In the Matter of the Arbitration between
Transport Workers Union of America
and
American Airlines

CHAIRMAN'S OPINION
Case #M-318-89

The stipulated issue is:
Was there just cause for the discharge of Evelis Brandon? If not, what should be the remedy?

A hearing was held on April 18, 1990 at which time Mr. Brandon, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. Ms. Judith A. Shire and Mr. Anthony J. Gaudioso served, respectively, as the Company and Union members of the Board of Adjustment, and the Undersigned served as Chairman. The Oath of the Board was waived. A stenographic record of the hearing was taken. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Board met in executive session on July 10, 1990.

The evidentiary question is whether the Company has met its burden of proof by showing, by clear and convincing evidence, that the grievant committed an unprovoked assault on Crew Chief Frank DiMarco by grabbing DiMarco, pushing him back into another piece of equipment and punching him in the lip.

DiMarco's testimony supports the charge. He asserts that he was giving the grievant routine instructions for unloading a plane's baggage, when the grievant first yelled and screamed at him, said "let's go" (which DiMarco interpreted to mean that the grievant wanted to fight); and then after parking his tractor, got off it and came at him, grabbed his shirt near the neck and throat and pushed him backwards against a stationary cochran. And that after they were separated, DiMarco felt a blow to his
lip, which because the grievant was the one in close proximity, he believes the grievant inflicted. There is no dispute that DiMarco suffered a cut or bruised lip.

Admitting he "grabbed" DiMarco, the grievant denies he struck him on the lip. He asserts that DiMarco insulted him and provoked him to anger by calling him "dick" and "dickhead" as DiMarco gave orders for the plane's unloading.

In determining what happened, I do not consider the testimony of Raven Chaney to be reliable. Nor do I consider the testimony of Ralston Headley to be accurate or complete. The testimony of the other witnesses, either because they did not see the incident or did not see it in its entirety, cannot be determinative. Chaney was ostensibly a fleet service clerk, but in reality, he was an undercover agent investigating drug trafficking and/or use among employees. His first written report of the altercation between the grievant and DiMarco was false, by his own admission. That report did not fix responsibility for the altercation nor support the elements of the charge. His second report (provided to the investigation firm) was written after he returned home from his shift on May 19, 1989. It, along with his testimony, support the charges against Brandon. Chaney's explanation for his first, "false" report, was that he didn't want to prejudice his position among the employees or presumably "blow his cover". It should be noted, significantly, that Chaney reported that the grievant struck DiMarco on the lip with two blows at two different times. Yet DiMarco reports only one blow. So, in short, I am uneasy with Chaney's testimony, and as it is the only direct evidence linking the grievant to DiMarco's lip injury, I cannot accept it as the critical testimony which would support all the elements of the charge and hence be the basis for upholding the discharge.
Headley's testimony is equally unreliable. He broke up the altercation. I think he knows more about the blow to DiMarco's lip than he acknowledges. He denies that he saw the grievant do it, advancing instead the possibility that he (Headley) may have accidently struck DiMarco on the lip when he separated the two men. That testimony is not convincing. His description of how he separated them (and the traditional methods of doing so) do not lend themselves to the probability of an accidental blow to the lip. Had he bruised DiMarco's lip while separating the two men, I am convinced that he and DiMarco would have known it and reacted differently.

This is not a criminal case. Here, the civil, rather than criminal standards of proof apply. Circumstantial evidence, logic and reasonable conclusions are adequate in disciplinary cases, to meet the standard of clear and convincing. Therefore, the case narrows to the testimonies of the grievant and DiMarco. Both have something to gain from picturing themselves in the best light. The grievant seeks to overturn his discharge. DiMarco seeks to be viewed as an innocent victim, who did not provoke the confrontation.

Based on their respective testimonies, the other circumstantial evidence and rational analysis, I have concluded that the following happened. The grievant did advance on DiMarco; did exhibit anger towards him; did grab him and push him backwards; and, because there was motive and compelling probability, did hit DiMarco on the lip. But, again, logic, circumstances and rationality lead me to disbelieve that this occurred only because DiMarco ordered the grievant to first remove empty cartons from the plane (and place them on the ground) and then unload the baggage. And/or that it occurred because DiMarco called the grievant or got his attention with the word or sound "yo." There is no evidence of earlier "bad blood" between them.
or earlier confrontations. There had to be something more to cause the grievant to first show anger by language; then to park his tractor and return to confront and grab DiMarco. That something had to be provocative - in the nature of a real or perceived insult. Indeed, the events do not hold together and cannot be adequately explained without it. Consequently, I conclude that the grievant may very well be telling the truth when he claims that DiMarco, in giving unloading orders, called him a "dick" and "dick-head."

In that setting where the grievant, improperly I believe, resented and even resisted removing empty cartons before the baggage, the appellation "dick" or "dick-head" is insulting and provocative and could well trigger a physical assault. That the grievant did not make this claim as defense at his unemployment insurance hearing is troublesome. Yet, that proceeding is different than an arbitration. I do not know if the grievant and his representative knew or thought that his unemployment claim would be contested by the Company and therefore what magnitude of defense was necessary.

However, on balance, and in short, the Unemployment Insurance case notwithstanding, I am persuaded that there had to be some triggering event to set the grievant off to attack DiMarco, and my conclusion in that regard and the evidence supporting it in this record simply preempts the omission from the Unemployment Insurance record.

Of course, this is not to excuse the grievant. He should have carried out DiMarco's orders without resistance or complaint. Had he done so the event might not have taken place. And even if or when called an insulting name, his proper response was to do the job as ordered and complain to his Union about DiMarco's name calling. At best, the provocation is
therefore only a mitigating factor. Discipline is clearly warranted. The assault was serious and dangerous. Even after separated the grievant continued the attack with a blow to DiMarco's lip. This type of response and conduct cannot be tolerated, especially when alternative remedies are available through Union representation and the grievance procedure. But, under the particular circumstances of this case, discipline short of discharge is warranted and appropriate. The discharge shall be reduced to a disciplinary suspension for the period of time the grievant has been out. I find no significance to and therefore reject the Union's claim that the Company relied on the wrong work rule in effectuating discipline.

Eric J. Schmertz
Chairman

DATED:
In the Matter of the Arbitration:

between:

Transport Workers Union of America

and:

American Airlines

AWARD
Case #M-318-89

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

The discharge of Evelis Brandon is reduced to a disciplinary suspension. He shall be reinstated, but without back pay.

DATED: July 23, 1990
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.

DATED: July 1990
STATE OF ) ss.: 
COUNTY OF )

Anthony J. Gaudioso
Concurring
Dissenting

DATED: July 1990
STATE OF New York ) ss.: 
COUNTY OF )

Judith A. Shire
Concurring
Dissenting
In the Matter of the Arbitration:
between

Transport Workers Union of America, Local 501, AFL-CIO
and

American Airlines, Inc.

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

There was just cause for the discharge of Vincent Goldring.

DATED: June 7, 1989
STATE OF New York ) ss.: Eric J. Schmertz
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: June 1989
STATE OF New York ) ss.: Mary B. Fives
COUNTY OF New York )

I, Mary B. Fives 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: June 1989
STATE OF New York ) ss.: Anthony J. Gaudioso
COUNTY OF New York ) Dissenting

I, Anthony J. Gaudioso 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

Transport Workers Union of America, Local 501, AFL-CIO

and

American Airlines, Inc.

OPINION OF CHAIRMAN
Grievance No. S-05-88

The stipulated issue is:

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

A hearing was held on December 14, 1988 at which time Mr. Goldring, 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. Ms. Mary B. Fives served as the Company's designee on the Board of Arbitration and Mr. Anthony J. Gaudioso served as the Union's designee. The Undersigned was selected as the Chairman. The Oath of the Board of Arbitration was waived; a stenographic record of the hearing was taken, and subsequently, the Board met in executive session on May 17, 1989.

On December 2, 1987, while attempting to travel with his family from San Juan to St. Thomas on an American Eagle flight using his employee pass, the grievant, a store's clerk is accused of physically assaulting Vanessa Riollano, an American Eagle supervisor who was working the American Eagle departure gate. An assault of the type alleged is in direct violation of Company Rules applicable to travel on an employee pass and there is no serious dispute that it would be grounds for discharge if proved and if unexcused.
The critical questions in this case are whether the grievant who had worked for the Company for only about three years, committed the assault as charged, and if so, whether he should be excused or the discharge penalty mitigated because he was provoked by Riollano.

I accept as accurate and credible the testimony of Riollano and other testimony by Company witnesses that despite his denial, the grievant committed the assault. I find as a matter of fact that, angry and frustrated because there was no room for him and his family (though there was room on the final flight that day for his family) on the flights to St. Thomas, the grievant hit or pushed Riollano in the chest, causing her to fall to the floor, and then, when she ran, pursued her, caught her, and pushed or threw her into a glass wall partition.

The Company's Regulation N.5 provides among other penalties, for "dismissal from the Company for:

5. Misconduct while using travel privileges."

I find that to be a reasonable rule.

American Eagle is a wholly owned subsidiary of the Company, and Company employee travel privileges are applicable to American Eagle flights. Hence "Misconduct" in connection with an American Eagle flight is a violation of that Regulation.

It is clear that the grievant knew the limitations of his travel privileges. The principal limitation is that he and his family can be accommodated on a flight as non-revenue passengers only if there is space for them. If the flight is full with regular revenue passengers, the employee (and his family) cannot claim seats and cannot be boarded.

That is what happened in San Juan. After flying from New York to San Juan, the connecting flights from San Juan to St. Thomas
were all full with revenue passengers. Each time the grievant was told by American Eagle and particularly by Riollano that a particular flight was full, (or as in one case, became full when there was an equipment change to a smaller aircraft) the grievant became increasingly angry. When he was denied boarding on the last flight to St. Thomas (though there was room for his family and they were initially boarded) he remonstrated with Riollano, and angrily and rhetorically asked her whether it meant that he "had to stay in San Juan." It is undisputed that Riollano replied "Yes, unless you want to go swimming." The grievant's assault on Riollano followed.

The remaining question is whether Riollano's response, which she admits was wrong on her part, and which was at least impolite, if not provocative, was so provocative as to excuse the grievant's assault that followed. I conclude it was not.

Travelling on pass privileges, the grievant knew or should have known that there was a risk that all the flights could be filled with revenue passengers. The possibility that he could be stranded at any location was or should have been well within his contemplation. There is no evidence, or even an allegation, that American Eagle planned not to board him, or willfully created a situation designed to deny him the travel accommodations. So while his frustration is understandable, there is no excuse for his anger and certainly no excuse to blame American Eagle or its personnel for his predicament. His attitude each time he was told there was no room was one of anger, and uncooperativeness, including his use of insulting and disparaging words about American Eagle Airlines. That attitude was uncalled for and inconsistent with the known limitations and risks he ran when travelling on
his employee pass.

If Riollano's remark that it appeared he was stuck in San Juan, "unless he wanted to go swimming" was provocative and may have set off the assault, she had been previously provoked by his angry complaints about not being boarded, and by his profane and insulting words about her airline (which he made to his wife and she to him, but within Riollano's hearing, and obviously intended for her ears). In short, she was fed up with his attitude and conduct, and though she should not have passed the remark about "swimming" and should have restrained her own anger she was first provoked by the grievant, by his unjustified complaints and uncooperativeness when he could not be boarded. Therefore, I find that the grievant was responsible for creating the atmosphere and circumstance that led to the remark about swimming. And that if the assault might not have occurred but for that remark, that remark would not have occurred but for the grievant's objectionable and insulting attitude. Therefore I cannot find that the grievant should be excused from the consequences of his assault on Riollano.

Moreover, the assault was actually two assaults. The first, when he hit or pushed her in the chest, and later when he chased her and pushed or threw her into the wall. If, arguendo, there is any excusable basis for the first, there is none for the second. Assuming that the first was spontaneous, uncontrollable physical reaction from anger and frustration, it should have ended there. The grievant had time to realize what he had done. He should have stopped the attack. Enough time had passed for him to back off, help Riollano from the ground, and apologize for his loss of
control. There was time for him to recognize his error, and to attempt to limit its severity. But he did not. As she ran away, instead of restraining himself then as I believe he could and should have done, he chased her. And when he caught her, again instead of restraining himself, he committed the second assault by thrusting her into the wall. That second assault, even under a scenario most favorable to the grievant, compounded and aggravated his mistakes, and nullifies any consideration of justification or mitigation.

Accordingly, the discharge of the grievant, a relatively short service employee, is upheld.

DATED: June 7, 1989

Eric J. Schmertz
Chairman
In the Matter of the Arbitration between:

Transport Workers Union  
Local 514

and

American Airlines, Inc.

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 discharge of R. Mobley for violation of Regulation 34 of the American Airlines Rules and Regulations, is upheld.

DATED: May 8, 1989

STATE OF New York  
COUNTY OF New York

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

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

I, Gary Drummon 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
Transport Workers Union
Local 514
and
American Airlines, Inc.

The stipulated issue is:

This dispute is hereby submitted to the System Board of Adjustment, American Airlines, Inc., pursuant to Article 32 of the Agreement covering Airline Mechanics, Plant Maintenance, Fleet Service and Ground Service employees for determination by the Board.

The name of the employee involved is R. Mobley, BNA.

An attempt has been made to obtain an adjustment of the dispute in the manner provided for in Article 31 of the Agreement and that the parties have failed in such manner to reach a satisfactory adjustment.

This dispute was brought about as a result of the Company terminating the employment of the Grievant for alleged violation of American Airlines Rules and Regulations, Rule 34.

The Union contends this action is unjust and unwarranted. Therefore, we request the Board grant the claim of the grievant to the extent requested.

A hearing was held in Nashville, Tennessee on April 18, 1989 at which time Mr. Mobley 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.
Mr. Gary Drummond served as the Union's member of the System Board of Adjustment. Mr. Michael Costello served as the Company's member on said Board, and the Undersigned was selected as the Neutral Referee. The Board's Oath was waived, and a stenographic record of the hearing was taken. The Board met in executive session following the hearing.

The grievant was discharge for violation of Regulation 34 of the Company's Regulations, the pertinent part of which reads:

"...Any action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal."

It is undisputed that the grievant entered a plea of guilty in the District Court for Tulsa County, Oklahoma, to the charge of unlawful cultivation of marijuana. That offense is a felony in Oklahoma. It is not disputed that the guilty plea constitutes a conviction of that criminal offense.

