In the Matter of the Arbitration between

Independent Federation of Flight Attendants and

Trans World Airlines, Inc.

AWARD

Cases 88-30 and 88-213

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

The disciplinary letter, the fifteen (15) day suspension and the discharge given to and imposed on Gaines Salvant were not for just cause. He shall be reinstated with full back pay and benefits.

DATED: October 16, 1989
STATE OF New York ) ss.
COUNTY OF New York )

Eric J. Schmertz
Neutral Referee

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

DATED: October 1989
STATE OF
COUNTY OF

Norma Adams
Concurring

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

DATED: October 1989
STATE OF
COUNTY OF

Dirk J. Siedlecki
Dissenting

I, Dirk J. Siedlecki 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:  
Independent Federation of Flight Attendants and  
Trans World Airlines, Inc.:  

The issues are:

[1] Whether there was just cause for the 15 day suspension of Gaines Salvant, and the disciplinary letter placed in his file, and if not what shall be the remedy?

[2] Whether there was just cause for the discharge of Gaines Salvant, and if not what shall be the remedy?

A hearing was held on May 24, 1989 at which time Mr. Salvant, 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. Norma Adams and Mr. Dirk J. Siedlicki served respectively as the Union and Company arbitrators on the System Board, and the Undersigned was selected and served as the Neutral Referee. The Oath of the Board was waived.

The grievant was first suspended and later discharged because he reached those sequential points in the Company's progressive discipline policy for "No Shows" for flight assignments.

Significant in this case is the fact that the grievant was not suspended and discharged under the generally accepted principles and disciplinary grounds for unsatisfactory attendance or absenteeism, but rather, as acknowledged by the Company, for violations of a specific policy relating to and designed to control and discipline for failure to protect flight assignment (i.e. "No Shows").
Therefore the propriety of the discipline imposed on the grievant in this case turns on whether in fact, he violated the specific "No Show" policy and whether that policy was enforceable and binding on him.

If the latter part of that question is answered in the negative an answer to the first part is immaterial.

If there is any well settled rule in industrial relations, which is uniformly and consistently recognized and applied by arbitrators, it is the rule on the effectiveness and enforceability of policies resulting in employee discipline. This is compellingly so when the policy contains a specific step by step progression of increasingly severe discipline, resulting, at specific points, in the more severe penalties of suspension and discharge. The conditions for liability and enforceability are universally recognized. They are:

That the policy and procedures reasonably relate to the jobs affected and to the performance of those jobs;

That the measures of discipline be reasonable for the offenses;

That the policy or work rule be made known to the covered work force by adequate notices, postings, distribution or other dissemination;

That the policy or rule be evenhandedly and consistently applied to all employees similarly situated.

All of these standards must be present and complied with for the policy to be enforceable for discipline.

In this matter, the policy is clearly reasonable. To ensure the reliability of the Company's flight schedule, flight attendants are expected, properly, to meet their flight assignments, and a record of "No Shows" need not be tolerated.

A review of the policy, with its points of warnings, letters
of discipline and suspension and finally discharge, shows a relation of reasonableness between the offenses and their cumulative nature, and the levels of discipline imposed.

In this matter there is, however, some evidence of disparate treatment, at least procedurally, in the application of the steps and sequence of the "No Show" policy, between the grievant and one or two other employees, similarly situated, to the grievant's disadvantage. And on the question of whether he committed all the violations alleged, there are grounds to consider whether one of the grievant's "No Shows" (the flight assignment on which he was "balanced") should have been charged against him because he may not have been properly notified and did not "okay" that assignment.

But I need not decide those last two factors because I have concluded that a different essential requirement for the enforceability of the Company's policy has not been met.

The Company acknowledges that it did not notify its employees of the policy nor of its specific formula for discipline. It also did not officially notify the Union of the policy or its implementation.

Indeed, the Union learned of it accidentally. The Company admits that the details of the policy were for the internal information of management and as a guide to management for the imposition of discipline in "No-Show" cases.

This is not to say that the grievant was not told, through counseling and warnings, that he was subject to further discipline and that his job was in jeopardy. Rather, it is to say that he was not put on notice of the precise sequence of steps and the number and frequency of "No Shows" that would mechanically result not just in the application of discipline, but, critically, the point at which he would be suspended and discharged.

The Company's "No Show" policy is exact, as follows:
<table>
<thead>
<tr>
<th>No Show Offense</th>
<th>Disciplinary Action Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>Letter of Warning</td>
</tr>
<tr>
<td>2nd</td>
<td>5-10 days removal from payroll</td>
</tr>
<tr>
<td>3rd</td>
<td>10-15 days removal from payroll</td>
</tr>
<tr>
<td>4th</td>
<td>Termination (In some instances, a 30 day removal might be appropriate.)</td>
</tr>
</tbody>
</table>

Where, as here, the policy is so exact and progressively inexorable, the employee is entitled to know, with similar precision and exactness, where he stands and what will next happen.

The reasons that he is entitled to that notice are also well known. Disciplinary programs and policies are not limited to the imposition of penalties. Also, they are designed and intended to rehabilitate and save the employee from further discipline by changing his record and raising his performance to a satisfactory level. By warning of specific consequences, step by step, of failure and continuing failure to work to a satisfactory level, the employee is given a fair chance to remedy his wrongs. This latter rehabilitative purpose is frustrated, or at least impeded, if the policy is not well publicized to the work force.

Absent that notification, it remains solely punitive and that is not enough to justify it, even if the penalties are reasonable and evenhanded.

Also, in my view, the notice requirement extends also to the employee's bargaining agent. That the Company did not inform the Union was a failure of the purposes of notice. Obviously, discipline of its members is an important matter to the Union, not just so that the Union can represent and defend its member, but so that the Union can provide advice and counsel and assist the member towards rehabilitation. If the Union is not a "partner" with the Company in gaining employee compliance with rules and policies, it certainly has a legitimate part to play in helping its member improve conduct and performance, thereby making discipline or further discipline unnecessary. And both the Company and the
Union should want that result. Not to notify the Union, and give it a chance to participate is to make that result which is one of the reasons for a discipline policy - all the more difficult.

For the reasons stated, this flaw is enough to procedurally negate the discipline imposed on the grievant. I make no determinations on the grievant's "No Show" record or how or where it would have fit in the Company's "No Show" policy, had that policy been enforceable.

DATED: October 16, 1989

[Signature]
Eric J. Schmertz
Neutral Referee
In the Matter of the Arbitration
between

Air Line Pilots Association

and

Trans World Airlines, Inc.

