees and evenhandedly administered.

The instant policy is unreasonable insofar as it includes as or toward an "occurrence," absences due to bonafide illnesses which fall within the sick leave benefits and provisions of the collective bargaining agreement. Absent a showing of a record of chronic absences, or false or fraudulent claims of sick benefits, or other abuses of the sick leave provisions of the contract, the Company may not treat absences due to sickness that are covered by the sick pay provisions of the contract as "absences" for discipline or potential discipline under its lateness and absentee policy. To that extent, the promulgation, application
and implementation of the Company’s lateness and absentee policy is in violation of the contract.

The Company is directed to change, modify or amend its policy to comply with this Award. All employees who have been adversely affected by the policy shall have their records corrected, including the expunging therefrom of all recordings of absences that this Award prohibits. Their accumulations of "occurrences" shall be appropriately changed. Any discipline resulting therefrom is reversed and expunged and said employees shall otherwise be made whole.

In accordance with the stipulation of the parties, I shall retain jurisdiction for the application and/or interpretation of this AWARD.

DATED: September 26, 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
AFGE, Local 1917
and
U.S. Immigration & Naturalization Service:

The issue is the propriety of the three day suspension of Michael A. Perri, Jr.

A hearing was held on June 3, 1988 at the offices of the Service at which time Mr. Perri, hereinafter referred to as the "grievant" and representatives of the above-named Union and Service appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record was taken and each side filed a post-hearing brief.

There are two charges against the grievant for which he was suspended three days. He is charged with wilful delay in reporting to the Pan Am terminal at JFK Airport on reassignment from his maritime position; and following reporting for that reassignment, for using "obscene, insulting, and abusive" language to Supervisor Michael F. Blair.

I have found that the charges have been proved only in part, and I shall reduce the disciplinary suspension proportionately.

In discipline cases, the charges must be established by the employer by clear and convincing evidence. The charge that the grievant purposefully delayed in reporting to the reassignment has not been so established. The Service's case on that charge is speculative and inadequately circumstantial. It claims that, based on normal travel time (following an allowed lunch period) the grievant should have arrived at Pan Am by 2 PM. That he did not arrive
until 3 PM caused the Service to conclude that he was resisting the reassignment and attempting to minimize his time there. That may be so, but there is no direct evidence to support it. The grievant was not seen engaging in delaying tactics, and his explanation that traffic and parking difficulties that day were heavy and difficult, causing the delay, was not refuted by the requisite quantum of rebuttal evidence. So, though the Service had cause to be suspicious, suspicions are not enough to meet the "clear and convincing" standard.

It is clear in my mind that the grievant was angry about the reassignment; was angry about the fact that Blair would not grant his request that he be released from duty by 4:30 PM; and was angry that by being retained until 6 PM, he would have difficulty traveling home, little time for a meal and sleep, before his scheduled assignment the next day. He exhibited his anger and resentment by what he said to Blair. I accept as accurate, the language attributed to the grievant by the Service, especially since the grievant neither denied it nor recollected what he said exactly. Indeed, he virtually conceded the use of the specific unsocial language.

However, I find that what he said was a reaction to the circumstances, an intemperate outburst against the position he found himself in, and an emotional complaint in an excessive form. Yet, he did not defy the orders of the supervisor; he performed the duties assigned; and remained at work the full time required. Moreover, and importantly, as inexcusable as his outburst was, I do not find that it was directed to or against Blair, nor was it intended as a vilification of Blair. It was not intended, nor did it come out as a personal attack on or an insult to or abuse of the Supervisor. Rather it was an intemperate and inappropriate response to a work situation. And considering its setting, manner
and language, was disrespectful to Blair, but not defiant of his authority or insubordinately personal.

Therefore though the grievant's conduct is not to be excused, and because had had been previously cautioned about these types of outbursts, some discipline is justified, and that discipline is appropriately a suspension. But, because I do not find it as egregious as the Service alleges, and because the AWOL charge falls short of the requisite proof, I shall reduce the grievant's three day suspension to a one day suspension.

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 three day suspension of Michael A. Perri, Jr. is reduced to a one day disciplinary suspension. He shall be made whole for the two days lost.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Was there just cause for the discharge of Everald Wilson? If not what shall be the remedy?

A hearing was held on November 29, 1988 at which time Mr. Wilson, 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.