The Union does not challenge the propriety or validity of Company Regulation 34. Instead, it contends that the Regulation was misapplied in this case. It asserts that for a criminal offense committed off duty to be grounds for discharge, the Company must show that its reputation and/or business was damaged or that the conviction was well enough known to the public to cause those potential damages to the Company. It asserts here that no such damage or potential damage resulted. Additionally, the Union recognizes that discharge might be proper if the employee committed a crime that caused his fellow employees to refuse to work with him. But, points out the Union, there is no proof of any such problem in this case. Finally it contends that Regulation 34 was designed more to punish for theft and other serious work place offenses, than for off duty crimes, and has submitted a
number of arbitration decisions in which discharges for off duty crimes were reversed by arbitrators because the foregoing conditions were not shown.

The language of Regulation #34 does not make any of the distinctions raised by the Union. Rather, clearly and unequivocally it provides for dismissal for criminal offenses whether on duty or off duty. Nor does it provide for consideration of the impact on the Company's business, reputation, or the willingness or unwillingness of other employees to work with the offender. Nor does it make any distinctions between theft or any other criminal offenses.

It seems to me that these distinctions were well within the parties contemplation when Regulation 34 was promulgated. And had there been the intent to provide for those distinctions, the Regulations could and should have said so. And if unilaterally promulgated by the Company, the Union should have grieved its meaning and interpretation at the outset. The arbitration cases cited by the Union in which arbitrators recognized these distinctions and reversed discharges are matched by arbitration cases submitted by the Company in which the arbitrators upheld the discharges. So, I cannot find that by arbitral decision, the distinctions relied on by the Union are an implied part of Regulation 34. Thus the plain language of Regulation 34 stands as written without implied conditions or variations. And it is to the clear language of the contract and rules of conduct promulgated thereunder that the arbitrator is bound.

The Union is correct in stating that generally (in the absence of this unconditional Regulation) off duty offenses may not be grounds for discharge unless it is shown that the employer has
been damaged in reputation or business. But even if applicable here, that would not be sufficient to reverse the discharge, because the Union has overlooked one other factor in that circumstance.

It is well settled that the nature of off duty offense which has a reasonable relationship to the employee's job, and which reflects on the employer's ability or reliability on the job, is also grounds for discharge. Thus, for example, employees with jobs involving handling money or confidential information, or those with police or security functions, may be dismissed for off duty offenses or crimes of moral turpitude.

Here, the grievant is an airplane mechanic. He grew and cultivated marijuana. He admits that he used marijuana "until 1986." The relationship between possession and use of marijuana and the duties of an airline mechanic is one of incompatibility. The grievant asserts that he didn't use the marijuana he grew. He says he grew it "just to see how it grew." That explanation is not believable, especially since drying marijuana was also found in his house along with smoking paraphernalia. Though there is no direct evidence that the grievant used the marijuana, in view of his admitted past use and the other incriminating evidence of use, I cannot fault the Company from refusing to run the risks involved in keeping the grievant employed in what manifestly is a job requiring utmost care and competence, in the interest of safety.

So, even applying the Union's theories, the grievant's off duty conduct and conviction are so related to the essentials of his job and so clearly place in question the clarity of mind and the sharpness of reflexes required of an airline mechanic, as to
warrant his dismissal, even if Regulation 34 was not conclusive.

Now that I have upheld the propriety and enforceability of Regulation 34 in this proceeding, and have upheld the grievant's discharge, I wish to make a recommendation which in no way changes the Award, but which I leave to the Company to consider on a voluntary basis.

The grievant is a young man who has made a mistake. I believe him when he says that he did not know that growing marijuana was a felony in Oklahoma. I believe he is contrite and is rehabilitatable. I am not sure that his future employability should be so prejudiced by his discharge. Therefore I suggest that the Company consider reemploying him in some job less sensitive than that of mechanic, where safety of the aircraft is not a factor. I am sure that if that is done, he will have to be downgraded, probably to some starting job with routine duties. He should be given a chance to show, by drug testing or otherwise that he is a non-user or free of use, and after the passage of some time, to be decided by the Company, he may again at the sole option of the Company become eligible for return to the mechanic classification or some comparable job for which he is qualified.

DATE: May 8, 1989

Eric J. Schmertz
Neutral Referee
The stipulated issue is:

Did the District violate Article VIII F and H of the Agreement in denying the grievant, Marcia Smith, her request with regard to a physical education assignment at the Arlington High School north campus for the 1987-1988 school year? If so, what shall be the remedy under the Agreement?

A hearing was held on March 21, 1989 at the offices of the District, at which time Ms. Smith, hereinafter referred to as the "grievant," and representatives of the District and the Association 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.

While the grievant was working as a physical education teacher at the Arlington High School south campus, a vacancy in a position as a physical education teacher at the Arlington High School north campus occurred. The vacancy was posted, and the grievant requested that she be chosen to fill the vacancy, which, if granted, would have resulted in her move from the High School's south campus to its north campus.

The District denied her request on the three grounds. First, that though she was fully certified and qualified as a physical education teacher, the north campus job also contemplated teaching a section in health education, and she was not certified to teach health. Second, if her request was granted, another
teacher, probably from the south campus would have to travel between the campuses to teach the health section that the grievant was not certified to handle and that that would "conflict with instructional requirements and the best interests of the school system" within the meaning of Article VIII F of the Agreement. And third, that pursuant to rulings in a prior arbitration case, the grievant had no contractual right to request the change in teaching locale because teaching physical education on either or both campuses is or are synonymous assignments, and to move from one location to another would not be a "transfer" nor an available "vacancy" within the meaning of Article VIII E, F, G of the Agreement.

The prior arbitration award notwithstanding, I do not agree with the District's argument.

Section f of Article VIII reads:

Consideration of Requests for Transfer

In the consideration of requests for voluntary reassignment and/or transfer, the wishes of the individual teacher shall be honored to the extent that they do not conflict with the instructional requirements and best interests of the school system.

The "requests for voluntary reassignment and/or transfer" referred to therein, obviously refer, in part at least, to Section E Requests for Transfer, which reads:

Teachers desiring a change in grade, subject or assignment, or transfer to another building, or promotion to any position for which a vacancy has not been advertised, shall file a written statement of such desire by letter to the Superintendent and to the involved principals.

The District has stipulated that the grievant had shown
a "proper interest" in the vacancy. That means to me, that she made her request for the north campus job within the procedures of Section E.

It is also stipulated that the grievant had greater seniority than the person hired to fill the vacancy and also had greater experience teaching at the high school level. There is no evidence that the grievant was unwilling to assume voluntary responsibility of coaching, if requested.

Frankly, I fail to see how the District, or a prior arbitrator could not view the grievant's request at least as a "transfer to another building" (i.e. from the south campus to the north campus) within the meaning of Section E. And I fail to see how it would not be so, even if the two differently located campuses are part of the same high school. So I reject the District's argument that the grievant had no contractual right to bid on or request assignment to this vacancy.

With that finding, Sections F and G come into play. In view of the grievant's greater experience at the high school level; her certification as a physical education teacher and the absence of any evidence that she would not coach (though that is not contractually material since coaching is purely voluntary), the question narrows to whether her rejection because she was not certified to teach health courses, was proper.

I do not accept that explanation as justification for at least two reasons. First, I conclude that the requirement to teach health by the appointee to the north campus vacancy was essentially an after thought to justify the hiring of someone other than the grievant. The job vacancy was posted three times, on March 10, March 30 and May 15, 1987. All three postings were the
same. They noticed a "staff need" in "physical education" at the "High School." At no time did the posting note or require certification in health courses, or even that teaching a health course would be part of the job. Therefore, the grievant had the right to reasonably expect that the job vacancy was limited to teaching physical education, for which she was fully qualified.

Indeed, as it turned out, the person hired taught a health course for only a few weeks after the school year began, and thereafter was confined to physical education. So, I am not convinced that the health course assignment was an important or even planned activity for the person chosen to fill the vacancy, or a qualifying condition that should have barred the grievant from being selected.

Second, for that reason, and based on practices disclosed at the hearings, I am not persuaded that a "conflict with the instructional requirement" or with the "best interests of the school system" would result if one section of health education at the north campus was taught by a teacher who had to travel to that campus from elsewhere. The record discloses that regularly in other years teachers have "commuted" between campuses to teach health and home economic courses, and to coach.

In short, while it would be more convenient for the physical education teacher located at the north campus to teach health courses, if needed, any such assignment by a physical education teacher traveling from elsewhere to the north campus is consistent with the district's practices, and therefore does not rise to the level of a "conflict with the instructional requirements" or to
the level of being contrary to the "best interest of the school system," within the meaning and intent of Section F.

The same is true, in my view, for the District's assertion that any such arrangement would have caused the loss of one-half a period of "supervisory time."

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

The District violated Article VIII F and H of the Agreement in denying the grievant, Marcia Smith, her request with regard to a physical education assignment at the Arlington High School north campus for the 1987-1988 school year. She shall be given that physical education assignment at the north campus in the 1989-1990 school year, if the assignment still exists then.

DATED: April 5, 1989
STATE OF New York ) ss.:
COUNTY OF New York )

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

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

BOCES Staff Association

and

Board of Cooperative Educational Services of Rockland County

OPINION AND AWARD

Case #19 39 0253 87

The stipulated issue is:

Is the compensation of the grievants in the grievance filed on October 6, 1987 in violation of Article IV A, Article XXVIII, and Appendix B of the current agreement between Rockland BOCES and the BOCES Staff Association? If so what shall the remedy be?

Hearings were held on May 23, 1988, February 6 and 28th, 1989 at which time representatives of the above-named Association and Board appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs and reply briefs.

As I see it, the central question is whether the directive of the Rockland County Department of Personnel, effective September 1, 1987 reclassifying the Teacher Aide positions in the BOCES of Rockland County to Teaching Assistant positions carried with it an upgrading in salary under the collective bargaining agreement for the reclassified Aides from the Aides salary schedule to the Teaching Assistant salary schedule.

In the adjudicatory process, whether in arbitration, in court, or before administrative agencies, it is not infrequent that "things may appear to be within the letter of the law, but not within its intent or purpose."

I conclude that that is what is present in the instant
case. It would appear that when the Teacher Aides were found to be Teaching Assistants by the Department of Personnel, they would be entitled to pay as Teaching Assistants. But, upon careful review of the record before me, I find that the Personnel Department, and the State Education Department did not intend or order that result, and that the facts adduced herein do not support that result under the collective bargaining agreement.

In short, I find that the Personnel Department, as affirmed by the State Education Department ruled that the Teacher Aides should be Teaching Assistants within the meaning of the Education Law and Commissioner's Regulations, but that that ruling did not mean that the reclassified Aides had become Teaching Assistants, substantively, under the collective bargaining agreement for pay purposes.

Prior to the reclassification ruling, there were two relevant classifications in the BOCES bargaining unit and covered by the collective agreement - Teaching Assistants and Teacher Aides. Each had a separate and different salary schedule (Appendix B and Appendix C respectively). After the ruling the Board technically reclassified the aides as Teaching Assistants, and accorded them the rights and benefits of that classification under the Education Law and Commissioner's Regulations.

However, the Board did not change their salary schedule; did not change their duties; and, to "avoid confusion" with the prior incumbent teaching assistants gave them an "internal title" of "Teaching Assistant/Teacher Aide."

Absent a bilaterally negotiated agreement between the parties, I am persuaded that the reclassified Aides would be entitled to the higher contractual salary schedule of Teaching
Assistant if that was ordered by operation of law or if the duties of the Aides had so significantly changed since their salary schedule was last contractually negotiated as to bring them to the substantive level of Teaching Assistants under the contract. These conditions or circumstances are not present in the instant case.

The reclassification order of the Department of Personnel does not deal with salaries, makes no comparisons between the reclassified Aides and the then incumbent Teaching Assistants, and indeed, makes no reference to the collective bargaining agreement or to the two different salary schedules therein. Its audit "revealed that the incumbents of all these positions (i.e. the Teacher Aides) have been providing direct instructional services to students; most for greater than half of their workday. Such instructional services include but are not limited to working one-on-one with students in the reinforcement of education such as reading, math, sign language, etc."

That finding brought the Aides within the definition of Teaching Assistant under the Education Law and Commissioner's Regulations and within the jurisdiction of the Board of Education. That Description, with Duties reads:

[1] Description: A teaching assistant appointed by a board of education to provide under the general supervision of a licensed or certified teacher, direct instruction service to students.

[2] Duties: Teaching assistants assist teachers by performing duties such as:

(i) working with individual pupils or groups of pupils on special instructional projects;

(ii) providing the teacher with information about pupils which will assist the teacher in the development of appropriate learning experiences;

(iii) assisting pupils in the use of available instruction resources, and assisting
in the development of instruction materials;
(iv) utilizing their own special skills and abilities by assisting in instructional programs in such areas as: foreign languages, arts, crafts, music, and similar subjects; and 
(v) assisting in related instructional work as required.

What is significant, I believe, is that the duties which the Department of Personnel observed and which were the subject of its audit, were essentially the same duties which the Aides were performing when the current collective agreement was negotiated in 1986 and were the same duties for which the parties had agreed on a particular salary schedule. In other words, whether as Aides, or thereafter reclassified as Teaching Assistants, the pay schedule negotiated was applicable to and reflective of a set of duties and responsibilities that had not changed since they were evaluated for pay purposes. And that that salary schedule evaluated those duties and responsibilities different from and at a lesser rate than the salary schedule of the prior incumbent Teaching Assistants.

I am satisfied that as the salary schedule for Aides was bilaterally agreed to in contract negotiations; was adequate for the duties and responsibilities then required of the Aides, and in the absence of any significant changes and increases in those duties and responsibilities, that salary schedule must continue to obtain, regardless of the educational law reclassification by the Department of Personnel. Again, neither the reclassification ruling nor the facts of this case point to a different conclusion. Nor do they probatively accord professional parity between the former Aides and the incumbent Teaching Assistants.

Indeed, the decision of the Commissioner of Education of
the State Education Department of April 29, 1988 is both instruc-
tive and supportive of this finding. The decision was in response
to the Association's appeal to the Commissioner requesting that
the Board be directed to

"amend the appointments to reflect the re-
classification as Teaching Assistants,
with placement on the salary schedule for
Teaching Assistants and all other contrac-
tual benefits..."