AWARD
Case No. NY-126-87

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

The Company did not have just and sufficient cause for disciplining the grievant, Robert Caceres, for the reasons set forth in Captain S. Fallucco's letter dated October 8, 1987. The disciplinary notice shall be expunged from the grievant's record, and he shall be made whole for pay lost, if any.

DATED: September 19, 1989
STATE OF New York } ss.
COUNTY OF New York }

Eric J. Schmertz
Neutral Referee

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: September 19, 1989
STATE OF New York
COUNTY OF New York

Donald H. Brown
Concurring

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

DATED: September 19, 1989
STATE OF New York
COUNTY OF New York

John R. Dell Isola
Concurring

I, John R. Dell Isola 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: September 29, 1989
STATE OF
COUNTY OF

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

Rex A. Pitts
Dissenting

DATED: September 1989
STATE OF
COUNTY OF

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

Michael M. Flinia
Dissenting
In the Matter of the Arbitration between

Air Line Pilots Association

and

Trans World Airlines, Inc.

The stipulated issue is:

Whether the Company had just and sufficient cause for disciplining the grievant, Robert Caceres, for the reasons set forth in Captain Fallucco's letter dated October 8, 1987?

A hearing was held on May 5, 1989, at which time Mr. Caceres, 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. Captains Rex A. Pitts and Michael M. Flinian served as the Company members of the Board of Arbitration. Captains Donald H. Brown and John R. Dell Isola served as the Union members of said Board. The Undersigned served as the Neutral Referee. The Oath of the Arbitrators' was waived, a stenographic record of the hearing was taken and each side filed a post-hearing brief. Thereafter the board met in executive session.

Captain Fallucco's letter of October 8, 1987 reads:

Dear Captain Caceres:

The investigation referred to in my letter of September 02, 1987, is concluded.

A meeting was held in my office on September 29, 1987, in which you stated your reasons for not protecting Flight No. 770 on August 30, 1987, and subsequent events.

I understand that circumstances beyond your control contributed to your inability to
protect your reassignment to Flight No. 770 from Flight No. 493 on August 30th as a result of an unexpected automobile difficulty. However, I must remind you of the Flight Operations Manual, Chapter 6, Page 4, Item B.4: "If a crew member expects to be absent from his normal contact for any extended period of time, he shall advise the responsible agency of an 'interim contact.'" There had been several attempts to contact you at the hotel for reassignment to Flight No. 770. Additionally, your refusal to accept any further assignments was a further disruption to TWA and your fellow pilots.

I find these actions to be inappropriate. I cannot agree with the reasons given for refusing further assignments. The events of August 30th demonstrated a lack of commitment towards work obligations. As a result of this incident, it is my intention to show you removed from schedule without pay for a period of two (2) days. This discipline is to take effect no sooner than ten (10) days after receipt of this letter.

Based on the record before me, I do not find just cause for the two day loss of pay penalty. The rule from the Flight Operations Policy Manual referred to in the aforesaid letter was not violated in this case because the grievant did what apparently has been an accepted or tolerated practice by pilots generally. Pilots leave their normal contact for shopping trips, sightseeing, meals and other relatively short periods of time without advising of an "interim contact." In the instant case, the grievant did not intend to be away from his hotel location for an "extended period of time." He went with his girlfriend to see a house that he planned to purchase for a move of his residence to that location. He expected to be away for only a few hours, no longer than other pilots regularly absent themselves from their normal contact for the various personal activities referred to previously. Before he left, he notified his Captain and First Officer of his plans and purpose. His period away was unexpectedly extended because his
car broke down twice on the way back to his lay-over hotel. There is no evidence that his reported car trouble was falsified. When he realized he would not make it back to make his scheduled flight assignment he called Crew Scheduling at a telephone number previously given to him for such purpose, and apparently informed the Company in time for a replacement to be obtained and for the flight to be protected.

Under these circumstances I do not find that the grievant "expected to be absent from his normal contact for an extended period of time." (emphasis added) Also, and alternatively, because the rule has not been enforced uniformly against other pilots in comparable circumstances, it cannot now be enforced against the grievant.

Under this finding, it is immaterial if the Company tried to contact him for a change in schedule while he was away from his normal contact. The same could have happened to other pilots who were similarly absent for short periods and who were not disciplined.

Captain Fallucco's letter goes on to charge the grievant with "refusal to accept any further assignments" which caused "further disruption to TWA and your fellow pilots." Aside from the apparent need to call in replacements or reserves, there is no evidence that any of the flights the grievant was asked to take after he phoned the Company a second time when he finally got back to his hotel, were cancelled or delayed, or that other pilots experienced "disruptions."

As a discipline case, the burden is on the Company not only to prove the offense charged but also to establish the propriety of the discipline imposed. Here there is a sharp conflict over what the grievant was told and what flights he was offered when he first called in from the road when his car broke down and after he got back to the hotel. He testified that his first call from the road when he informed the Company that he could not make
his regular flight, concluded with a statement by the Company's representative at Crew Scheduling that he "was off schedule." The Company denies making that statement. Alternatively it argues that if said, it does not mean that the pilot is excused from other replacement assignments that he could reasonably assume.

After he called from his layover hotel it is undisputed that he was asked if he could take a number of other flights and declined to do so. However it is disputed whether as the Company asserts he was re-offered his original flight. The grievant denies that that offer was made.

I do not find it necessary to make determinations on what or what not he was offered after his return to his layover hotel. I so conclude because I think that it was reasonable for the grievant to believe that he was not obligated at that point to take the flights offered. I think he had reasonable grounds to so believe because he had been told earlier that he was "off schedule" and that that meant he was relieved of further work at least for that day and that schedule, and was only obliged to get back into the schedule or back to his domicile within a reasonable time. I think it likely that he may have been confused about what he was to do (as he had never experienced this situation before) and rejected the flights offered not just because he found them inconvenient or undesirable, but because he thought he had the option to decline in view of his "off schedule" status.

The matter therefore narrows to whether he was told he was "off schedule" and whether he had legitimate grounds to believe that that meant he was relieved of an immediate obligation to resume scheduled flying.