There is no doubt in my mind that shortly prior to March 25, 1988 the Employer had grounds to discharge the grievant for his cumulatively unsatisfactory employment record which included several warnings for poor attendance and "pattern absences on weekends," and two suspensions for other acts of misconduct. However on March 25, 1988 and when the instant discharge was effectuated on May 20, 1988, the Employer took steps which prejudiced its right to take discharge action on that latter date.

On March 25, 1988, instead of discharging the grievant for a continuation of an unsatisfactory attendance record, together with his other record of discipline, it gave him a "final warning."

In significant part that "final warning" read:

"Abuse of sick leave policies
1] No call (AWOL) on 3/18/88
2] Excessive sick leave
3] Pattern sick leave

This is a final written warning. Further abuse will be cause for dismissal." (emphasis added)
Secondly, when the instant discharge was effectuated, it was not for the grievant's overall disciplinary record, but rather limited to "continued excessive and patterned absenteeism."

The Employer asserts that the instant discharge was for the grievant's overall record, with "emphasis" on his sick leave and absentee record. However I reject this position. It is not what the discharge notice states. More significantly, the Employer concedes that it gave serious thought to dismissing the grievant on the grounds of his overall record (including the two suspensions), and even drafted discharge notices on that basis. But it discarded those expanded dismissal notices, settling instead for the official notice in this case, citing only "excessive and patterned absenteeism" as the grounds. To my mind that means that the Employer made a conscious and determined decision to base the discharge solely on the absenteeism charge, and not to rely on the balance of the grievant's disciplinary record. Therefore it is to the "absentee" charge that the Employer is bound and which the Employer must prove by evidence that is clear and convincing.

By these two actions the Employer narrowed the issue to whether, following the final warning, the grievant continued to abuse the sick leave program and continued his record of absenteeism at a level and magnitude which properly triggered his discharge.

I conclude that though not perfect or completely acceptable, the grievant's record for the short period after the final warning, did not constitute an "abuse" or "continuation" of his sick leave and absentee practices warranting dismissal. And, with the issue so narrowed, the procedure of the grievant's discharge, did not meet the requisite steps of progressive discipline.
Following the "final warning," the grievant took "vacation days" on April 1, 2, 3 and 10, and his "birthday holiday" on April 9. The Employer states that those absences, which the grievant requested and was granted, were proper, and that he should not be penalized for them. On April 19, 21, 22, 23, 24, the grievant was on suspension for another offense, and it is similarly stipulated that those days cannot be held against him in this proceeding. On May 1 he had another proper vacation day.

The grievant's offenses, following the final warning, are limited to May 8, 14 and 15. On the 8th he was late to work about 10 minutes because of a "late subway." On May 14, at the end of his shift on the day before, the grievant asked for and was granted a "vacation" day. It turned out subsequently, that he had earned only a one-half day vacation at that point, so he was granted ½ the 14th on vacation, and docked ½ a day's pay for ½ of that day as an absence. On the 15th the grievant called in ill, and was docked for that day, as he had previously exhausted his sick leave benefit.

So, his errors, following the final warning, were for his lateness on May 8th, a ½ day absence on May 14th and a day's absence on May 16th.

Though there is doubt in my mind that those absences and lateness rise fully to the level of "further abuse" within the meaning of the "final warning, I need not determine that definitively at this point because of a procedural defect in the Employer's disciplinary action. Limited to his absentee record, including sick leave abuses and patterned absences, the grievant had been only warned previously. At no point was he suspended for that record. (His two suspensions were for other reasons and
as previously ruled, are not part of or relevant to this case.)

Universally well settled is the principle that for poor attendance of all types, the procedure of progressive discipline is mandated. And that warnings must be followed by a suspension, to impress on the employee the seriousness of his unsatisfactory record, before discharge can be imposed for a continuation of that record. Here, assuming that his record following the final warning was still unsatisfactory, a suspension, not a discharge would have been the proper penalty.