In rejecting the Association's complaint over the "hybrid"
term "Teaching Assistant/Teacher Aide" and its complaint regard-
ing the Board's failure to increase the former aide's salaries,
the Commissioner said, in pertinent part:

"In light of respondent's recognition that
petitioners serve solely in the Teaching
Assistant tenure area and its assertion
that its designation of their positions as
Teaching Assistant/Teacher Aides for contract
interpretation purposes does not alter the
fact that they serve solely in the unclassified
service, that part of petitioners appeal which
contends that respondent has improperly attempted
to create a hybrid position in both the classi-
fied and unclassified service must be dismissed
as academic." (emphasis added) and,

"Both this appeal and the grievance filed by
the BOCES Staff Association request that re-
spondent pay petitioners pursuant to the sal-
ary schedule for Teaching Assistants contained
in the collective bargaining agreement. It
must be noted that petitioners do not allege
that their Union has failed in its duty of fair
representation in this matter. Under such cir-
cumstances, the petitioners request that respondent
be ordered to apply to them the contract terms
concerning Teaching Assistants must be dismissed." (emphasis added)

It is clear to me that the references to the "tenure area"
and "the unclassified service" and to the absence of an allegation
of a failure of the "duty of fair representation" and the dis-
missal of the Association's request for application of the contract
benefits, mean that the ruling of the Department of Personnel and
the appeal decision of the Commissioner were limited to the Education Law and to the Commissioner's Regulations, and had no intended effect on the collective bargaining agreement or the provisions thereof, and left the salary question and any job duty comparisons between the reclassified aides and the Teaching Assistants to collective bargaining.

In further support of this conclusion that the Department of Personnel ruling had no effect on the application of the collective agreement, the Commissioner cited, Matter of Board of Education v. Ambach 70 N.Y.2d 501, which in significant part held:

"...when an employer and a union enter into a collective bargaining agreement, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract...only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer..."

It is clear therefore, that the pay question posed in this arbitration case was not dealt with at all by the reclassification ordered by the Department of Personnel and that that order was not intended to accord the Aides, reclassified as Teaching Assistants, the same salary schedule as the prior incumbent Teaching Assistants.

Consequently, it is a matter solely under the contract and for first impression contract interpretation in this arbitration, without any direction or presumptions created by the reclassification order.

That leaves the posture of this arbitration case at the point where the parties mutually agreed on a salary schedule for a set of duties performed by the Aides, and still performed by the
Aides, now reclassified as Teaching Assistants, without any significant change or increase in those duties or responsibilities since that salary agreement, the reclassification notwithstanding. In that respect, one thing cited by the Commissioner is significant to me. He states that

"petitioners do not allege that their union has failed in its duty of fair representation..."

To me that means that when the Association negotiated a salary schedule for the duties and responsibilities of the Aides, most recently in the 1986 to 1990 contract, it did so in compliance with its duty of fair representation, and that therefore that salary schedule, albeit lower than what was negotiated for the then incumbent Teaching Assistants, fairly compensated them for their work as Aides and fairly recognized a difference in duties, responsibilities, skills, etc., between the Aides and the then incumbent Teaching Assistants. If the duties of the then Aides had changed or had risen to the level of Teaching Assistants under the contract that was the time to negotiate parity. As there is insufficient evidence in this record of any significant change in the duties and responsibilities of the reclassified Teaching Assistants (or Teaching Assistants/Teacher Aides) from what they did when classified as Aides, including some work and responsibility they take on in "crisis intervention" the contractual distinctions between the newly classified Teaching Assistants and the prior incumbent Teaching Assistants still obtain, as does their different salary schedules.

Consequently, for the two groups to be paid the same remains a matter for collective bargaining or must await a showing of significant substantive changes in duties and responsibilities.
from what existed when the present salary schedules were "fairly" negotiated, and is not, at present, something that can be changed by arbitration.

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

The compensation of the grievants in the grievance filed on October 6, 1987 is not in violation of Article IV A, Article XXVII and Appendix B of the current agreement between Rockland BOCES and the BOCES Staff Association.

DATED: July 11, 1989
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 Union No. 369 Utility Workers Union of America, AFL-CIO:

and

Boston Edison Company

AWARD

P&M Grievance No. 4019

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

The Company did not violate the collective bargaining agreement by its suspension or discharge of the grievant, Larry Ross.

DATED: February 10, 1990
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
Chairman

DATED: February 1990
STATE OF New York )
COUNTY OF New York )

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

Robert A. Scannell
Concurring
DATED: February 1990
STATE OF
COUNTY OF

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

Donald E. Wightman
Dissenting
In the Matter of the Arbitration:

between

Local Union No. 369 Utility Workers Union of America, AFL-CIO:

and

Boston Edison Company:

OPINION OF CHAIRMAN

P&M Grievance No. 4019

The stipulated issue is:

Did the Company violate the collective bargaining agreement by its suspension or discharge of the grievant, Larry Ross? If so, what shall be the remedy, if any?

A hearing was held on November 15, 1989 in Braintree, Massachusetts, at which time 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 tripartite Board of Arbitration in this matter consisted of Mr. Donald E. Wightman, Union designee; Mr. Robert A. Scannell, Company designee; and the Undersigned, as Chairman. The Oath of the Arbitrators was waived; a stenographic record of the hearing was taken; and both sides filed post-hearing briefs. The Board met in executive session on January 11, 1990.

The grievant is charged with "unauthorized absence from the work location and for violation of the Company's Drug and Alcohol Policy."

The following facts, which resulted in the grievant's suspension and discharge are not disputed.

On September 13, 1989 the grievant, a Grade a Splicer, was assigned to a job site in South Boston. About mid-morning, without permission, the grievant left that location, drove a Company
truck to the Company's Prudential Center offices, and withdrew some money from the Credit Union. He then drove the Company truck to a restaurant in Roxberry where he met an unidentified person and purchased two bags of heroin. Thereafter, inside the truck he ingested one or a portion of one of the bags of heroin by snorting it into his nostrils. At that point with white powder (later admitted by the grievant to be heroin) on his nose, he was apprehended by two Boston City Police officers, who had been maintaining a surveillance, and placed under arrest.

The relevant part of the Company's Drug and Alcohol Policy, promulgated in 1984 states:

"Freedom from drugs and alcohol is an essential part of this policy...The illegal use, sale, or possession of narcotics, drugs or controlled substances while on the job, or on Company property, is a dischargeable offense."

It was for violation of the foregoing Policy that the grievant was discharged, following his suspension for unauthorized absence from his work assignment.

The Union's case, and its defense of the grievant, is its assertion that the Drug and Alcohol Policy was unreasonable in this case because its application to the grievant constituted disparate and uneven discipline when compared to other offending employees similarly situated. And that therefore because of its discriminatory application to the grievant, his discharge should be voided.

I have no quarrel with the Company's policy of discharging an employee who possesses or uses a controlled or illegal drug on Company property during working hours. Clearly, the Company has the right to protect its operations, to insure the safety of its employees and the public it serves, from the obvious and inherent dangers of drug use or drug trafficking on the job, especially since employees regularly work on high voltage cables, in other dangerous settings, including at heights, and in the operation of Company vehicles. Indisputedly, mistakes can be fatal to the em-
ployee who has used drugs, to fellow employees in the work area, and of potentially serious inconvenience from service disruptions, if not danger, to the community and the citizenry.

The only real question in this case, and the Union's challenge to the instant application of the Drug and Alcohol Policy is whether the Company legitimately can make a distinction, for discipline purposes, between employees, like the grievant, who are found for the first time to possess and/or use drugs on the Company property during working hours, and other employees who for the first time are found under the influence of a drug and unfit for duty on the property, during working hours, but who have not been found or where it cannot be determined that they ingested the drug and/or brought it on to the property.

As I understand the application of the Drug and Alcohol Policy, and as expressed in the record in this case, and reiterated at the executive session of the Board of Arbitration, employees who fall into the latter group are not discharged, but given a chance at rehabilitation by mandatory referral to the Company's rehabilitation program, with its procedures of surveillance and regular drug testing. But employees in the former group, as in the instant case with the grievant, are discharged.

Though under the Policy, the Company has reserved the right to discharge in either or both circumstances, it concedes that as a matter of practice, it has used its rehabilitation program for first offenders in the latter category, and has not fired them until and unless they fail to respond to or follow the rehabilitation program.

The Company distinguishes between the two situations as follows; absent evidence to the contrary, it must assume than an employee found under the influence or unfit for duty, possessed and used the drug off the property and outside of working hours whereas the grievant, and others in a similar setting, possessed the drug and used it on the property and during working hours. To the Company's mind, the latter set of facts constitute a much
more serious and egregious violation. Additionally, the Company argues, that possession on the property opens the prospect for sale or trafficking on the property, and that that possibility absent from those merely found unfit and/or under the influence, is potentially most serious, justifying a greater disciplinary penalty. In short, the Company contends that the two situations are markedly different and that employees involved in one or the other are not similarly situated and that equal discipline is not required.

The Union views it differently. It asserts that there is no significant difference between the two categories. It argues that an employee under the influence of a drug or unfit for duty because of drug use had to have "possessed the drug" and indeed still does (in his system), and obviously "used" the drug in order for him to become unfit and under its influence. Impliedly, it asserts that the Company should not infer that those unfit possessed and/or used the drug off the property, when on property use and possession is equally possible. Or at least that inference should not be the basis for such dramatically different discipline - discharge on one hand or a chance at rehabilitation on the other. Additionally, and also implicit if not explicit in the Union's case, is the position that under either or both set of facts, the impact on the job is the same. An employee who is simply unfit, and an employee who possesses and/or uses the drug on the property both endanger the work and operations of the Company, and both place themselves, fellow employees and the public at the same risk. So that again, there should not be different penalties or responses. The Union also points out that the Company's fear of drug sales on the property is mere speculation; not part of the charge against the grievant in this case; and absent any evidence of that offense, or its practice or realistic potential, it should not be part of the reasons for the discharge penalty given the grievant.

There are parts of the Union's argument with which I agree. If the sole issue is safety, I would agree with the Union that
employees in both categories are similarly situated. There is no question that the Company has the right to be primarily concerned with safety. And if an employee in either category is a safety risk of roughly equal magnitude (and I believe they are) they should be treated similarly. Clearly any such finding and consequence would create a very serious dilemma. To be evenhanded, the Company would have to discharge both or offer rehabilitation to both. The former would effectively undermine or destroy the Company's ongoing rehabilitation program with which I have been favorably impressed over the years, which represents an enlightened approach to drug use and which I think neither the Company nor the Union would like to see discontinued or curtailed. The latter, namely to provide first offense rehabilitation for employees in both groups (and apparently what the Union seeks in this case), would, though progressive and humanitarian, accord a one time "license" to employees to possess and/or use drugs on the property, by confronting them with the rehabilitation program and not traditional discipline. It seems to me that neither consequence would be jointly acceptable.

However, in the instant case there is another important factor that does distinguish the grievant from an employee found only to be unfit due to drug use. And I conclude that that distinction is a credible difference which, in this case at least, separates the grievant from other employees whom the Union asserts are similar. The difference is that the grievant committed a crime on and with the use of Company property (the truck) when he bought and thereafter ingested the heroin, again in the truck during hours that he should have been at work. I conclude that the Company and any employer has the right to protect itself against the commission of crimes on its property, and it has that right independent and regardless of what the police and the authorities do to the offender. So the ultimate disposition of the criminal charges against the grievant (which was probation and a fine) does not pre-empt the Company's right to punish for an act that is not
just violative of a work rule, but also an acknowledged crime.

I cannot find that dismissal is too harsh or inappropriate as the penalty for that offense and as a deterrent to any other criminal activity on the property even if the arresting officer thought a lesser penalty would be enough. This differentiates between the grievant and others who are found unfit and offered a second chance through a rehabilitation program. Even if, as to an employee in the latter category, it can be inferred possibly, as the Union claims, that he too possessed and used drugs on the property, it cannot be inferred that any such employee committed a crime on Company property during working hours. The first inference may be reasonable or logical; the second inference would be manifestly contrary to our system of criminal due process and burden of proof.

Finally, I have not lost sight of the Union's argument that the grievant's purchase and use of the heroin was a traumatic reaction to a fatal accident in a manhole in which the grievant had worked but left just before the explosion, and which killed one of his friends. I do not discount or reject that explanation and have no grounds to disbelieve it. Rather, in view of the legitimate Company rule, and the crime committed, I do not think that I have contractual authority to consider that in mitigation, or reduce or set aside the penalty for that reason. Consideration of the grievant's emotional state, and whether in fact his purchase and use of heroin was proximately, exclusively or even primarily related to the manhole explosion and his friends death, is a matter for the Company's consideration, especially as that connection was not clearly and convincingly established in the record before me. I do not disagree with the Union that the grievant needs help with his drug problem. It would magnanimous for the Company to offer him that help, but to order it in lieu of the discipline the Company chose to impose, is to substitute my judgment for a proper managerial decision, and hence is beyond my authority.
DATED: February 10, 1990

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
Local Union No. 369, Utility Workers Union of America and
Boston Edison Company

AWARD
P&M Grievance #3838

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

[1] The discharge of Peter Frankenberger is reduced to a disciplinary suspension.

[2] He shall have one final chance to forthwith make and maintain his attendance at a satisfactory level.

[3] He shall be reinstated without back pay, and warned that a failure to maintain a satisfactory record of attendance will be cause for his summary dismissal.

DATED: June 13, 1989
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.

DATED: June 1989
STATE OF
COUNTY OF

I, Robert B. Ambler 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: June 10, 1989
STATE OF
COUNTY OF

I, Barbara C. Foulsham do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration:

between

Local Union No. 369, Utility Workers Union of America

and

Boston Edison Company

OPINION OF CHAIRMAN

P&M Grievance #3838

The stipulated issue is:

Did the Company violate the collective bargaining agreement by its termination of the grievant, Peter Frankenberger on September 16, 1988? If so, what shall be the remedy, if any?

A hearing was held on January 24, 1989 in Braintree, Massachusetts, at which time the grievant and representatives of the above-named Union and Company appeared. Mr. Robert B. Ambler served as the Union representative on the Board of Arbitration. Ms. Barbara C. Foulsham served as the Company's representative on said Board, and the Undersigned served as Chairman. The Oath of the Board of Arbitration was waived, as was its executive session. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic of the hearing was taken, and both sides filed post-hearing briefs.