The Company has not met its burden of rebutting the grievant's direct testimony that Crew Scheduling told him he was "off schedule." No Company official who spoke to the grievant in the original telephone conversation testified. The Company's case on what took place in that conversation was adduced at the hearing by a witness.
who gained his knowledge from Company reports. The record discloses that it is the Company's regular policy to tape the conversations between pilots and crew scheduling. Presumably a recording of the grievant's first conversation with Crew Scheduling was so recorded. The grievant and the Union on his behalf asked for the tapes at the grievance procedure and for this arbitration hearing, asserting that if they were listened to they would disclose that Crew Scheduling told the grievant he was "off schedule." The Company did not produce the tapes which would have been the best evidence, and offered no reason why it did not do so. It did not claim that the conversation was not taped nor did it claim that if taped, the tapes no longer existed.

Under that circumstance, I accept the grievant's direct testimony that he was told he was "off schedule" rather than the Company's hearsay testimony that he was not so told. Put another way, the Company has within its control and custody the best evidence of the critical conversation. Not to produce that best evidence is to fatally prejudice its otherwise hearsay evidence.

Finally, I find nothing in the record showing that by instruction, regulation, or practice, the phrase "off schedule" does not mean what the grievant thought it meant. If he was wrong, the Company has not met its burden of showing that he was wrong or more importantly, that he knew or should have known he was wrong. Therefore the events that took place after he was told he was "off schedule" cannot be held against him.

DATED: September 19, 1989

Eric J. Schmertz
Neutral Referee
In the Matter of the Arbitration:
between:
Air Line Pilots Association:
and:
Trans World Airlines, Inc.:

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

[1] For its acknowledged violation of Section 12(B)(3)(d) of the contract, based on its later discovery that another "reserve pilot (was) available for the flight," the Company shall grant the grievant, S. Wetmore the remedy it offered at the hearing.

[2] The involuntary change in Wetmore's duty-free period to assign him to protect Flight 5 which was scheduled to depart after the beginning of his originally scheduled duty-free period, was not a violation of Section 12(B)(3)(d) of the contract.

DATED: October 3, 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.

DATED: October 1989
STATE OF
COUNTY OF

I, Donald H. Brown, Jr. do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED: October 1989
STATE OF
COUNTY OF

John R. Dell'Isola
Concurring in #1 Above
Dissenting from #2 Above

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

DATED: October 1989
STATE OF
COUNTY OF

Rex A. Pitts
Concurring in #1 and #2 Above

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

DATED: October 1989
STATE OF
COUNTY OF

Michael M. Fliniau
Concurring in #1 and #2 Above

I, Michael M. Fliniau do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The issue involves the grievance filed by Captain O. J. Donovan challenging the Company's action in changing the duty-free period of First Officer S. Wetmore.

A hearing was held on May 4, 1989 at which time First Officer Wetmore, hereinafter referred to as the "grievant" appeared as did Captain Donovan and representatives of the above-named Union and Company. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Captains Rex A. Pitts and Michael M. Fliniau served as the Company designated members on the System Board of Adjustment. Captains Donald H. Brown, Jr. and John R. Dell Isola served as the Union designated members on said Board. The Undersigned was selected and served as the Chairman or Neutral Referee. The Oath of the Board was waived. A stenographic record was taken and the parties filed post-hearing briefs. The Board met in executive session in St. Louis on September 12, 1989.

Resolution of the disputed part of the grievance requires an interpretation of Section 12(B)(3)(d) of the contract under facts which the Company thought obtained at the time it changed the grievant's duty free period without his consent. Said Section reads:
A pilot's duty-free period may never be changed retroactively. The duty-free periods may be changed prospectively by mutual agreement between the pilot and the Company. The Company may schedule any reserve pilot to fly a trip terminating at the pilot's home domicile no later than twelve (12) hours after the scheduled commencement of such preplanned duty-free periods. A pilot who flies into such a period shall have his/her required rest period and then commence his/her duty-free period. When no other reserve pilot is available for the flight the Company may change such duty-free period(s) without the pilot's consent.

In the instant case, the grievant was scheduled for a duty-free period to begin at 0001 on March 27, 1988. On March 26, 1988 he was notified by the Company that he was assigned to protect Flight 5 scheduled to depart at 1900 on March 27th, and that his duty-free period was being changed to a later period so that he could undertake the new assignment. The grievant accepted that assignment under protest, and the instant grievance resulted.

The Company made the duty-free period change pursuant to the last sentence of the foregoing Section, namely:

> When no other reserve pilot is available for the flight the Company may change such duty-free period(s) without the pilot's consent.

The critical fact in this case is that Flight 5 which the grievant was assigned to protect, and because of which his duty-free period was changed, was scheduled to depart at a time later than when his original duty-free period was scheduled to begin. That is what the Union objects to in this proceeding and what the Union asserts is a violation of the foregoing contract Section.

Before going further it is appropriate at this point to note that at the outset of the hearing the Company acknowledged that it had learned (apparently during the processing of the grievance or
in preparation for this arbitration) that another reserve pilot was available at the time the grievant's duty-free period was changed without his consent and that that reserve pilot should have been assigned to Flight 5 rather than the grievant. Because of this later acknowledged violation of the contract Section the Company offered to grant the grievant the appropriate contractual remedy, and argued that the dispute herein was moot.

I ruled that the grievance which was based on what the Company did in the belief that no reserve pilot was available removed a justiciable issue, inasmuch as the parties remain in dispute over whether the Company could do what it did on the basis of what the Company thought the facts were at the time. And, as the Company maintained in this case that it had or would have the contractual right to involuntarily change the grievant's duty-free period under the facts it thought obtained, that situation, as grieved by the Union, is still disputed in this case and is therefore a matter for determination by this System Board.

In short, the grievance and hence the issue is, when there is no other reserve pilot available, may the Company change the duty-free period of a pilot without his consent and assign that pilot to protect a flight which is scheduled to depart after what would have been the commencement of that pilot's original duty-free period?

The Board will answer that question inasmuch as it remains a viable dispute between the parties, and is reflected in the grievance itself. However, as the Company concedes a contract violation based on different facts (namely its discovery that an-
other reserve pilot was in fact available) our Award shall grant the contractual remedy for that violation.

On the issue before us, the Company argues that Section 12(B)(3)(d) expressly authorizes such a change in a duty-free period under the language of its last sentence. Indeed, asserts the Company, as it procedurally first changes a pilot's duty-free period, thereby pushing that period back beyond the departure time of the flight to be protected, there is no longer a scheduled duty-free period into which the assignment of that flight would encroach. In other words, the situation as objected to by the Union would not in fact exist.