I conclude in this case that a suspension is the proper penalty. The grievant was on final warning and he knew it. As such, he had a special duty to avoid absenteeism, use of sick leave and lateness. While he may not be held to being an "absolute guarantor" of perfect attendance, he can and should be held to circumstances he could or should have controlled. He did not meet that standard of duty in this case. Under final warning, an employee must act prudently to avoid latenesses, even if it means traveling to work earlier than usual. The grievant's lateness on May 8th showed his failure to act prudently and to guard against the possibility of lateness. More serious are the circumstances of May 14 and 15 (a Saturday and Sunday). I don't accept the grievant's statement that he didn't know that he didn't have a full days vacation entitlement accumulated at that time. I think he knew, or at least should have known, and should not have asked for a vacation day, on very short notice, when it was administratively difficult for the Employer to check his eligibility. The burden was his, not the Employer's at that point, to seek a vacation day only if he had the entitlement. That ½ day loss of pay that day as a ½ day absence, is evidence of his failure to meet the duty imposed on him by the final warning. The same is
true, and perhaps more so, by his absence on May 15th. He testified that he had a cut lip and couldn't talk. I am not persuaded that that should have kept him out of work. He admitted that the bleeding had stopped after the accident the day before, and the wound did not require stitches. That he had trouble talking and/or that the injury caused pain is not enough to justify taking the day off, when his sick leave had been exhausted and when he was under a "final warning." That I also view as a default on his duty to exercise extra care with regard to his attendance record.

For these reasons, though the penalty of discharge is premature, a disciplinary suspension is proper. And I conclude that the period of the suspension should be for the time that he has been out.

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 discharge of Everald Wilson is reduced to a disciplinary suspension. He shall be reinstated, but without back pay, and the period of time from his discharge to his reinstatement shall be deemed the disciplinary suspension.

DATED: December 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.

Eric J. Schmertz
Arbitrator
The stipulated issue is:


The above number grievances all involve claims by the Union that supervisory employees performed bargaining unit work in violation of Article XIV Section 5(a) and (b) of the collective bargaining agreement.

A hearing was held on February 22, 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. Each side filed a post-hearing brief.

The Company asserts that this matter was determined and therefore is controlled by a prior Award by Arbitrator George Moskowitz. In that Award, rendered in 1986, Mr. Moskowitz held that Article XIV would not be violated if supervisory employees performed bargaining unit work for no more than four hours a shift. In the instant case, the Company concedes that supervisors regularly performed the bargaining unit work involved, but not in excess of four hours a shift.

The Union contends that the Moskowitz Award is not controlling because it was rendered during a period of full employment;
whereas in the instant case, a number of unit employees were laid off; that Mr. Moskowitz considered the then ratio of supervisors to bargaining unit employees in reaching his four hour formula, and that because of an instant change in that ratio due to bargaining unit layoffs, the Moskowitz formula is no longer applicable.

In both the Moskowitz case and the instant matter before me, the bargaining unit work involved is in the Telex Department, and concerns various methods and means of handling messages for customers. In both cases the Time-Tran system was and is used, and in the case before me the Union's specific complaints relate to supervisors performing the duties of "repair of live traffic" and "mailbox." So, I find that the Moskowitz decision dealt essentially with the same type of bargaining unit work as is involved in the grievances before me.

It is well settled that a subsequent arbitrator should not overturn the decision of a prior arbitrator where the two cases involve the same contract interpretation, unless the subsequent arbitrator finds the prior decision to be palpably wrong. The threshold question here is whether the Moskowitz decision dealt with the same contract interpretation issue as is presently before me. The answer is yes, unless the Moskowitz decision regarding the meaning and application of Article XIV is limited to critical factual circumstances then present, and now absent. The different fact relied on by the Union is the contention that Mr. Moskowitz based his four hours per shift formula on a specific supervisory-unit employee ratio.

I do not read the Moskowitz decision to require any specific supervisor-unit employee ratio. Mr. Moskowitz found that the work of "four supervisory employees overseeing the work of sixteen bargaining unit employees" was "in violation of Article XIV Section 5
when such bargaining unit work is performed by a supervisor in excess of four (4) hours per shift." (emphasis added) I interpret that to mean that Mr. Moskowitz was limiting supervisory employees to the four hours, not necessarily to a ratio of four supervisors to sixteen bargaining unit employees. Put another way, he made factual reference to an existing example (i.e. four supervisors overseeing sixteen unit employees), and found that supervisors working on bargaining unit duties for more than four hours prejudiced the units overtime opportunities. In my view he would have sustained their performance of bargaining unit work if it was for or less than four hours regardless of the number of bargaining unit employees they supervised.