The grievant was discharged for an unsatisfactory record of absenteeism and tardiness, culminating in his absence from work, from August 26, 1988 to September 7, 1988. After a call from the grievant on August 26th that he was "sick" without further explanation, the Company heard nothing further from him and was unable to reach him. On September 7th, he was sent a termination notice. Subsequently, the Company learned that for that latter period the grievant was voluntarily hospitalized for alcohol detoxification.
and rehabilitation. However, it is the Company's position that because of his prior record and short service (he was hired on August 11, 1986) his hospitalization and efforts at alcohol treatment are immaterial, and that he would have been terminated nevertheless even if the Company knew of his whereabouts and the purpose of the last period of absence.

The grievant's absentee and lateness record, prior to his discharge, was the subject of the following disciplinary measures:

- A Written Reprimand on April 17, 1987 for "abuse of sick plan;"
- A Written Reprimand on November 20, 1987 for "tardiness;"
- A Written Reprimand on May 18, 1988 for "Tardiness;"
- A Written Reprimand on July 28, 1988 for "Tardiness;"
- A Suspension and Final Warning on July 25, 1988 for "Tardiness."

As none of the foregoing were grieved or reversed by arbitration, they are now incontestible, and stand as proper progressive discipline imposed for the violations noted. Accordingly, the propriety of his disciplinary record up to the last period of absence is not disputable in this proceeding.

Also, the Company contends that he received many verbal warnings and counseling regarding his attendance record.

The Union's position is that the grievant's attendance record is not so bad, if certain absences due to bona fide medical conditions are considered; that the remaining absences did not exceed or significantly exceed the allowed sick days under the contract; that many of his absences and latenesses were due to an acknowledged alcohol problem, and that because the last period from August 26 to September 7 was for alcohol rehabilitation, pursuant to the
Company's Employee Assistance Program, his discharge is violative of the rehabilitation purpose and confidentiality of that Program, and also violative of the Massachusetts Handicap Discrimination Law.

I conclude that I do not have authority or jurisdictional competence under the contract to interpret and/or apply the Massachusetts Handicap Discrimination Law. My authority is confined to the contract and therefore I leave the meaning and application of that external law to the forums that have jurisdiction, with the rights of the parties on that point expressly reserved.

The Company is correct in its assertion that an employee with a chronically unsatisfactory attendance record need not be continued in employment even if the absences and latenesses are due to reasons beyond the employee's fault or control. An employer is entitled to rely on regular and prompt attendance by its employees and is not expected to run its business or services with employees who cannot meet that fundamental requirement.

The Company is also correct when it argues that its employee assistance program or any program for alcohol rehabilitation or for rehabilitation of any other employee personal problem is not a sanctuary from discipline. Clearly the assistance program is for assistance with the particular problem involved, but cannot be a substitute for or a waiver of the employer's unconditional right to expect good and prompt attendance and to sever from its payroll employees who build up an unsatisfactory record, whether or not in counseling or in the assistance program. In short, it is hoped that the assistance program will help alleviate the difficulties resulting in poor attendance, but if it fails or is resorted to late in the development of the poor record, discipline
including discharge as the final step in the application of progressive discipline may go forward.

However, there is one material factor in the instant situation that causes me to conclude that the penalty of discharge is slightly (and only slightly) premature.

The foregoing well settled rules, and my affirmation of the Company's citation of those rules, are based on the circumstance where the employee's poor attendance record is "chronic." That is where not only has it gone on unimproved for an extended period of time, but there is no reasonable prospect for or evidence of any probable improvement in the future.

The facts surrounding the grievant's record do not yet meet that "chronic" definition. During the grievant's first year of employment, twenty six days of absence were due to a "twisted knee" that was placed in a brace, incapacitating him from working. In 1988, the grievant was absent four days for surgical removal of a cyst from his arm. Both conditions were medically documented. Both were apparently corrected and no longer represent medical problems which will recur or which can be used to identify a "chronic" reason for poor attendance.

The other absences, including the last period which triggered his discharge, were apparently due to alcohol and possibly drug abuse. This reason may well be "chronic" as to duration and prognosis. Yet, the grievant has gone through a detoxification and rehabilitation program and unless one is prepared to reject such programs as useless, it cannot be said at this point that he has not solved or significantly improved his problem with alcohol and/or drugs. If he has, and the results are not yet in, the reason for most of his poor attendance record may have abated. His knee is repaired. His cyst removed and he has undertaken a bona fide
alcohol (and drug) rehabilitation program in a hospital. In short, I am not clearly and convincingly persuaded that the grievant's poor attendance record is "chronic" and not reasonably subject to improvement to a satisfactory level in the near future. Absent a conclusion that his problems are "chronic" I find that he should be given one final chance to show that his difficulties have been solved or are under control and that henceforth his attendance record can and will be satisfactory.

Under these circumstances, I deem that the appropriate remedy shall be to put the grievant again on final warning and to leave him at the last step in the chain of progressive discipline by imposing a lengthy disciplinary suspension in place of his discharge. He is expressly warned that unless his attendance record becomes satisfactory forthwith, and remains so, the Company will have cause to discharge him summarily.

DATED: June 13, 1989

[Signature]
Eric J. Schmertz
Chairman
The stipulated issue is:

Was the discharge of Clarence Grant on June 3, 1988 for just cause? If not what shall be the remedy?

A hearing was held on August 18, 1989 at which time Mr. Grant, 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 parties filed post-hearing briefs.

The grievant was discharged for being out of the plant for an extended period of time on May 27-28, 1988 during regular working hours without permission and while punched in. The Company charges him with falsification of records and fraudulent receipt of wages for time not worked.

The grievant and the Union on his behalf claim that he was out of the plant for only a total of about five minutes, and only into the plant parking lot to first give his wife the keys to his car at about 11:15 PM and later at about 1 AM to retrieve the keys from her, and that he could not find his foreman those short times to obtain official permission.
The weight of the substantial and credible evidence is contrary to the grievant's claim. In my view there is sufficient evidence to conclude that the grievant was out of the plant, and off Company property for a period from about 11:30 PM to 1:30 AM.

The grievant's shift that night was from 3:30 PM on May 27th, to 5 AM on May 28th. His foreman, Michael J. Marcikonis, testified that at about 11:30 PM he did not see the grievant working. At about 12:02 AM the foreman went out of the plant to give a layoff slip to another employee, and took that opportunity to casually look for the grievant's car and didn't see it in the parking lot. Thereafter, at about 12:25 the foreman returned to the parking lot and made a careful search for the grievant's car and did not find it in the lot.

Then the foreman returned to the plant and undertook comprehensive searches for the grievant, first at about 12:30 AM and and again at 12:50 AM and thereafter at about 1:05 AM. The foreman looked throughout the areas where the grievant was assigned to work and asked fellow employees if they had seen him. The grievant could not be found, nor could any one advise on whether they saw him or where he was.

Thereafter at about 1:20 AM the foreman again looked for the grievant's car in the parking lot and found it still missing.

The grievant, according to the foreman's testimony was first seen back at work at about 1:45 AM.

It is undiscputes that during the foregoing time, the grievant was still punched in "on the clock" (except for an authorized lunch period at a different time that is irrelevant to this case).
I accept as accurate the foregoing testimony of the foreman. However, limited to the foregoing the Company's case might be too circumstantial to be conclusive. But the Company's case is not so limited.

There is the direct testimony of the plant guard who, alerted by the foreman to look out for the grievant, testified that at 1:28 AM the grievant "drove into the lot and parked his car at the #2 spot, about 20-25 feet from the ground house." The guard stated that she then confronted the grievant for identification. Stating that he "left his badge inside," the grievant however identified himself as "Grant." At the hearing the guard identified the grievant as the same person.

I find no reason why the guard should not testify truthfully and accurately. She was certain that the grievant drove into the lot from the outside. That being so, I cannot believe the grievant's explanation and must conclude that he was out of the plant and off the Company property. It is well settled that circumstantial evidence if of sufficient quantity, connection and credibility, may be used to prove the disciplinary offense charged. Here, the various circumstances regarding the foreman's inability to find the grievant in the plant after several searches, and the discerned absence of his car from the parking lot, albeit circumstantial, become probative and persuasive evidence when joined by the direct and eyewitness testimony of the guard.

I conclude therefore that the Company has met its burden of showing that the grievant was improperly out of the plant for at least the extended period of time alleged.
I do not quarrel with the penalty of discharge. With the charges proved, and with evidence that the Company has consistently imposed the discharge penalty for similar offenses by other employees in the past, I cannot find the penalty of discharge too severe.

The Company is correct in characterizing the offence as a falsification of the time card record and the taking of pay for time not worked. And even if I thought a lesser penalty might be adequate, I am not permitted to substitute my judgment for the judgment of the Company when the penalty it did impose is not excessive or improper.

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 Clarence Grant on June 3, 1988 was for just cause.

DATED: October 3, 1989
STATE OF New York ) ss.:
COUNTY OF New York )

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

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

Local No. 270, Utility Workers Union of America, AFL-CIO

and

The Cleveland Electric Illuminating Company

AWARD

Case No. 53 300 0097 88

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

Under the contract, for two hours of the total work performed by Edward G. Cummins on September 30 and October 1, 1987, he shall be paid at the Plant Maintenance Mechanic A rate.

DATED: February 21, 1989
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
Chairman

DATED:
STATE OF
COUNTY OF

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

Henry J. Reffner
(concurring)
(dissenting)

DATED:
STATE OF
COUNTY OF

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

John E. Paganie
(concurring)
(dissenting)
In accordance with the arbitration provisions of the collective bargaining agreement between the above-named Union and Company, the Undersigned was selected as the Chairman of a tripartite Board of Arbitration, to decide, with the Union and Company designees to said Board, the following stipulated issue:

Whether, under the contract between the parties Edward G. Cummins is entitled to receive a higher classification pay for work performed by him on the dates of September 30 and October 1, 1987.

A hearing was held at the offices of the American Arbitration Association in Cleveland, Ohio on October 18, 1988, at which time Mr. Cummins, hereinafter referred to as the "grievant" and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators was waived. A stenographic record of the hearing was taken and the parties filed post-hearing briefs. Mr. John E. Paganie served as the Company designated arbitrator and Mr. Henry J. Reffner served as the Union designated arbitrator.

Based on the record before me, including prior arbitration decisions which I find persuasive and therefore precedential, I conclude that the bare assignment of "locking and tagging" involved in this case is within the grievant's Mechanic B classification and performance of that work does not entitle him to Mechanic A pay.
However, though the foregoing has been well settled in this collective bargaining relationship by prior arbitration decisions, I find that it is based on circumstances where and when the safety work preliminary to "locking and tagging," such as disconnecting the electrical systems, the mechanical systems, and presumably the fuel and water connections has not only been done by other personnel such as a roving operator and an electrician, but the assignment of that safety work to that personnel has been effectively arranged by supervision, and the work of those craftsmen is not subject to direction and supervision by the Mechanic B.

But the foregoing conditions did not obtain fully in the instant situation.

Supervisor Greg Schenker, who gave the grievant the disputed work assignment on the days in question, testified that he had arranged for a roving operator and an electrician to do the preliminary safety work and to deactivate the equipment so that the grievant could lock and tag it, and thereafter perform prescribed mechanical repairs. However, he was surprised and could not explain why it became necessary for the grievant "to go to the office to find people to do the preliminary work."

It is that particular phase of the work performed by the grievant that I conclude was not expected of him, which should have been effectuated by supervision but which the grievant did preliminary to being able to tag and lock the equipment as safe, that I find was beyond the B classification and within the A classification.

The following exchange between the Chairman and Supervisor Schenker at the hearing significantly establishes to my mind that this phase of the work was beyond the grievant's Mechanic B assignment on those days.
ARBITRATOR SCHMERTZ: When you gave Mr. Cummins the work order, did you anticipate that he would have to lock and tag anything?

THE WITNESS: Yes, he would have to hang his locks and tags to make the equipment safe.

ARBITRATOR SCHMERTZ: You anticipated that as part of his assignment?

THE WITNESS: Yes.

ARBITRATOR SCHMERTZ: Did you anticipate he would have to go into whatever the office was to find people to do preliminary work before he hung his tags and locks?

THE WITNESS: No, I didn't.

It is this "arranging" that I find falls more within Section A 7 of the Mechanic A Job Specifications, reading, inter alia

"...arranging with supervisors and Plant Watch Engineer for clearance and removal from service of plant electrical equipment; locking off or tagging off of plant equipment; removing "hold off" tags when equipment is ready for service."

than within Section A 10 of the Mechanic B Job Specifications, as relied on by the Company, and which reads:

"Conducting the work so that assigned employees are safeguarded at all times."

However, after the grievant located the personnel to do the preliminary safety work, I am not persuaded that the grievant "direct(ed) their duties" or the "duties of up to three other employees" within the meaning and intent of the Mechanic A Job Specifications. Indeed, absent countervailing evidence, the grievant is the best judge of how much time he spent on Mechanic A work, and what that work was. He testified that over the two days in question he spent a total of "two hours" on work within the Mechanic A classification. He also testified that his claim in his grievance and in this arbitration is for "two hours pay at the A rate."

From this testimony together with my other findings of fact, I conclude that the two hours that the grievant referred to
was the time he spent in seeking and arranging for personnel like a roving operator and electrician and reversing the process at the conclusion of the work. By limiting the time to two hours he is conceding that he did not direct that personnel in the performance of their duties as would a Mechanic A. In short, his claim is limited to handling the preliminary and concluding "arrangements" that should have been done, or done more effectively by supervision, or could have been done properly by a Mechanic A under that Job Specification.

Also, I accept as reasonable, as the best evidence, and as accurate, his time estimate of two hours for that work, for both days. I do not find it improper to include the time he had to wait until the operator and electrician became available, and to equally apportion the time as one hour for each day.

With that testimony and limited claim, I reject the Union's claim on behalf of the grievant for sixteen hours of pay at the A rate.

Also, in further support of my conclusion that he worked in the Mechanic A classification for two hours, and that his claim limited to two hours of pay at the A rate, is his unrefuted testimony that on other occasions, under similar circumstances, he was paid both at the higher rate and only for the time spent on a specific higher rated job duty.

Article IX Section 4 of the contract reads in pertinent part:

"An employee assigned temporarily and for one hour or more in any one day to work of higher classification shall be paid the appropriate rate for such higher classification during such temporary assignment."