The Union disputes this sequential procedure and its logic. No matter how you look at it, it argues, a pilot's personal plans for his duty-free period are disrupted by a change in that period, whether the change is made before or simultaneous with the involuntary assignment of the flight to be protected. Furthermore, and in specific opposition to the circumstances of this case, the disruption is especially egregious because it disturbs a duty-free period and plans made for the use of that period that was originally scheduled to begin before the assigned flight is to be flown. When there is such a material disruption, asserts the Union, the junior available pilot should be called in under the inversal provisions of the contract. In short, it is the junior pilot, not the more senior pilot scheduled for a duty-free period, who should be inconvenienced.

Aside from this equitable argument, the Union claims that the proper interpretation of Section 12(B)(3)(d) bars the Company from so acting.
The Union argues that under Section 12(B)(3)(d) duty-free periods can be changed under limited circumstances without the pilot's consent and that those circumstances provide or imply that the flight to be protected must be scheduled to depart before the beginning of the originally scheduled duty-free period. It points out the only encroachment allowed on and into a duty-free period is the assignment to a flight that "is scheduled to terminate less than twelve (12) hours after that duty-free period has commenced."

Perforce, such a flight must have begun before the commencement of the duty-free period, because the contract language speaks of that flight "fly(ing) into such a period" and is limited to an encroachment of no more than twelve hours, "terminating at the pilot's home domicile."

From this the Union asserts that any encroachment on a duty-free period is similarly limited to flights departing before the commencement of that period. Specifically that the last sentence: "When no other reserve pilot is available for the flight, the Company may change such duty-free period(s) without the pilot's consent," which immediately follows the foregoing conditional sentence must be so conditioned too. Put another way, the Union claims that Section 12(B)(3)(d) should be read as an entity, and that its common thread and intent, under circumstances where a pilot's duty-free period is involuntarily changed, is to limit that change, expressly under the second and third sentence, and impliedly to the last sentence, to a flight that departs earlier than the commencement of the duty-free period.

The Union's interpretation is reasonable and logical. How-
ever it is not the only reasonable and logical interpretation. Just as acceptable is an interpretation that flying into a duty-free period, for a period not to exceed twelve hours is the only encroachment allowed without changing the duty-free period, and that under other circumstances as contemplated by the last sentence, the duty-free period must be changed. In other words, rather than the twelve hour provision being a limit on the last sentence, it is instead the exception to the last sentence.

Additionally, the last sentence itself contains no limitation. It unconditionally provides for a change in a duty-free period under one specific circumstance, and that is when no other reserve pilot is available. It does not limit its application to flights preceding the duty-free period, and had that circumstance been intended, the parties could have so provided.

The upshot of these two logical but different interpretations is to create the classical ambiguity. Ambiguities are clarified by negotiation history and by past practice. Here, no evidence of what took place when the contract language was negotiated was introduced into this record. And though the Company alleged a past practice supportive of its position, it could not cite specific examples or other probative actions comparable to what is presently in dispute. So I cannot find a dispositive past practice.

Absent evidence of the negotiating history or past practice, the Arbitrator is left to the traditional "burden of proof." That burden is on the grieving party, here the Union, to prove its case clearly and convincingly. Though I think the Union believes that the Company is misusing 12(B)(3)(d) to avoid or evade the difficult
to justify utilization of an inversal, I cannot find that the language of Section 12(B)(3)(d) clearly prohibits the Company from applying it as it did in this case. And, it is not yet at a point where an "abuse" of that Section can be claimed.

Finally, on the Union's equitable argument, I think that a change in a duty-free period can be equally disruptive whether it is done to protect a flight leaving before the original duty-free period is to begin or after it was to begin. Notification of a change a day before, for example, to protect a flight leaving earlier, within a matter of hours, can be no less unsettling to personal plans as the same notification, but for a flight which will depart, as in the instant case, sometime after the duty-free period was to begin. In both instances, the duty-free period is changed (except for the 12 hour allowed encroachment) and with that change, in both cases on short notice, personal plans are disturbed.

In short, so long as the pilot is notified before his original duty-free period is scheduled to begin, the change in his duty-free period may be equally disruptive, regardless of when the flight to be protected departs.

If I am wrong in this analysis, it, together with a clarification of the contract language, is a matter for negotiations.

Eric J. Schmertz
Neutral Referee

DATED: October 3, 1989
In the Matter of the Arbitration between

Air Line Pilots Association

and

Trans World Airlines, Inc.

AWARD
Case No. NY-123-88

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

The Company violated Section 12(B)(3)d of the contract when in September 1988 at the JFK domicile it changed Captain Donovan's duty free period without his consent.

The Company shall cease and desist from using Section 12(B)(3)d of the contract to change a pilot's duty free period without his consent to place that pilot on standby duty.

DATED: November 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.

DATED: November 26, 1989
STATE OF Missouri
COUNTY OF St. Louis

I, Donald H. Brown, Jr. do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED: November 1989
STATE OF ILLINOIS
COUNTY OF MARC

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

DATED: November 1989
STATE OF MISSOURI
COUNTY OF ST. LOUIS

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

DATED: November 1989
STATE OF
COUNTY OF

I, W. F. McKinney do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument which is my AWARD.
TWA-PILOTS' SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration:

Air Line Pilots Association and

Trans World Airlines, Inc.

The stipulated issue is:

Whether or not the Company violated Section 12(B)(3)d when in September 1988 at the JFK domicile it changed Captain Donovan's duty free period without his consent?

A hearing was held at the Company offices in Mt. Kisco, New York on July 28, 1989 at which time Captain Donovan 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. Captains Rex A. Pitts and W. F. McKinney served as the Company members of the System Board, and Captains Donald H. Brown, Jr. and Eugene F. Corcoran, Jr., served as the Union members on said Board. The Oath of the Board was waived; a stenographic record of the hearing was taken and both sides filed a post-hearing brief. The Board met in executive session in St. Louis, Missouri on November 9, 1989.

Section 12(B)(3)d reads in pertinent part:

"...when no other reserves are available for the flight, the Company may change such duty free period(s) without the pilot's consent."

In the instant case, the Company changed Donovan's duty free period to place him in stand-by status. What is at issue is whether Section 12(B)(3)d can be properly utilized to put the affected pilot on "standby."

It is the Union's position that Section 12(B)(3)d is limited by its terms to place the pilot on or assign him to a particular
flight, which, in the Union's view means an assignment involving the actual operation of an airplane. It argues that the phrase "available for the flight" does not mean an assignment to standby.

To accomplish the latter, namely to change a duty free period for assignment to standby, the Union asserts that the Company must resort to Section 12(E)(3) of the contract (i.e. the inversal procedure). Said Section reads:

"Inversing Seniority—In the event standby protection for the operation cannot be provided by a pilot holding a reserve schedule or by a reserve officer, the Company may assign the most junior pilot in the status required at the domicile who is legal, qualified, and available to standby duty."