For had Mr. Moskowitz intended that a particular ratio of supervisor-to-unit employee be present as a condition precedent to permitting a supervisor to perform up to four hours of bargaining unit work per shift, he would have specifically built that into his formula. Instead he stated that

"the function of the Award should be to outline the parameters of contractually intended and permitted areas of supervisory performance and responsibility as agreed."

and that

"the function of the Award should not cast any doubt on or weaken these functions of the supervisor at the "command position" which functions are designed or reasonably expected to be performed, to assess the smooth flow of traffic, message backlog, operational delay in transmission, or to make managerial decisions concerning resolution of problems. These supervisory functions include the monitoring and control of the system for the end purpose of service to the customer."

And in his actual Award he stated:

"I shall therefore award that bargaining unit work in excess of four (4) hours per shift per supervisor cease."
He made no reference to, nor did he found it on any supervisor-unit employee ratio. What Mr. Moskowitz meant, I conclude, is that Article XIV contemplates supervisors performing some quantity of bargaining unit work because of the nature of the business and their responsibilities to the services rendered customers, and that if it was limited to no more than the four hours per shift per supervisor, that needed responsibility would be met, the quantitative allowance under Article XIV satisfied, and, as a reasonable balance, would not deprive an employee of overtime earnings or cause a layoff within the meaning of Article XIV. Nor did Mr. Moskowitz condition his formula on the requirement that there be full employment among all unit employees.

Considering the foregoing, I am satisfied that it was not Mr. Moskowitz's intention to structure a particular supervisory-bargaining unit ratio as a condition to supervisory activity on bargaining unit work. Rather, the limit he intended and ruled was solely the four hour limitation.

Indeed, if such a ratio is to be considered, so too, in my view, must the quantity of available work at any time both supervisors and unit personnel perform that work, with additional consideration of the percentage handled by supervisors compared with the percentage handled by unit employees. Those were not part of Mr. Moskowitz's considerations and would be important if questions of deprivation of overtime or layoff causation had to be decided. Under the circumstance where supervisors were performing an unreasonable quantity of bargaining unit work, when unit employees were on layoff, the Moskowitz formula might not be applicable or fair. But the requisite evidence for my consideration of those circumstances was not developed or presented adequately in this case.
With that interpretation of Article XIV, under which Mr. Moskowitz balanced the right of supervisors to perform some bargaining unit work as part of their responsibilities, with the protection due unit employees from loss of overtime opportunities or from layoff, other limitations are not sustainable based on the record in this case.

Accordingly, I find that Mr. Moskowitz's decision is relevant and applicable to the instant case before me, and I do not find the Moskowitz decision to be a "palpably wrong" interpretation of Article XIV of the contract. Therefore I conclude that I am bound by it; that it stands as a valid and enforceable interpretation of Article XIV and as the current contractual rule regarding the amount of bargaining unit work which can be performed by a supervisor without violating employee rights under Article XIV.

Remaining therefore is the question of whether the supervisors in the case before me, have been exceeding the four hour per shift limitation. The burden of proof is on the Union and that burden has not been met by the requisite quantity and quality of probative evidence. The Union's case in this regard is based on "observations" made by certain bargaining unit employees. But those observations unsupported by time and work records, are too imprecise and inconclusive to prove the Union's claim that the supervisors have been doing bargaining unit work for six or more hours per supervisor per shift. The Union witnesses could not document the amount of time precisely or even with reasonable accuracy, nor could they show conclusively the nature of the work done over the period involved. It is not illogical or unreasonable to conclude that within the six or more hours alleged by the Union, the supervisors were doing supervisory work at the "command positions" which Mr. Moskowitz said must not be weakened. In the
face of the Company's denial of supervisory activities in excess of four hours per shift, and its evidence on the nature of the work the supervisors have been doing, I cannot find that the Union's contention has been proved clearly or convincingly. Though the evidence on overtime potential and a nexus between supervisors working and layoffs is inconclusive in this record, my finding that the Moskowitz decision is controlling, makes the findings of fact on those questions unnecessary in this case.

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

The Union's grievances set forth in the above stipulated issue, all relating to the performance of bargaining unit work by supervisory employees, are denied.

DATED: May 31, 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.

Eric J. Schmertz
Arbitrator