The facts of this case fall substantially within the language and meaning of that contract clause.
Accordingly, for two hours of the work performed by the grievant on September 30 and October 1, 1987, he is entitled to and should be paid at the Mechanic A rate.

DATED: February 21, 1989

[Signature]
Eric J. Schmertz
Chairman
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:
between:
Local 1-2, AFL-CIO
and:
Consolidated Edison Co., Inc.

There are two threshold procedural issues which require rulings by the Chairman of the Board of Arbitration. They are the scope of the issue(s) submitted to arbitration, and whether that or those issues are arbitrable.

Hearings were held on February 27 and March 8, 1989 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 Union challenges the right of the Company to require, involuntarily, membership and service on the fire brigade by employees classified as chemical technicians and nuclear plant operators, and challenges the right of the Company to require those employees (and apparently any member of the fire brigade) to take a stress test.

The Company claims that the sole issue in dispute and the issue mutually submitted to arbitration is the challenge to its requirement that fire brigade members take a stress test.

Also, it is the Company’s position that the issue or issues, whether confined to its single issue or encompassing both as advanced by the Union is or are not arbitrable.

Let me deal with the arbitrability question first. It is clear that I have the contractual authority to do so. Article
XII Section 48 (3) reads:

If a question arises as to whether or not a particular claim of grievance is a grievance as defined in this Article, the question may be taken up through the grievance procedures herein provided for, and may be submitted to arbitration if need be, at the instance of either party (emphasis added).

The contractual definition of a grievance and particularly its exclusions are dispositive of the Company's claim of non-arbitrability with regard to the one issue both sides agree has been properly submitted to arbitration, namely the stress test for fire brigade members.

Article XII Section 48 defines a grievance

...as any controversy, dispute or difference arising out of the meaning or application of this contract or affecting the relationship between any employee or the Local Union and the Company.

Paragraph (2) thereof sets forth the exclusions. It states:

Changes in general business practice, the manner of operating units of the business, the control and direction of working forces, the selection of personnel subject, however to the specific provisions or to seniority and for the various preferences, the performance of the Company's public obligations as a regular public utility, and other business and operating questions, shall not give rise to a grievance of employees or of the Local Union. (emphasis added).

There is no dispute that the Company is subject to and must comply with the Rules and Regulations of the Nuclear Regulatory Commission. I deem such compliance to fall within the definition of "performance of the Company's public obligations as a regulated public utility" within the meaning of the aforesaid paragraph (2).

Part 50 App. R, Section III (Specific Requirement) Paragraph H. of the regulations of the Nuclear Regulatory Commission
reads in pertinent part:

Fire Brigade. A site fire brigade trained and equipped for fire fighting shall be established to ensure adequate manual fire fighting capability for all areas of the plant containing structures, systems, or components important to safety. The fire brigade shall be at least five members on each shift. The brigade leader and at least two brigade members shall have sufficient training in or knowledge of plant safety-related systems to understand the effects of fire and fire suppressants on safety shutdown capability. The qualification of fire brigade members shall include an annual physical examination to determine their ability to perform strenuous fire fighting activities...(emphasis added).

I am satisfied that a physical examination to determine ability to perform strenuous activities can be properly in the form of a "stress test."

As the Company is bound by these Rules, as the Rules or Regulations are Public Law, and as the Rule is mandatory (it uses the word "shall" in ordering the establishment of a fire brigade and the physical examination for ability to perform strenuous activities), I must find that compliance therewith is a "public obligation" within the meaning of those items in Paragraph (2) of Article XII Section 48 which may not be in the subject of a grievance, and which per force may not be arbitratable.

Put another way, the Company's public and statutory duty to test fire brigade members for physical stress capability is expressly excluded under the contract from the grievance procedure and from arbitration.

Therefore, the Union's general challenge to the Company's administration of a stress test to members of the fire brigade which the Union has made an issue in this proceeding, is not arbitrable.
However, the Union may grieve and arbitrate the content of these tests if it believes they are unrelated to the duties of the fire brigade and therefore substantively improper and/or may, on a case by case basis, challenge the validity and/or propriety of how the test was administered and/or the accuracy of its results.

But I do find arbitrable, if it is part of the issue properly submitted to arbitration, the Union's challenge to the involuntary assignment to the fire brigade of employees in the classifications of chemical technician and nuclear plant operators. In doing so, I make no determination at this time on the dispute between the parties over whether in fact those classified employees previously served on the fire brigade, voluntarily or involuntarily. That is a matter on the merits and not relevant to arbitrability.

The NRC only requires the Company to establish a fire brigade of "at least five members each shift." It does not identify or determine which employees and what classifications are eligible. Clearly, under the NRC rules, the fire brigade can be made up of employees of any or various classifications, separately or collectively, and still be in compliance. Therefore the Union's claim that the employees classified as chemical technicians and nuclear plant operators should not be required to be members of the brigade because their job duties do not provide for or contemplate that service, and because, as alleged, historically they have served only voluntarily, is a dispute that falls within that part of the definition of a grievance that makes grievable (and arbitrable)

"disputes or differences...affecting the relationship between any employee...and the Company."
What remains is the question of whether the Union's challenge to the assignment of certain classified employees to the fire brigade was "grieved" and submitted to arbitration in this case. And if so, with what specificity.

In the absence of a jointly signed submission to arbitration, the best evidence of the scope of an issue(s) is what was processed through and bilaterally discussed in the steps of the grievance procedure before referral to arbitration. That is not helpful here, because following oral discussions between representatives of the parties when the dispute(s) arose, there was no subsequent grievance step employed, as the parties agreed instead to go right to arbitration. The evidence and testimony of the oral discussions are sharply conflicting and inconclusive one way or the other. So those discussions, at least the reports of them in this arbitration, are not helpful or determinative.

That leaves the documents relating to the dispute(s) involved in this case and to what was referred to arbitration. I disagree with the Company's view that those documents are clear and supportive of the Company's position. The Union's telegram of August 9, 1988, from Mr. Henry Helmer its then Business Manager to Thomas Galvin, the Company's Vice President of Industrial Relations is reasonably susceptible to two interpretations. It can be of course interpreted as referring only the stress test dispute to arbitration. But by "demand(ing) immediate arbitration of the outstanding issues concerning the right of Consolidated Edison to require all employees who function as the fire brigade...to take a stress test..." (underscored supplied) the plural word "issues" could reasonably have been intended to encompass the disagreements over the manning of the brigade as well as the stress test.
The Company's letter to the Arbitration Association, commencing the arbitration process, was, I am sure, submitted in good faith and represented what the Company thought was to be arbitrated. But it was unilateral and self-servicing. And I do not think that the Union had to object to its short-hand caption to preserve its rights over the issue to be arbitrated. It is well settled that this type of correspondence is not like "common law pleadings" and not technically prejudicial in the framing of the issue.

More significant, to my mind, is the memorandum of August 3, 1988 from a group of Chemical Technicians to Mr. S. Brain, the Company's Nuclear Power Vice President. That memorandum objected to the Company's "intention to impose additional fire brigade requirements on the Nuclear Production Technicians in the Chemistry Section." I consider it immaterial that this objection was not put on a traditional grievance form or cast in grievance language. What is material is that it represents a disagreement between those employees and the Company over involuntary assignment to the fire brigade and put in issue at that time and for this case the question of whether those employees could be required to be part of the brigade. I am satisfied that the Company was thereby put on notice that those employees were objecting to the assignments or planned assignments. And, in view of the mutually agreed to waiver of the grievance procedure, those objections were and remain part of the dispute in the instant case. That there may be other and subsequent written and possibly duplicate grievances filed by the Union covering these grievances do not, standing alone, oust the complaints of the classified employees referred to in the August 3rd memorandum from the instant case.
I shall assume, because the record is not clear, that the classification of the employees in that memorandum, referred to therein as "Senior Nuclear Production Technicians" or as "Watch Chemist" or as "Chemist" are the Chemical Technicians on whose behalf the Union is grieving and arbitrating in this case. On that basis I find that the issue includes that and those grievances. In short, what remains in dispute for further arbitration on the merits is the question of whether the Company can involuntarily assign Chemical Technicians to the fire brigade.

Finally, if the memorandum of August 3, 1988 expressly covers by the classifications referred to therein, the "Nuclear Plant Operators," then the remaining issue for arbitration on the merits also includes the question of whether the Company can involuntarily assign nuclear plant operators to the fire brigade. But, if the classifications in the August 3, 1988 memorandum do not cover the nuclear plant operators, then, because there is insufficient evidence showing any "grievance" or complaint, on their behalf, those operators are not part of this arbitration and their grievances or objections regarding assignment to the fire brigade are not within the scope of the issue to be arbitrated in this case.

DATED: June 27, 1989

Eric J. Schmertz
Chairman
The stipulated issue is:

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

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

Considering the Company's economic condition (including its present share of the yogurt market as compared to the past, and increased costs, in significant part from its purchase by two successive owners in 1959 and 1981 respectively), its competitive position in relation to other yogurt companies, its present scale of wages and pension benefits as compared to its other employees at other locations, and as compared to others in the industry and related industries, the cost of living increases during the contract period, the relation of wage increases as compared to cost of living increases over the last several years, and all other relevant data and evidence submitted in this case, I conclude that:

1. The covered employees should not suffer a decrease in purchasing power or relative position vis a vis the cost of living by any wage increase that is less than the increased cost of living for the relevant measuring period.
2. While the wages of the covered employees should reflect the increased competition the Company faces for a share of the yogurt market and any decreased profitability resulting therefrom, the employees should not bear the burden of increased debt or debt service arising from the sale of the Company to a new and different owner or from increased debts from any "leveraged buyouts" related thereto.

3. The Company's economic position and "ability to pay" does not justify a continuation of wage increases of "lump sums" that are not applied to the basic wage rates. I find no persuasive basis for the argument that because the covered employees now earn wages greater than competitors (and others employed by the Company at other locations) those other employees and their employers should first "catch up" before the covered employees are granted increases in wage rates.

I do not find the Company to be in such an adverse competitive or economic position that the superior wage benefits obtained by the covered employees through collective bargaining should be eroded relative to others, by wage increases in lump sums rather than increased wage rates.

4. The final positions of the parties as set forth in their briefs are too far apart and unsupported by the evidence for either to be granted. The Company's last position, structured in lump sums, is rejected as in appropriate and inadequate for the reasons set forth in paragraphs 1, 2 and 3 above. Conversely, the Union's last position is too large a demand, considering all the foregoing findings, and in excess of what the evidence and applicable patterns would justify.

5. The pattern established by my earlier Award on wage and pension benefits for the clerical employees, is a pattern that is consistent with and justifiably based on the evidence in this case and the realities both sides must face. With the exception of some merit increases, the dollar wage increases in that Award are increases in the rates, and on the average represent a 5% wage increase in each of the three years of the contract.

6. The present relative wage position of each covered employee with each other in the respective classifications, and among the
classifications, should be maintained, and therefore the wage increase should be in a percentage form across the board, rather than in a fixed dollar amount. Also, the wage increases should take into some consideration the additional merit increases I accorded two clerical employees. But this should be tempered by a recognition that the Company should not be unduly prejudiced by those merit grants.

7. There is inadequate evidence to differentiate the pension improvement case for the covered employees from the case for clerical employees. As I declined to improve pension benefits for the latter, the same shall apply to the covered production and distribution employees.

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 wage rates of the covered production and distribution employees shall be increased by 5.5 per cent effective April 1, 1988, an additional 5.5 per cent effective April 1, 1989, and an additional 5.5 per cent effective April 1, 1990.

There shall be no changes in the pension benefits.

DATED: January 23, 1989
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
Friedwald House HRF
and
LOCAL 144 S.E.I.U.

In accordance with a jointly signed letter dated June 20, 1989 (the "Friedwald side letter") and the Local 144 - Southern NY RHCF Association collective bargaining agreement (the "Southern Contract") executed by Friedwald House HRF ("Friedwald") on June 20, 1989, Friedwald made an application before me, as interest arbitrator, for reimbursement-based relief from the wage improvements and lump sum payments due under the Southern Contract in calendar years 1986 and 1987 for which Friedwald claims full reimbursement has not been received.

Both Friedwald and the Union appeared before me on August 17, 1989 with counsel, accountants and witnesses, and have presented evidence and their respective positions regarding Friedwald’s affordability to implement the wage improvements and lump sum payments due under the Southern Contract in calendar years 1986 and 1987.

Friedwald submitted a detailed calculation of the claimed shortfall in each of calendar years 1986 and 1987
which essentially conforms to the formula and definitions set forth in subparagraph 7 of the Reimbursement Clause of the Southern Contract. This formula is based on the new RUGS-II Medicaid reimbursement methodology in effect since January 1, 1986. The Union's shortfall calculations are essentially identical to Friedwald's, but several deductions are applied to the Medicaid Labor Costs reported by Friedwald for calendar years 1986 and 1987. Under either set of calculations, the established annual shortfall, as that term is defined in subparagraph 7(u) of the Reimbursement Clause, is greater than the dollar cost of the relief sought by Friedwald. Friedwald has not sought relief from the obligation to make the full fund contributions provided for in the Southern Contract, nor am I empowered to grant any such relief.

Accordingly, based on the record before me, I conclude that Friedwald is not affordable to the extent of paying the lump sum payments due under subparagraphs 2(a)(1) and (3) of the Southern Contract in 1986 and 1987, or retroactively implementing in calendar years 1986 and 1987 the 4% base wage increase effective November 3, 1986 or the 4% base wage increase effective October 1, 1987. Both of these 4% base wage increases shall be implemented effective January 1, 1988.
This Award is based on the particular circumstances and facts of this case and this home (which is a "non-parity" home), and establishes no precedent for any other home or facility or for any other proceeding.

Eric J. Schmertz
Arbitrator

Dated: October , 1989
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 Final Award.

ERIC J. SCHMERTZ
In the Matter of the Arbitration:

between

Metal Trades Council

and

General Dynamics

Electric Boat Division

OPINION AND AWARD
Grievance No. MTC-435-90

The issue is the Union’s grievance No. MTC-435-90, which, as amended at the hearing reads:

The Metal Trades Council of New London County, AFL-CIO charges General Dynamics, Electric Boat division with violations of the Preamble, Article I and any other provisions of the current Labor Agreement, and past practice.