The Union argues that the language of both foregoing Sections is clear. Section 12(B)(3)d expressly refers to a "flight" and 12(E)(3) refers expressly to "standby." Therefore the Union concludes that 12(B)(3)d cannot be invoked to put the pilot on standby, and that its use for that purpose in Donovan's case was improper and a contractual violation.

The Company's position is simply that the language "available for the flight" in Section 12(B)(3)d includes and encompasses "standby" status; is not limited to the actual operation of the aircraft of a particular flight or an assignment to that operation, and that past practice supports this interpretation and this use of Section 12(B)(3)d.

I am not prepared to hold that the two disputed contract Sections are so clear and unambiguous as to be conclusive on their face. Obviously, if one Section talks of changing a pilot's duty free period to make him "available for the flight" and the other talks of the assignment of a pilot "to standby duty," it can be logically and reasonably argued, as does the Union, that they deal with different types of assignments and status; 12(B)(3)d to cover the operation of a flight (especially as it refers not to a or any flight but narrowly to "the flight") and 12(E)(3) to the less
specific and as yet non-operational standby status.

Yet, there is logical and reasonable room to interpret the phrase "available for the flight" to include standby duty, simply because a pilot on standby is per force "available" to be assigned to fly a place. So, there is enough of an ambiguity in Section 12(B)(3)d to require an interpretation beyond its bare language, even juxtaposed with Section 12(E)(3).

However, the Company's evidence of "past practice" is not determinative in the Company's favor. Though it claimed a regular practice of changing pilot's duty free periods to put them on standby under Section 12(B)(3)d, it could only identify two such instances, and could not show convincingly that in those cases, the duty-free periods were changed involuntarily. Moreover, two examples in the year 1985, which apparently did not come to the Union's attention, do not qualify as a long standing, unvaried and consistent practice. And it is those latter elements that are required to establish a past practice which may be used to interpret and define the meaning and application of ambiguous contract language.

What is determinative in my judgment is the interpretation and identification the Company assigned to its action at the time it changed Donovan's duty free period. Its records show and it notified Donovan that its action was an "inversal." Indeed, for about twenty days thereafter it made no change in that interpretation or identification.

Frankly, I doubt that the Company would have changed the basis for its action had Donovan not, after twenty days, asked the Company to inform him of the "unusual circumstances" justifying the inversal. Then the Company notified him that its action was not an inversal, but rather under Section 12(B)(3)d.

In the law, there is evidentiary recognition of and credibility accorded "admissions against interest" and "spontaneous
exclamations." When the Company at the time it acted, identified Donovan's duty free period change as an "inversal," that constituted to my mind a constructive "admission against interest" or "spontaneous exclamation." It meant, as those circumstances mean, that spontaneously or automatically, the Company thought and believed that the contract section applicable to its action was the inversal Section, namely 12(E)(3). To my mind that is the best evidence of whether the Company, at that critical point, believed that it could do what it did under a different Section, Section 12(B)(3)d. That it did not then invoke 12(B)(3)d, and did not do so until the factual propriety of the inversal was challenged is persuasive evidence that it believed Section 12(E)(3) covered assignments to standby and not Section 12(B)(3)d. And that is how the ambiguity in Section 12(B)(3)d, if there be an ambiguity, shall be clarified.

In short, by its own action and identification otherwise, the Company may not use Section 12(B)(3)d to change a pilot's duty free period to place him on standby and thereby it violated Section 12(B)(3)d when as a final position, it relied on that Section in changing Donovan's duty free period without his consent in September 1988. The remedy is limited as set forth in the Award.

DATED: November 22, 1989

[Signature]

Neutral Referee
In the Matter of the Arbitration:

between:

Air Line Pilots Association:

and:

Trans World 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:

1. The grievances of the pilots who were employed in 1978 and 1979; furloughed in the fall of 1979, and recalled to active employment in the spring of 1985, that they have not been properly compensated in accordance with Sections 4(A)(1), 4(B)(2), 20(A)(2) and other related sections of the Agreement, is time barred from arbitration by Section 21(B) of the Agreement, and hence not arbitrable.

DATED: May 30, 1989
STATE OF New York) COUNTY OF New York) Eric J. Schmertz Neutral Referee

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

DATED: STATE OF COUNTY OF W. J. Hillebrand Concurring

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

DATED: STATE OF COUNTY OF Rex A. Pitts Concurring

I, Rex A. Pitts do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED:  
STATE OF J. R. Dell Isola  
COUNTY OF Dissenting  

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

DATED:  
STATE OF Fred S. White  
COUNTY OF Dissenting  

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

NOTA BENE:

As this Board has heard the contract issues on the merits, the Neutral Referee is willing, if acceptable to the parties, and together with his colleagues on this Board, if they are willing, to retain jurisdiction on the contract interpretation issues to hear and decide on the merits like matters which are timely grieved and filed for arbitration by or on behalf of other pilots who have been or are subsequently recalled from furlough and who claim they have not been properly compensated.

Eric J. Schmertz  
Neutral Referee
In the Matter of the Arbitration between
Independent Federation of Flight Attendants and
Trans World Airlines, Inc.

The Undersigned, duly designated as the System Board of Adjustment in the above matter, and having duly heard the proofs and allegations of the above-named Union and Company, presented on behalf of the Union by its President V. L. Frankovich, and on behalf of the Company by its Senior Vice President Employee Relations, J. W. Hoar, make the following AWARD:

It is hereby ordered that the Company implement the commission for in-flight liquor sales referenced in the June 8, 1989 letter of agreement no later than January 1, 1990.

DATED: December 7, 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: December 1989
STATE OF ) ss.
COUNTY OF )

I, Karen Lantz 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: December 1989
STATE OF }
COUNTY OF }

I, Norma Adams 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: December 1989
STATE OF }
COUNTY OF }

I, Sharon Faris 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: December 1989
STATE OF }
COUNTY OF }

I, Jill Swaya do hereby affirm upon my Oath as Arbitrator
that I am the individual described in and who executed this
instrument which is my AWARD.
TWA FLIGHT ATTENDANT SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration between

Independent Federation of Flight Attendants

and

Trans World Airlines, Inc.

A W A R D

Case No. 87-0003

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

The grievant, Terry Bartee was discharged for just cause under all the facts and circumstances of this case.