The Union contends that on April 14, 1989, after reaching an impasse, the Company advised the Union of its intent to unilaterally implement the provisions of its drug and alcohol program, which is a document dated March 27, 1989 entitled Memorandum of Understanding. Specifically the Company is violating our agreement by its intent to unilaterally implement the program in the following respects:

1. Changing the "under the influence" standard of 0.1 to "impairment" 0.04.

2. Requiring employees to take breathalyzer tests under threat of discharge for insubordination for refusal.

3. Mandating random testing.

The Union demands that the Employer:

1. Cease and desist.

2. Make whole all employees affected by these continuing violations.

Hearings were held on February 1, March 2 and March 5, 1990 at which time representatives of the above-named Union and Company appeared, and were afforded full opportunity to offer evidence
and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and the parties filed post-hearing briefs.

What is before me is whether the Company's action in unilaterally promulgating its new alcohol and drug policy as referred to in the grievance violated the contract. What is not before me, because I was not given that authority, is whether the Company's action violated the National Labor Relations Act. Subsumed in the latter, and also not before me, is the question of whether the "impasse" referred to in the grievance was the type of collective bargaining impasse under the Act which would allow the Company thereafter to unilaterally implement its drug and alcohol policy as proposed to, but not accepted by the Union during negotiations thereon. I leave these matters to the National Labor Relations Board which has jurisdiction thereof, and the positions and rights of the parties in that forum are expressly reserved.

On the contract issue I find the Company's action (or its plan to so act) to be impermissible. Article XXVII of the contract notwithstanding, I conclude that the policies regarding alcohol and drugs which pre-existed the changes referred to in the grievance were long established work rules, initially promulgated unilaterally by the Company, but over time bilaterally accepted and relied upon. Drug use and/or possession was a summary discharge offense. Relevant to this case, the proscribed level of alcohol was .10; discipline was applied pursuant to a bi-laterally negotiated "5-15 and out" policy; a breathalizer, though not used in the early years, was introduced along the way, and employees were disciplined for positive breathalizer readings as well as for observable symptoms of intoxication. But it is unclear whether employees were disciplined for the bare refusal to take the breathalizer test, irrespective of reasonably suspicious symptoms. If the new policy contemplates that, it must be viewed as a change.

At least as to the prior alcohol policy, I find that that
long standing practice had become a condition of employment and hence tantamount to a contractual agreement, which as a matter of contract, and limited thereto, could be changed or eliminated only by negotiated agreement.

The prior alcohol policy became a contractual agreement in three ways. First, under the well settled rule that accords contractual status to a long standing, bilaterally accepted and relied on practice which is not inconsistent with the collective bargaining agreement.

Second, by negotiating the written "5-15-out" discipline policy, which expressly provides for discipline for violations of the alcohol policy, and by renewing that agreement at each successor contract negotiations, there is joint acknowledgement of a mutually recognized and accepted alcohol policy to which the discipline relates. Had that policy remained only a Company promulgated work rule, the joint negotiations and renewal of a discipline policy related thereto would have been unnecessary. The Company could have imposed discipline unilaterally.

Third, and most determinative in my view, is the fact that when the Company sought to change the policy by lowering the alcohol standard from .10 to .04, by introducing a possibly different basis for disciplining for refusals to take a breathalizer test, and by "random testing," it entered into negotiations with the Union. For months, proposals and comments were exchanged and a number of negotiation sessions were held before an "impasse" was reached and recognized. To my mind, those negotiations, initiated by the Company are persuasive evidence that the Company believed that its prior alcohol policy was or had evolved into a bilateral agreement, and that changes required bi-lateral negotiations.

In short, for the three foregoing reasons, the Company is now estopped from denying the bi-lateral and contractual nature of its prior alcohol policy. There is nothing in the record (and
little attention was paid to it by the parties) which compels any different conclusion or anything relevantly different with regard to drugs.

Article XXVII Section 1 does not mandate a different finding. That provision is ambiguous. The long standing practice involved in this case does not constitute a "variation" of the terms or provisions of the contract. The contract itself is silent on the drug and alcohol policy. For the same reason it is not an "alteration" of the contract. It is not clear to me, and therein lies the ambiguity, whether the words "agreement" and "understanding" do or do not refer to "variations" of the contract. In other words, are "agreements" and "understandings" standing alone not binding if not in writing, or is the proscription on "agreements" and "understandings" that vary the contract. The latter is also not the impact here. And the former may only be applicable if not ambiguous. In the face of the ambiguity I am satisfied that the well settled rule that transforms a long-standing practice not in conflict with the contract, into contractual status, should prevail here.

That there was not agreement on the changes the Company sought through negotiations means that the practice and its contractual import were not extinguished or altered. Like any other contract provision that one side fails to change or delete in bargaining it remained in full force and effect with the final negotiations of the successor collective agreement. That is the contractual status of the matter in this case. Whether the NLRA and the law thereunder relating to impasses and an employer's right to implement its impasse pre-empts this contractual finding or otherwise, I leave to the NLRB and/or proceedings under the Act.

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

Limited to the contract, and without any find-
ing under the NLRA, the Union's grievance MTC-435-90 is sustained. The Company has or would violate the contract by:

1. Changing the "under the influence" standard of 0.1 to "impairment" 0.04.

2. Requiring employees to take breathalizer tests under threat of discharge for insubordination for refusal; to the extent that this requirement is different from the past practice.

3. Mandating random testing.

The relief the Union seeks in its grievance is granted.

DATED: September 4, 1990
STATE OF New York ) ss.: COUNTY OF New York )

Eric J. Schmertz Arbitrator

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

Was the removal from the job of Robert Madden on April 21, 1987 appropriate under the circumstances? If not, what shall be the remedy?

A hearing was held on October 7, 1988 in Boston, Massachusetts, at which time Mr. Madden, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and the parties filed post-hearing briefs.

The grievant was removed from the highly skilled job IR23 lathe operator for "unsatisfactory performance," and placed in an IR20 lathe operator position, "a job that requires less skill, where tolerances required were lower, and where the pieces were less valuable."

The Company states that its action was "non-disciplinary" and pursuant to that part of its Code of Plant Conduct which reads:

"When in the judgment of the supervisor an employee is for any reason not performing on his or her job classification in a satisfactory manner, he or she will be removed from that job classification and referred to Employment for placement in a classification...commensurate with his or her skill and ability. Normally an employee involved in this type of situation is not an undesirable employee and needs only to be assigned work for which he or she is better suited."

(Emphasis added).

Though that provision has some ambiguity in it, I deem the
underscored language, as applied to the facts in this case, together with that portion of the Company's opening statement that its action was proper under its managerial right to "remove a person from a job for inability to perform the job" (emphasis added), to mean that in the instant case the Company determined that the grievant lacked the ability to perform the IR23 lathe job satisfactorily.

The Union contends that the grievant's removal was disciplinary.

Though the grievant did not testify, the "pleadings" leading to the arbitration, including the grievance meetings, disclose that the Company's charge against the grievant is that he performed a particular job assignment on a machine piece for the United States Navy, in a wrongful, negligent and incompetent manner particularly with regard to measuring for the close tolerances of the "final cut," thereby making a cut deeper than specified, with attendant irreparable damage in the amount of $70,000. More particularly, I deem the facts to be that the grievant used a digital readout device, a non-calibrated instrument; that the digital readout was imprecise and inaccurate, whether because of its non-calibrated type or because of malfunction, and that a cut that was too deep resulted. The Company claims that for the close tolerances involved, the grievant should have used a calibrated micrometer with a combination square, and possibly a dip gauge. It asserts that as an employee in this highly skilled classification, who had made similar but less damaging mistakes in the past, the grievant knew and had been told not to rely on the digital readout. On this, the Company's position was stated by William Casey, the Union Relations Specialist:

"...to rely on an un-calibrated instrument such as a digital readout to machine finish dimensions shows a lack of prudence and care;
a lack of prudence and care that is completely unacceptable in the highest graded lathe job in the entire plant."

The initial question is whether by this error the grievant has shown an "inability" to do the job, and whether, under the Code of Conduct he should be non-disciplinarily placed in a job "commensurate with his skill and ability," meaning in my view an implied "lesser" skill and ability.

I find the Company's conclusion on this point to be erroneous. It is clear, and virtually stipulated in the record that even if the grievant used the wrong tool and the wrong methodology, he is fully capable of following the correct methodology and has the skills and ability to effectively use the proper tools. This is evidenced by the following exchange between the Arbitrator and Mr. Casey at the hearing:

"THE ARBITRATOR: I take it there is no question about his ability to use the combination square and the depth micrometer and these more precise measuring instruments?

THE WITNESS: I know firsthand that Mr. Madden was trained in that we were apprentices together.

THE ARBITRATOR: Is there any doubt in your mind that if he had used these devices the way you testified he should have used them, that he would have been able to do this cut accurately?

THE WITNESS: Yes."

The grievant's mistake therefore was not because he did not have the ability to follow proper or prescribed work procedures but because he used a different procedure than what the Company claims he should have employed. But there is no serious dispute over the fact that he had the skill and ability to do what the Company thought he should have done.

That being so, I do not see this case as a removal from a higher rated job and an assignment to a lesser rated job because
the former was beyond the employee's ability and the latter "commensurate with his ability." Rather, even if the Company did not wilfully intend it that way I view it as "punishment" for the costly mistake he made and for his work record which included one or more prior production errors. Put another way, if the grievant's "poor work record" was not due to "inability," the standard contemplated by the Code and Management Rights has not been met, and there remains only disciplinary action to redress the claimed unsatisfactory record.

Therefore, by the facts adduced, the case is transformed, possibly unintentionally, into a disciplinary matter and with the Union I agree with that identification. The grievant's production error, against the backdrop of his prior production difficulties, would, standing alone, justify discipline. But it does not stand alone.

During the hearing it was acknowledged by both sides that Mr. Thomas Shinnick, Jr. was one of the best, if not the best, IR23 lathe operator. His high reliability, capability, productivity and extensive experience are well recognized by the parties. For ten years up to 1987 he worked on the same lathe as did the grievant. He testified that he used the digital readout "every day" and used it, "regularly" "for blocking out dovetail cuts." He further testified that he blocked out dovetail cuts without using a micrometer or combination square, relying only on the digital readout. He also testified that though at times he used the micrometer to measure or "block out the first cut," subsequent cuts were done relying only on the digital readout. And that of course, when or if the digital readout is malfunctioning he'd use the micrometer. To my mind, Mr. Shinnick's testimony means that with the availability of the digital readout he relies on it heavily and even preferentially, to do the same work that the
grievant did. The following exchange between the Arbitrator and Mr. Shinnick supports the conclusion that a preferential reliance was placed on the digital readout to make the critical cut:

THE ARBITRATOR: Could what happened to Mr. Madden have happened to you?

THE WITNESS: Yes.

THE ARBITRATOR: How?

THE WITNESS: Doing the exact same thing, relying on the digital reader.

THE ARBITRATOR: In other words, after the first cut that you checked, even the first one I suppose if you took the cut using the digital meter to the tolerance and then you checked it, you could have gone over the tolerance?

THE WITNESS: Sure.

It seems to me that if the highly regarded Mr. Shinnick did the same work or the bulk of it in the same way, and if, as he did, acknowledges that he could have made the same error because of the same reliance on the digital readout, the grievant should not be punished for doing it that way too. I recognize that though Mr. Shinnick makes use of the micrometer more than did the grievant, (in making the first cut, and, in what is irrelevant here, in checking the accuracy of the cut after it is made) he nonetheless relied solely on the digital readout so often that one may treat their work practices as substantially similar.

However, the grievant (and Shinnick too) would be subject to discipline for errors caused by the use and total reliance on the digital readout if the Company had adequately instructed the operators not to use that device, or to use it differently, or to perform the work assignment differently than how the grievant (and Shinnick) did it. I do not find that the Company gave or provided such adequate instruction. There is no work manual setting forth
the proper procedure for this type of work. Basically, the grievant was trained by Shinnick. The digital readout was not an unauthorized, makeshift or "bootleg" device. It was placed at the work stations by the Company, presumably to be used by the operators, and, as stated by Shinnick replaced a calibrated dial on the lathe in 1983 or 1984. There is no evidence that the Company instructed the operators not to use the digital readout in the manner used by the grievant. He was instructed not to use it when he had made prior errors, because at that time it was "malfunctioning" and required repairs. He was not told not to use it the way he did if it was functioning well. The prohibition was not general or even applicable to its use to block out and travel down the cut, but rather limited to situations when it was jammed with a chip or otherwise malfunctioning. If it was intended as a prohibition to what the grievant did here, it was at best ambiguous and ineffectively communicated. Of course the grievant and the operators must be mindful of the possibility that the digital readout may be jammed or malfunctioning, and must not use it then, but that is much different from instructing operators not to use it to make cuts to the tolerances involved, when the digital readout appears to be functioning well. Here, until the error was discovered, there is no evidence that the digital readout was malfunctioning. If the Company wants the operators not to use the digital readouts generally and uniformly as the grievant and apparently Shinnick have used it, it must be more specific, more instructive and more prohibitive that it has been or was with the grievant.

Under the foregoing circumstances I find inadequate justification for the grievant's removal.
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 removal from the job of Robert Madden on April 21, 1987 was not appropriate under the circumstances.

The parties have stipulated that they can work out the proper remedy under the foregoing Award.

Eric J. Schmertz
Arbitrator

DATED: February 13, 1989
STATE OF New York ) ss.
COUNTY OF New York ) ss.

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

Was the discharge of Richard Pyburn for just cause? If not what shall be the remedy?

A hearing was held on October 27, 1988 in Boston, Massachusetts at which time Mr. Pyburn, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken and the parties filed post-hearing briefs.

The accusation against the grievant, which caused his discharge, is that he smoked a marijuana cigarette during working hours and on plant premises at about 1 AM on August 5, 1987.

The Company's Code of Conduct provides that "discharge may be imposed" for:

"Use or possession of illegal drugs (including marijuana) on Company property..."

The Union does not dispute this Code provision and does not dispute the propriety of that penalty for that offense. Rather, in this case, the Union's position is that the grievant was not smoking or participating in the smoking of a marijuana cigarette, even if three other employees who were in the proximate area at the time, just outside the plant building, were doing so.
Critical, is the testimony of Karen McIntyre, a Company security guard. It was she who testified that she smelled marijuana as she approached the doors, outside of which were the grievant and the others, and saw the four employees, including the grievant, pass a cigarette among them with each taking turns "taking a drag." It was she who testified that when she confronted the four employees whom she stated were seated close to each other on a bench and spool, one of them (David Velez) flipped the cigarette behind the bench.

Because the incident took place at 1 AM on Company property, but outside a building, and because I could not judge at the hearing what the lighting conditions were and whether if the lighting was poor, Ms. McIntyre could not have seen the events clearly or may have erred in what she thought she saw, I requested the opportunity to view the site under replicated circumstances. With the agreement of the parties, and with the presence of representatives of both sides, I viewed the site on a night subsequent to the hearing. At that time, the representatives of the parties stipulated that the lighting and location was similar to what they were on August 5, 1987.

I now conclude that there was sufficient light outside the building for McIntyre to see what the grievant and the other three were doing. Considering the breeze I experienced coming from outside the plant at the location she testified she smelled marijuana, I conclude that she could and indeed did smell marijuana at that point, before proceeding to the door to observe the employees and before confronting them.

I find no reason why McIntyre should falsify her testimony and I am satisfied that she testified credibly and accurately.
Though she was not completely clear on where each employee sat, though in close proximity with each other, and forgot that one left quickly after being confronted, I am satisfied that on the critical points, particularly her observation of the grievant sharing the cigarette, her testimony was honest and reflective of what was going on.

I conclude therefore that she saw each of the four seated in close proximity to each other; that they passed around a cigarette; that each, including the grievant took a "drag" on it; and that Velez tossed it away when confronted.

I also conclude that the cigarette was marijuana. The testimony of Sargent Angus Clarke, who retrieved the cigarette residue, along with a package of cigarette paper inside of a Marlboro cigarette package, and the report from the laboratory to whom it was submitted for testing are basically uncontroverted. Finally, in this regard, I am satisfied that the connection between the cigarette retrieved and the employees, including the grievant, has been adequately established by the standard of proof required in a disciplinary rather than a criminal proceeding.

Having accepted McIntyre's testimony that the grievant joined in smoking that cigarette, I reject his assertion that he was smoking a regular tobacco cigarette. A marijuana cigarette not a tobacco cigarette is the type passed back and forth for participatory smoking.

Also and accordingly I reject the grievant's testimony that he was seated some distance away from the others and that what was "passed back and forth" was his cigarette lighter.

The grievant's credibility on the use of marijuana is questionable. He admits that he knew that David Velez smoked marijuana generally, and even did so in his, the grievant's, car when
they drove back and forth to work. He and David Velez are friends. He tolerated Velez's smoking, even in the confines of his car. These admitted circumstances make more probable and probative McIntyre's testimony that the grievant joined his friend, and the others, on the morning in question, in smoking the marijuana cigarette.

The drug test which the grievant took several days after the incident, which was negative, and which he presented to the Company, and his offer, at the time of the incident to take a drug test, are irrelevant. The grievant was discharged for "possession and use" of marijuana in violation of the Code of Conduct. He is not charged with nor was he discharged for "being under the influence of marijuana." The former is enough to sustain a discharge; the latter need not be proved.

To my knowledge and in my experience, drug tests measure whether there is enough marijuana acid in the body to produce "intoxication" or to be "under its influence." Casual use, or use in a small quantity, as was the case here, is probably not measurable. Hence a later administered test, or even one administered at the time, would not necessarily prove or disapprove "use or possession." So, neither the grievant's offer to take a test, nor the negative results of the test subsequently taken by the grievant himself are probative or determinative regarding the charge against him and for which he was discharged.

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 grievant, Richard Pyburn, committed a Code of Conduct offense which "normally results in the employee's discharge." Therefore the discharge of Richard Pyburn was for just cause.
DATED: February 22, 1989
STATE OF New York ) ss.:
COUNTY OF New York 

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

In the Matter of the Arbitration:

between

Boston Globe Employees Association:

and

Globe Newspaper Company

The stipulated issue is:

Whether or not the publisher has violated the contract by prohibiting the periodic presence of Bank of Boston representatives in the Boston Globe Employees Association office space provided by the Employer at the Employer's Morrissey Boulevard plant? And if so, what shall be the remedy?

A hearing was held on March 13, 1989 at which time the above-named Association, hereinafter referred to as the "Union," and the Company, referred to as the "Publisher" or "Employer," appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record of the hearing taken; and the parties filed post-hearing briefs.

The nature of the planned activity of the representatives of the Bank of Boston is set forth in an announcement by the Union to its members in its Newsletter. That announcement read:

The BGEA in conjunction with the Bank of Boston will be offering banking services out of the union office once a month. A representative from the Bank of Boston will be in the union office to assist you in obtaining mortgages and student loans as well as addressing any other banking needs or questions you may have. The representative will help you do all paper work etc. in the union office as well as deliver to you at the Globe any relevant documents. Please note the union will not be responsible for any of the business that transpires.
The Company objected to the plan; notified the Union that it would not allow Bank representatives on the premises and that the plan was beyond the scope and meaning of "union business" as referred to in Article X paragraph 9 of the collective bargaining agreement. That section reads:

The Employer shall provide adequate, secure and accessible space within the Morrissey Boulevard plan for the conduct of union business.

The contractual agreement for office space made available to the Union by the Company was agreed to in the negotiations for the 1982-1984 contract, and appeared for the first time in that contract. The contract language then was the same as now, except that it did not include the words "secure and accessible." But the critical language "for the conduct of union business" was in the 1982-1984 contract, and remained unchanged thereafter.

Obviously, the issue is whether the Bank of Boston services to be made available to the Union members at and through the office provided the Union by the Company is "the conduct of Union business" within the meaning of the foregoing contract provision.

The Company argues that "union business" is defined and limited to a union's legal and representational authority, namely its function as the collective bargaining agent in dealing for its members with the Company on wages, hours and working conditions, and in the administration of the collective bargaining agreement. The banking services offered and contemplated by the Bank of Boston albeit at and through the Union's office does not fall within the traditional and legal definition of union business, and hence, asserts the Company, there is no contract violation if the Company bars its implementation.
The Union contends that "union business" is not limited or constrained by narrow technical definitions, but rather should be interpreted based on the many services that unions offer to their members that are recognized as programs consistent with a union's objective to improve the personal lives of its members and which may go beyond the legal bounds of "wages, hours and working conditions." But because they are lawful and legitimate, and so long as they are carried out without interference with the Company's production and work schedule, they are a bona fide "union business" with the modern intent and purpose of the contract.

More specifically, the Union asserts that there has been a past practice of such activities carried on at and from the Union office; that the Company has been aware of those activities, which conceded are not within the legal ambit of "wages, hours and working conditions;" the Bank of Boston presence is just another such activity and cannot now be prohibited by the Company.

There is no probative evidence that at the time Article X paragraph 9 was first negotiated, in the 1982-1984 contract, the phrase "union business" was mutually intended to mean anything other than its legal, labor law definition. In the absence of any such specific evidence of a different meaning, the language must be accorded its traditional and well understood meaning, especially when it is part of a labor contract. That meaning, in labor law, pertains to the "business of the union" on behalf of its members, over wages, hours and working conditions.

As the contract language "union business" has not been changed in the successor and current contracts, that meaning cannot be enlarged or changed to encompass the bank services in dispute in this case, unless long standing past practice, known to
or acquiesced in by the Company, shows by specific examples beyond the traditional meaning, of an expanded or changed meaning in the language.

It is undisputed that there has been no negotiated change in the critical language. Nor do I find a change by past practice. The examples of other or additional uses of the office, recited and relied on by the Union, do not rise to the level of a binding practice within the requisite definition.

What the Union has pointed to are ad hoc activities made available directly by the Union to its members. Those activities were so low keyed or de minimus as to not be known to the Company or, because of their casual de minimus nature were not objected to by the Company. Examples of these activities were personal counseling of members by a prior union president, hand-craft sales, making available discount theatre, restaurant and vacation tickets, and certain other sporadic non-BGEA activities.

These are not the kind of open, continuing and regular activities that make up a past practice. None of them are analogous to the bank service in dispute here. Unlike the example cited, the Bank of Boston, not the Union or its officials would be offering the services. Employees of the Bank, not the Union would be coming on to the Company’s premises to offer and transact the services. And most significantly, the Union has disclaimed responsibility for the transactions involved. To my mind, the latter disclaimer, divorces the banking activities from any definition of "union business," including the liberal definition advanced by the Union in this case. Moreover a regular set of banking services is much more institutionalized, more visible and more commercial if not controversial, than any of the activities cited by the Union as making up a past practice. In short, I find
material and determinative differences between what went on before and the proposed banking services of the Bank of Boston.

The hypothetical examples raised by the Union that are consistent with a Union's modern interests and responsibilities, but not necessarily within its legal authority as the bargaining agent, are just that - hypothetical and speculative. Interviews by counsel of employees with workers compensation claims, for example, or other types of personal and professional counseling which the Union might make available to its members through specialists, are simply not part of this case. When and if such situations (and others of a similar type) arise, they will have to be judged then if the Company prohibits the use of the office for such purposes. Indeed, I do not agree with some of the Company answers to the hypothetical situations posed during the hearing, but those possibilities are not before me, and are not of precedential use in deciding the question at hand.

Finally, I find of significance the ruling of the office of appeals of the NLRB in response to the Union's charge that the Company violated the Act by refusing to provide information on vendors and third parties it permitted on the premises to provide services to employees. In upholding the refusal to issue a complaint the Board's Office of Appeals said,

"The provision of personal loans does not relate to terms of employment."

That ruling means to me, that what the Union proposed the Bank of Boston do is not only legally not related to the Union's representational authority generally, but currently (i.e. as of now) is not so related. Therefore, as I believe the Board looked at the contract language and practices thereunder, and had before it the facts if not the substance of the dispute that is the subject
of this arbitration, I interpret its ruling under the Act, to be currently applicable to the contract as well.

For the foregoing reasons, and despite my personal commendation to the Union for its imaginative efforts to provide important and more convenient bank services to its members, I must find that the contract language "union business" is confined to the Union's legal authority to deal with the Company on "wages, hours and working conditions" for the employees it represents. And that does not include the services to be offered by the Bank of Boston,

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 Employer has not violated the contract by prohibiting the periodic presence of Bank of Boston representatives in the Boston Globe Employees Association office space provided by the Employer at the Employer's Morrissey Boulevard plant.

DATED: June 26, 1989
STATE OF New York ) ss.
COUNTY OF New York )

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

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between:

Greenburgh #11 Federation of Teachers, Local 1532, AFT AFL-CIO:

and:

Board of Education, Greenburgh #11 U.F.S.D.

The above-named Federation of Teachers, hereinafter referred to as the "Union," and Board of Education, hereinafter referred to as the "Board" have submitted to me for decision, a dispute involving the grievances of Mary McCarron and Janet Pagano, hereinafter referred to as the "grievants."

The Union and Board were unable to agree upon a stipulated issue. Based on the record before me I deem the issue to be:

Did the Board violate Article V Section B 1.c. of the collective bargaining agreement dated February 1, 1986 to January 31, 1988 covering Teachers, and Article VIII Section F of the collective bargaining agreement dated February 1, 1986 to January 31, 1988, covering Teacher Aides, with regard to the grievances of Mary McCarron and Janet Pagano?

The Union stipulated that this case "does not involve a pay remedy."

Ms. McCarron is a Teacher and Ms. Pagano is a Teacher Aide.

A hearing was held on October 3, 1988 at which time the grievants and representatives of the Union and Board appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record of the proceedings was taken.

The two aforementioned contract provisions read the same, as follows:
Members of the bargaining unit who are deemed to be disabled as the result of a work related incident by the Workers' Compensation Board shall incur no loss of sick leave and shall be paid at their regular rate of pay during the period of such work related disability. Any sick leave used during an absence which is later determined by the Workers' Compensation Board to be work related shall be credited back to the teacher aide's accumulated sick leave. A member of the bargaining unit who is, due to the lack of sick leave, placed on leave without pay for a disability that is later determined by the Workers' Compensation Board to be work related shall be paid at his/her regular rate of pay for the period that he/she was on leave without pay. If the District does not contest the work related nature of an absence, the member shall continue to receive his/her salary during such absence to the extent that it remains a work related absence. Any benefits under the District's Worker's Compensation insurance policy other than a scheduled award shall be payable to the District for any period that the member of the bargaining unit is on a Workers' Compensation leave to the extent that such benefits constitute payment of wages.

As I see it, the critical and determinative language of the foregoing clause is:

"If the District does not contest the work related nature of an absence, the member shall continue to receive his/her salary during such absence to the extent that it remains a work related absence."

Obviously, to properly implement this sentence, if an employee is not to receive salary during the absence the Board must decide at the time of the absence to contest the work related nature of the injury and the absence resulting therefrom. There would be no other way or basis to deprive an employee of salary during the absence involved.

Both grievants were absent from work due to what they claimed were work-related injuries. Both filed Workers' Compensation claims. Their claims were submitted to the State Insurance Fund and the Workers' Compensation Board.

During the period of their absences the Board did not pay
them their salaries, but decided instead to await the determinations of the State Insurance Fund and the Workers' Compensation Board as to whether the injuries were work-related and the claims properly covered by Workers' Compensation.

I find the determinative language of the two contracts to be clear. If the Board does not contest the claim, it must pay the affected employee his or her salary during the period of the absence. And conversely, only if the Board contests the claim may it withhold payment of salary during the period of the absence until the appropriate administrative agency or agencies make substantive determinations.

I have previously held that for these alternative actions to be implemented, the Board must decide whether to contest or not to contest a claim at the time the absence takes place.

As the Board did not pay the grievants their salaries during the relevant periods of absences the issue narrows to whether the Board contested their claims.

I find the Board did not. What the Board did is clear and admitted. It took no position regarding the validity of the claims, but left it to the State Fund and Compensation Board. It did not act to oppose the claims and it did not accept the claims. Rather it "stood mute," awaiting the outcome of the investigations by the State Fund and Compensation Board. What it did however, was not to pay the grievants their salaries.

I fail to see how the Board's position of neither opposing or accepting the claims, constitutes "contest(ing)" the claim within the meaning of the contract provisions.

The dictionary definitions of "contest" are "challenge," "dispute," "contention," "litigation." The Board did none of these.
Manifestly to "contest" requires some action in opposition; some partisan position challenging or disrupting the claim; or some contention doubting the validity of the claim. A passive or neutral stance, which neither opposes nor approves the claim does not meet the test of contesting the claim, and cannot therefore be a basis to deny the payment of salary during the absence involved.