Eric J. Schmertz
Neutral Referee

DATED: April 9, 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.

Dirk J. Siedlecki
Concurring

DATED: April 1989
STATE OF
COUNTY OF

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

Patricia Granger Sutton
Dissenting

DATED: April 1989
STATE OF
COUNTY OF

I, Patricia Granger Sutton do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with Articles 16 and 17 of the collective bargaining agreement between the Independent Federation of Flight Attendants, hereinafter referred to as the "Union," and Trans World Airlines, Inc., hereinafter referred to as "TWA" or "the Company," the Undersigned was selected as the neutral referee of a Board of Adjustment to hear and decide the following issue:

Was the grievant discharged for just cause under all the facts and circumstances of this case? And, if not, what shall be the remedy?

Hearings were held on July 7 and 8 and September 22, 1988, at which time Mr. Terry Bartee, the grievant, and representatives of TWA and the Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Mr. Dirk J. Siedlecki served as the TWA designee on the Board and Ms. Patricia Granger Sutton served as the Union designee on the Board. The Oath of the Arbitrators was waived. A stenographic record was taken.

The parties submitted post-hearing briefs, and the Board met in Executive Session on March 7, 1989.

FACTS

Terry Bartee was a TWA flight attendant with seniority dating from June 24, 1985, sufficient to be a "bid" flight attendant. He departed from JFK to Paris on November 25, 1986, on a
pairing consisting of the following schedule: JFK-Paris-Cairo-Bombay-Cairo-Paris-JFK. The incidents involved in this proceeding took place in Cairo after the return trip from Bombay. There was a scheduled layover time in Cairo of forty-nine hours and thirty-three minutes. On arrival in Cairo at about 6:00 A.M. on December 3, 1986, Bartee checked into the Sheraton Heliopolis Hotel on the outskirts of Cairo. This was the TWA crew hotel, and the Company paid for Bartee's stay at the hotel.

Bartee slept for a while and sometime in mid-afternoon he met Mr. Peter Manzella, a fellow TWA flight attendant who had arrived in Cairo earlier. They ate together and went shopping in the bazaar. After shopping, they returned to the hotel at about 10:30 or 11:00 P.M. and had dinner together. Bartee stated he was unsure whether he had had anything to drink at dinner, but if he did it must have been a glass of wine. Manzella testified that Bartee drank no alcoholic beverage at dinner.

After dinner, they went upstairs to Bartee's room, used the bathroom, changed clothing and went downstairs to the LeBaron discotheque which was located in the hotel. They arrived at the LeBaron sometime after midnight, on December 4, 1986. According to Bartee and Manzella, each ordered a gin and tonic and sat at the bar and chatted.

The parties are in sharp dispute over what followed.\footnote{1} More importantly, the Company claims that four Egyptian men, while

\footnote{1} For example and initially the witnesses were in conflict over the number of people in the disco at the time Bartee was there. Bartee testified to less than 15 and Manzella to 8-10. The Company witness testified to 100 (Gharib), 100-120 (Soliman) and at least 20 (Allam).
in the men's room of the LeBaron, were the objects of Bartee's unsolicited and somewhat forcible sexual advances. Bartee denies that anything of the sort happened.

The Company's evidence concerning the alleged sexual advances consisted primarily of the testimony of Messrs. Ayhman Gharib and Mohammed Alam, and Mohammed Soliman, the manager or director of the LeBaron. Gharib testified that sometime in the early morning hours of December 4, he encountered Bartee in the men's room and believed he was drunk. He testified that Bartee, with his trousers down to the floor, his hands outstretched and saying "yes, yes," attempted to grab Gharib's penis and came within 15-20 inches from him. Gharib, saying "no," moved away from Bartee and quickly left the men's room. Shortly thereafter, according to Gharib, he reported the incident to Soliman. Gharib also testified that a smiling Bartee later started to approach him in the disco, but that Gharib left the area before Bartee reached him.

Alam testified that he entered the men's room at the LeBaron and while he was standing at the urinal, Bartee, who was standing at the adjacent urinal, reached for Alam's penis and Bartee said "hey man, hey man." Alam testified he immediately left the men's room and directly reported the incident to Soliman who told him to calm down and that he would investigate.

Both Alam and Gharib testified that it was 1½ to 2 hours after they complained that they became aware that Soliman was investigating the events. Soliman, the disco director, testified that at about 2:00 A.M., Mr. Tarek Nour Ezzat, a disco patron, complained that a man tried to grab his penis while he was in the men's room standing at the urinal. He identified Bartee as that
man. Ezzat did not testify at the hearing. Soliman decided to watch Bartee and the men's room. About twenty minutes later an Egyptian patron entered the men's room and within a minute was followed by Bartee. Soliman then heard an argument coming from the men's room. He entered and thereupon found Bartee and the other patron in an argument. The other patron complained to Soliman that Bartee had been looking at the patron's penis and asking him "immoral things" and complained that he did not expect such things to happen in a respectable place. Soliman said that, at the time, Bartee denied the accusations. From what he saw and heard, Soliman concluded that an incident similar to the one described by Ezzat had occurred. The Egyptian patron, whose name Soliman could not recall and who did not testify at the hearing, left shortly thereafter with his fiancee.

According to Soliman, shortly after he left the men's room he was approached by Alam and then by Gharib, and each asked if an incident had occurred in the men's room. (As previously noted, Alam and Gharib testified that they had complained to Soliman about two hours earlier). When Soliman answered in the affirmative, they told him about their encounters with Bartee, each of them laughing about it with several others joining in the laughter. Alam and Gharib testified that they knew each other and Ezzat only from seeing each other at the disco; otherwise they had no social relationship and were not friends with one another.

Bartee testified that he had gone to the men's room three times and felt as if he was being followed. Each time someone else was in the men's room, but he neither spoke nor gestured to them. Moreover, neither Alam nor Gharib were the men he saw in the men's room. He testified that he told Manzella, "something
strange—just strange feelings I have, everytime I go the bathroom somebody comes after me." Manzella stated he had noticed it also. Bartee also testified that he "felt a definite sexual tension or aura emanating" when he went to the men's room and that on his second trip the men's room he felt "sexual tension in the air" because of the length of time the other person was at the urinal without Bartee "hearing anything."

When Bartee and Manzella decided to leave the disco, Bartee decided to go the men's room again. This was about 30-45 minutes after his last visit. He testified the frequency of his men's room visits in part was due to an attack of diarrhea attributable to his stay in Bombay, and that despite his acknowledged discomfort at going to the men's room in the disco, he did not go to the lavatory in his own room because it was a large hotel and his room was quite a distance away.

According to Bartee, on this last occasion he entered the men's room and was accosted by an Egyptian male who asked if he was an American, and when Bartee acknowledged that he was and that he worked for TWA, the Egyptian struck him in the face, declaring that he hated Americans. Bartee testified that Soliman thereupon entered the men's room and told Bartee, who was washing blood off his face, that he, Bartee, would have to leave the disco.

Bartee and Manzella testified that when they tried to report the assault on Bartee to the hotel personnel, they were told that neither security nor the manager was available, but that they could speak to the assistant manager. Upon speaking to the assistant manager, he advised them that he had already received complaints about Bartee's behavior. Bartee also was refused details of the
complaints except that the three disco patrons who by then had been summoned to the assistant manager's desk mentioned only "bad behavior." According to Bartee, when he pointed his assailant out to the assistant manager, the manager did nothing.

Soliman testified that after he received the complaints about Bartee, he told Bartee to leave the disco and advised the night manager of the problems. Thereafter he, Bartee and Manzella went to the assistant manager's desk. Gharib was at the desk when they arrived. Soliman then brought Ezzat and Alam to the desk where the three complainants and Soliman gave written statements.

Bartee testified that the assistant manager advised him not to get TWA involved. Nevertheless, Bartee attempted to contact TWA to tell the Company about the assault on him but was unable to do so. The hotel did contact TWA to advise them of the incident and to complain. Neither Gharib nor Alam testified that they were aware that Bartee was employed by TWA and there was no evidence that TWA or the hotel or its disco had lost any patronage attributable to the alleged incidents. Moreover, there was no evidence that the matter had become a matter of notoriety beyond the hotel and TWA. Within TWA, however, knowledge of the matter had gone beyond those directly involved due primarily to a "long line" describing the incident which had been sent by TWA and which may have had considerable circulation within the Company.

Bartee was discharged by the Company effective January 8, 1987. A grievance was filed on January 16, 1987, and received by the Company on January 29, 1987. A step I hearing was held and denied by letter dated March 4, 1987. This Step I hearing was held under the interim grievance procedure established by the Company.
and in effect from May, 1986, to February, 1987, as a result of a work rule change implemented by the Company after the commencement of the Flight Attendants strike of March 7, 1986. The Company agreed to re-hear some cases after the parties reverted to Article 16 of the collective bargaining agreement, and this grievance was the subject of a second Step I hearing which also denied the grievance. The Union filed a Step II appeal which resulted in deadlock and in this appeal to the Systems Board of Adjustment on August 13, 1987.

The Union contends:

[1] the Company failed to comply with requirements of a fair, thorough and impartial investigation prior to imposing the sanction of discharge and that the Union improperly was not advised of the investigation;

[2] even if the facts concerning his conduct was established, Bartee was not subject to Company discipline for his actions because he neither was on-duty at the time of the alleged misconduct nor did the off-duty conduct so affect TWA as to provide jurisdiction for the Company to discipline him;

[3] the Company failed to sustain its burden of proving the charges of misconduct by Bartee; and

[4] even if misconduct was proved, under the facts and circumstances of this case the sanction of discharge (a) is unduly harsh and (b) constitutes disparate treatment for Bartee when considered in context with similar disciplinary cases.

The Company disagrees with each of the foregoing Union contentions.
1. Fairness of investigation and notification of Union.
The events and proceedings in this matter began during a period when the flight attendants were involved in a labor dispute. However, while the collective bargaining agreement between the Union and the Company was in dispute as to effectiveness, the Company instituted a Step I hearing under the agreement, thereby affording the grievant rights under that procedure. The record demonstrates that, even if the grievant was prejudiced under the original Step I procedure the prejudice was cured by the rescheduled Step I hearing, and both parties participated in that procedure, including Union representation.

Moreover, while it is desirable that information be obtained first-hand by the Company, the failure to do so did not result in an investigation which was not fair, thorough and impartial. Substantial information was obtained by TWA personnel from the hotel which had conducted its own investigation and included written statements by witnesses. Of course, all of the witnesses adverse to Bartee were resident in Egypt and, under those particular circumstances, the Company engaged in a feasible investigation of the facts which ultimately did not unfairly prejudice the grievant at the time or for the purposes of this hearing.
2. Did the grievant's off-duty or on-duty status give the Company jurisdiction to impose discipline for the alleged misconduct? Any usual and broad distinctions governing an employer's right to impose discipline for employee misconduct are based on whether the employee was on duty or off duty when the alleged misconduct occurred. In this case, this does not provide an entirely satisfactory line.

The grievant was on lay-over as previously described and, in substance, en route during a flight which began at JFK on November 25, 1986. At the time of the alleged incidents he was not on duty in the sense that he was performing duties or had an obligation to perform duties for the Company. On the other hand, he was not entirely off-duty either. He was staying at a hotel as a TWA employee, he was identifiable as a TWA employee, his accommodations were paid for by the Company and he was subject to worker's compensation and scheduling change. Those circumstances created the situation where, at the least, an employee has an obligation to avoid engaging in conduct which is inconsistent with regular and customary standards of conduct expected of such employees under circumstances where it is reasonable to expect that the misconduct in question is practically certain to cause injury to the business or severe embarrassment to the reputation of the Company. This standard may not ultimately define all the limits of the employee's obligation when on lay-over, but this standard for employee conduct is sufficient for a decision on the facts of this case.

For the purposes of this nexus for imposing discipline, the circumstances established by the record are that if the grievant
engaged in misconduct of the kind and nature alleged in LeBaron's which was located in the TWA crew hotel, the conduct would have occurred in a place where it would practically inevitably cause TWA serious embarrassment. The facts also show that TWA did suffer serious embarrassment in its relationship with the hotel which engaged in significant communications concerning the alleged incident with TWA and it cannot be seriously disputed that it was public conduct inconsistent with the standard expected of a flight attendant. Therefore, if the alleged incidents occurred, TWA had the authority to discipline the grievant.

3. Did the Company sustain its burden of proving misconduct by Bartee? The witnesses were in sharp conflict over what, if anything, happened at the LeBaron on the morning of December 4, 1986. Basically the Company claims that four Egyptian men, while in the men's room of the LeBaron, were the objects of Bartee's unsolicited and some discernible physical sexual advances. Bartee denies that anything of the sort happened. Obviously, resolving this dispute requires determining the credibility of the witnesses.