At the hearing it became clear that the Board did in fact and at one time doubt the bona fides of the grievants' claims. In both instances the Board or its representatives thought that the injuries may have been related to earlier injuries or other circumstances, and not to the job-related circumstance alleged. But the Board took no official action in support or furtherance of such beliefs. It did not oppose or question the claims either before the State Insurance Fund or the Workers' Compensation Board. Indeed, it did not even notify the grievant or the Union that it doubted or questioned the validity or bona fides of the claims. In short, the Board may have harbored doubts, but it took no steps to "contest" the claims based on those doubts, as required by the contract to justify non-payment of salary during the absences. Accordingly the Board erred in not paying salaries to the grievants during their absences.

By the time of the hearing, or at least by now, the grievants have been paid their salaries for the periods of their absences based on the later decisions of the Insurance Fund and Compensation Board that their injuries were work related and that they were entitled to some Workers' Compensation awards.

But if not, the Board shall make the grievants whole for salary denied or withheld.
The Undersigned, having been duly sworn, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Board violated article V Section B 1.c and Article VIII Section F of the Teacher and Teacher Aide collective bargaining agreements, with regard to the grievances of Mary McCarron and Janet Pagano. The two named grievants should have been paid their salaries during their job-related injury absences. If by this time they have not been paid those salaries, they shall be so paid forthwith.

Eric J. Schmertz
Arbitrator

DATED: January 3, 1989
STATE OF New York ) ss.
COUNTY OF New York )

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

Did the Board of Education violate the contract between it and the Greenburgh Federation of Teachers, Clause H by reassigning Elaine Brownstein, without her consent, from kindergarten to first grade at Juniper Hill School for the 1988-1989 school year, when two Juniper Hill School kindergarten teachers with less seniority than Mrs. Brownstein remained as teachers in kindergarten? If so, what shall be the remedy?

A hearing was held on June 5, 1989 at which time Mrs. Brownstein and representatives of the above-named Association and School District appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Subsequent to the hearing, and pursuant to agreed upon arrangements, the Association filed a memorandum in reply to the "Memorandum of Law" submitted by the District at the hearing.

Clause H, Section 2 is the relevant contract provision. It reads:

Where a change in enrollment or limitation of physical facilities requires the reduction in the number or change in assignment of teachers in a particular building, at a particular grade level or in a particular department, in accordance with established Board policy respecting class size, building utilization, curriculum or educational policy or philosophy, transfers shall be made considering the following factors:
The position of the Association is that the District is limited in its reasons for an involuntary reassignment of a teacher to the six factors enumerated in the foregoing clause; that the factors must be considered in the order listed, from #1 to #6; that factors #1 and #2 were not factually applicable to the instant case; and that Mrs. Brownstein's reassignment violated factor #3 because, as is stipulated in the issue, there were two kindergarten teachers with less seniority than Brownstein and one of them should have been transferred instead of Brownstein.

The District's position is that Clause H Section 2 is not exclusive and does not set forth all the relevant factors or considerations which the District may employ in deciding on an involuntary reassignment. It asserts that the words "transfers shall be made considering the following factors" (emphasis added) means that only consideration need be given to the enumerated factors, but that so long as good faith consideration is given to those factors, the District may use and rely on other reasons to make and justify the reassignment; that the negotiation history of bargaining supports this view as does past practice; that here, Brownstein was selected because she was "best qualified" for the reassignment to the first grade; that though the other two junior kindergarten teachers were certified to teach first grade they were still probationary, had been previously transferred and the District thought it would be disruptive to transfer them again; and that at
the time of the grievance, the state of the education law prohibited the district from bargaining away a school superintendent's unrestricted right to make transfers and reassignments and that that law is applicable to the arbitrator's authority in this case (even though the law was later changed).

I find that Clause H Section 2 is sufficiently clear to make any past practice to the contrary immaterial. I also find that the evidence and testimony on its bargaining history does not establish the non-exclusive or advisory nature as asserted by the District. Indeed, I am convinced that during the negotiations, and with the assistance of a mediator, the clause evolved with sufficient mandatory and exclusive intent to warrant its interpretation and enforcement as written. It should be noted that the mandatory word "shall" (meaning "must") is included in the phrase "transfers shall be made considering the following factors" (emphasis added). So, I am not persuaded, nor does the record of bargaining show, that the emphasis was more on the word "considering" than on the word "shall." A logical, and I believe proper interpretation is that the word "shall" limits the District to the six factors listed, and that the word "considering" means that the factors are to be considered in descending order.

Also, and persuasive to me, is the obvious fact that if the Clause says that certain factors are to be considered, it means that other factors are not to be considered. A contrary conclusion would make Clause H Section 2 essentially meaningless or at least highly ineffectual. I do not believe that it was negotiated for a meaningless or ineffectual purpose.

In the instant case the District considered other factors as well as the six listed. It considered, and indeed was persuaded
by the relative abilities of Brownstein and the two junior teachers. And it considered and apparently was persuaded by the probationary status of the other two and by the fact that they had been previously and recently transferred. And there is some evidence that the District considered "the best interests of the District and the pupils."

There is no doubt that these additional factors are probably meritorious, standing alone and apart from the contract. But they are not among the factors listed in Clause H Section 2. These "external" factors were certainly within the knowledge or contemplation of the parties when the Clause was negotiated. Had it been intended that they could be considered, they would and should have been included in the listing. As I have found the six factors to be exclusive, these "external" factors may not now be included or implied.

With regard to the District's legal argument regarding the arbitrator's authority at the time this grievance arose to procedural and not substantive aspects of transfers or reassignments, I decline to take arbitral jurisdiction. I have long held that unless both sides voluntarily give me the authority to interpret and apply "external law" to a contract dispute, I lack the "jurisdictional competence or authority" to do so. In this case the parties have not given me that authority jointly. The District advances the external law and the Association inter alia opposes its consideration by the arbitrator. The impact of that law is therefore left to the forums with jurisdiction and authority, with the rights of the parties expressly reserved in that respect. My authority stems from and is confined to the contract, and my decision is based on the contract.
The Undersigned, duly designated as the Arbitrator, and having been duly sworn, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Board of Education violated the contract between it and the Greenburgh Federation of Teachers, Clause H, by reassigning Elaine Brownstein without her consent, from kindergarten to first grade at Juniper Hill School for the 1988-1989 school year, when two Juniper Hill School kindergarten teachers with less seniority than Mrs. Brownstein remained as teachers in kindergarten.

The Board of Education is directed to return Mrs. Brownstein to her kindergarten position at the Juniper Hill School beginning the next school year.

DATED: July 6, 1989
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 153 O.P.E.I.U. and
International Ladies' Garment Workers Union

OPINION

AWARD

The stipulated issue is:

Was the denial of the bid of Lydia Kakavas just? If not what shall be the remedy?

A hearing was held on February 23, 1989 at which time Ms. Kakavas, hereinafter referred to as the "grievant" and representatives of Local 153, hereinafter referred to as the "Union" and the International Ladies' Garment Workers Union, hereinafter referred to as the "Employer," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant, a Grade 5 Clerk Typist in the Employer's Health Center bid for the position of Secretary to the Medical Director, classified as Grade 8. The Employer denied her bid for the then vacancy in the Secretary job on the grounds that she lacked the "fitness and ability" required by Article VI of the contract. The pertinent part of that provision reads:

"....Vacancies and promotions shall be filled from among staff members on the basis of fitness and ability...."

I find the Employer's denial of the grievant's bid to be violative of the letter, spirit and purpose of the contract in at least three respects.
First, instead of according the grievant credit for her twenty-eight years of seniority, it held that extensive seniority against her in deciding she lacked the fitness or ability for the promotion. A principal reason for denying the bid, is the Employer's position that because of the grievant's long service at the Health Center, she had developed familiarity and personal relationships with the staff which would make it difficult for her to act independently and perhaps at time adversarially in dealing with physicians and the staff and in maintaining the "confidentiality" of records as the representative of the Medical Director. There is no evidence of any such disability in this record. It is only the Employer's view, unsupported by any probative examples of inability to take on the new role and duties of Secretary to the Director or breaches of loyalty or confidentiality. Indeed, by hiring a person from the outside for the job, the Employer disregarded, without substantive reasons or rationale, the specific thrust and preferential interest of Article VI, that

"...Vacancies...shall be filled from among staff members..." (emphasis added).

With twenty eight years seniority and with no serious dispute over her technical skills and work record, I find it unjust, if not arbitrary to deny the grievant's bid because she had too much experience and seniority as a staff member of the Health Center. Especially so, when the reasons advanced by the Employer are purely speculative, unsupported by examples of conflicts of identity or lack of loyalty or indiscretion.

Second, the bid was denied because the vacancy, as the job posting states, required "executive secretary experience."
Again, I cannot accept that qualification as a total bar to advancement of staff members, as would be the case if the Employer's position prevailed. Based on the record, the only job in the bargaining unit that calls for "executive secretarial experience" is this job - Secretary to the Medical Director. (The secretary to the Director of the Member Assistance Program, is in the Director's words only "close to the level of executive secretary). I do not quarrel with that job duty. I think it is appropriate for the Medical Director's Secretary. Nor do I quarrel with the Employer's right to determine the job duties of all the jobs in the bargaining unit. What I quarrel with is the result - the total foreclosure of eligibility within the bargaining unit for promotion to this secretarial position. For, as there are no other jobs in the unit which require or include "executive secretary" experience or duties, no staff member while employed at the Health Center can acquire that experience. And hence, all staff members are effectively and constructively ineligible and unfit for this promotion. I conclude that that flies in the face of the "priority" for staff members set forth in Article VI. Also, a further look at the contract persuades me that the parties did not intend to require a successful bidder to have all the qualifications, or be capable of taking on all the duties of the promotion immediately upon being advanced. Section 5 of Article VI provides for a "training period" for employees promoted. It also provides for cancellation of the promotion "if the employee's services are unsatisfactory." While this provision provides for wage increases after satisfactory completion of a training period, it also means, to me, that employees promoted are accorded a period of time (i.e. three months) for on-the-job experience, if not specific training, to demonstrate fitness and ability, and to acquire skills which
the employee has the ability to learn. Section 5 is not limited in its application. Hence it applies to all promotions within the bargaining unit, and I see no reason why it should not apply to the grievant's bid for promotion to the bargaining unit job of Secretary to the Medical Director. Therefore the Employer's denial of the bid because the grievant admittedly lacked "executive secretary experience" is also inconsistent with the letter and intent of the contract to accord a promotee up to three months to perform all duties satisfactorily especially here in view of the grievant's good work record as a clerk-typist. Given that chance, I believe the grievant would have succeeded. But in any event, she was contractually entitled to the chance on that basis.

Third, the bid was denied because the Employer determined that the job of Secretary to the Medical Director was "particularly stressful" and that it might impair the grievant's health because she suffers from high blood pressure.

There is no medical evidence or testimony whatsoever in support of this. There is no evidence that the grievant's high blood pressure is not controlled by medication. There is no evidence of a proximate connection between a "stressful" job and elevated blood pressure. There is no evidence that the grievant's doctor or any physician would bar the promotion on medical grounds. In short, there is no evidence in support of the Employer's conclusion that the grievant's purported high blood pressure made her unfit for the promotion.

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 denial of the bid of Lydia Kakavas was not just. She shall be given the job of Secretary to the Medical Director and made whole for the differential in pay.

Eric J. Schmertz
Arbitrator

DATED: March 27, 1989
STATE OF New York ) ss.
COUNTY OF New York ) ss.

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

Was there good and sufficient cause for the discharge of Julio Barreiro? If not what shall be the remedy?

A hearing was held on April 4, 1989 at which time Mr. Barreiro, 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.

There is no question that the grievant's record of absenteeism and lateness was excessive, and that prior to his discharge for that continued unsatisfactory record, he had been warned and suspended in accordance with the traditional rule of progressive discipline.

The only issues are whether he should be excused from that record because of his claim that it was due to his family responsibilities while his wife was pregnant and confined to her bed to avoid a second miscarriage, and to the need to stay home at times to care for the child after it was born while his wife recovered from a cesarian delivery and thereafter when she had to return to work to keep her job when they could not afford child care.

If there is any principle well settled in labor relations
and arbitral law, it is that an employer need not tolerate excessive and chronic absenteeism or lateness even if its cause is beyond the employee's fault and control. In the operation and furtherance of its business, the employer is entitled to rely on and require regular and prompt attendance. That principle alone is enough to deny that part of the grievance founded on those explanations.

Moreover, it is difficult to consider those explanations when the grievant's record shows innumerable absences and latenesses for which he did not call in or otherwise timely notify the Company so that it could plan or try to plan coverage of his work assignment. That reveals an indifference and irresponsibility which casts doubt on the bona fides of his excuses and his efforts to reconcile those problems with his employment responsibilities. Though I believe as a low income couple they did have problems with child care and the handling of family duties, the grievant's frequent absences on Fridays and Mondays and his marginal attendance record even before his wife's pregnancy also cast doubt on the overall credibility of his excuses and suggest other reasons as well for that unsatisfactory attendance record. There is no evidence to rebut these logical and reasonable inferences, and there is no evidence that his attendance problems are not chronic and would improve if he was retained in his job.

The grievant also claims that his absences in the later weeks were in fact vacation days pursuant to an agreement and arrangement he had with the Company's distribution manager. Such an unusual arrangement (when by practice employees take vacation during a particular consecutive period of time) requires clear proof, with the burden on the grievant and the Union to establish
that proof.

The Company's distribution manager denies he made any such arrangement with the grievant. The Union does not assert that any such arrangement was made. Only the grievant claims its existence. His bare claim and testimony are not enough to meet the burden of proof. Significantly, despite his claim of and reliance on the alleged arrangement, neither he nor the Union grieved his final warning of September 9, 1988. It seems to me that if the absences, particularly those in August, which led to the final warning, were actually an agreed to use of vacation time, the grievant and/or the Union would have vigorously protested and grieved the September 9 final warning as unjust and based on the wrong facts. The failure to protest or grieve the final warning is strong evidence that no such bilateral agreement was reached to allow the grievant to take vacation time in days.

The Undersigned, duly designated 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 good and sufficient cause for the discharge of Julio Barreiro.

DATED: April 11, 1989

STATE OF New York
COUNTY OF New York

Eric J. Schmertz
Impartial 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.