Alam and Gharib testified directly that when Bartee was in the men's room with them he attempted to grab their penises. Two other alleged encounters, the third (with Ezzat) and the fourth with the unnamed Egyptian, are based almost entirely on hearsay and standing alone would not be sufficient to sustain the Company's burden. However, they do not stand alone, considering the direct testimony of Alam, Gharib and Soliman.

Alam, Gharib and Soliman testified directly that there was a commotion in the men's room with respect to the fourth alleged incident. Although evidence of the sexual aspect of that fourth encounter is essentially hearsay, evidence that something happened which caused a commotion is not hearsay. Soliman's testimony that he saw Bartee enter the men's room after the Egyptian had entered it and that the argument and commotion followed, plus the testimony
concerning the appearance and demeanor of the Egyptian when Soliman entered the men's room, all of which followed Soliman's observation of the men's room because of the complaint from Ezzat concerning a sexual encounter, further support the claim there was a pattern of sexual advances on those men by Bartee.

Moreover, the testimony of Soliman concerning the hearsay statements of Ezzat and the other Egyptian may well involve exceptions to the hearsay rule as excited utterances or reports of present sense impressions. Taking account of the other two incidents and the facts surrounding the third and fourth incidents, the record supports the conclusion that the third and fourth alleged sexual encounters occurred based on the circumstances, the exceptions to the hearsay rule and proof of a pattern of conduct.

Bartee denies that any incident occurred and claims there was an anti-American episode on the fourth alleged incident. To credit Bartee's denial and thereby reject the substance of Alam's, Gharib's and Soliman's testimony requires concluding that the latter three were lying and in league to hurt Bartee. Other than the fact they did testify against Bartee there was no evidence that they were involved in a conspiracy. Indeed, if they were conspiring their stories probably would not have included such matters as their laughter at the incidents and admissions that they were not expecting to be called as witnesses. Nor, if they conspired, would their direct testimony have included some inconsistency on the times involved and the sequence of events. Moreover, the only motive offered by the Union for believing there was a conspiracy is a claim of Egyptian anti-Americanism and Arab or Moslem antipathy to homosexuals. While there might well be
anti-American feelings among Egyptians, there was no evidence that these witnesses shared those feelings at all or so strongly that they would engage in this kind of conspiracy that extended from Cairo all the way to the arbitration in the United States. It would be wholly improper to disbelieve an Egyptian national simply because he is an Egyptian national testifying adversely to an American who also is homosexual. Basically I accept their testimony in the critical areas as accurate, the less important inconsistencies notwithstanding.

Bartee did testify that the fourth incident involved an anti-American incident with an Egyptian male in the men's room. This story, probably is true only in part. If there was an "anti-American" response by the Egyptian male, it likely was a consequence of some provocation, and considering the evidence it is not mere speculation to contemplate Bartee provoked it.

Rarely an easy task, the difficulty of determining the credibility of witnesses in this case was magnified, because the witnesses for the Company testified through an interpreter, making personal observation of demeanor and choice of language less of a factor in resolving their credibility than if they had testified directly in English. These problems were not present in assessing Bartee's credibility.

However, it is not on his demeanor that I reject Bartee's denials. Rather it is based first, on the direct testimony of those witnesses who have no interest in the outcome of this proceeding and the corroborating aspects of their testimony. And, second is Bartee's failure to effectively report to TWA concerning his own claimed injuries, or offer any medical or other proof of that injury.
Third, there are significant and unusual facts provided by Bartee which give credence to the Company's witnesses and support rejection of Bartee's denials. He did admit that he made several trips to the LeBaron men's room because he was in discomfort. The reason he gave for going to the LeBaron's men's room instead of going to the lavatory in his own room in the hotel is just not plausible. Moreover, he admitted that he continued to go to the LeBaron's men's room despite his admission that he felt that men were following him and that he felt "sexual tensions in the air" when other men were present in the LeBaron's men's room. These factors, together with the other evidence, support the conclusion that there were sexual motives for his going to the men's room. Indeed, if the facts were limited to Bartee's description, namely an assault on him, I fail to see where "sexual tensions" were involved or why Bartee had any reason to sense external sexual tensions. Rather, the logical explanation is that the sexual tensions had to be Bartee's alone, and his tensions or arousement led to his conduct as described by Company witnesses.

It is important to note that Bartee was not discharged because he is a homosexual. The Company does not object to homosexual activity by consenting adults, in private, while on layover status. What it does object to, is his unsolicited, unwelcomed and forced homosexual advances to strangers in a public men's room. I am satisfied that the Company would object and act similarly in the circumstance of a forced, unsolicited and unwelcomed heterosexual advances.

Fourth, Bartee's prior record of conduct impeaches his testimony by impugning his capacity to testify truthfully. His prior record which consists of issuing checks with insufficient
funds and misrepresentation on his employment application goes directly to his capacity to testify truthfully.

4. Was the sanction of discharge proper? Under the foregoing circumstances, I do not find the Company's discharge of the grievant to be so harsh or inappropriately unresponsive to the offense as to require or permit me to set it aside and to substitute a different sanction even if I thought a lesser penalty would have been sufficient. A flight attendant deals with the public. Considering the public aspects of the grievant's conduct, and the embarrassment to TWA, I do not think it unfair or unreasonable if the Company concluded that Bartee's conduct in a public men's room made him unsuitable to deal with passengers and fatally impaired his future effectiveness and usefulness as a flight attendant working with other employees. Though the Company does not make this point specifically, it is obviously implicit. The long line report was unfortunate and possibly unnecessary but Bartee must share responsibility for it. It would not have been generated but for his conduct.

The final question is whether the discharge of the grievant constitutes unequal or unfair treatment of this grievant when compared to the discipline of other employees. The parties have cited a number of disciplinary cases to support their opposing positions on this issue. Those cases which involve voluntary sexual conduct by both participants are, in my view, distinguishable from the circumstances of this case.

But two cases have a direct bearing on this question of discriminatory discipline. Clivs DiSusa (January, 1983) (Union Exhibit No. 8) involved a male Service Manager, who while on duty and in full public view grabbed a female passenger and kissed her against her will as she was deplaning, thereby causing serious offense to the passenger and embarrassment to TWA. He was suspended without pay for seven days. In 1982, TWA discharged Clifford
Jones, a male flight attendant who forced his sexual attentions on an unwilling female flight attendant.

Limited to single cases neither can be said to have established a policy or a pattern for every ensuing case solely on the basis that it involved unwanted and uninvited sexual advances. TWA's discharge of Bartee is consistent with the sanction imposed on Jones and may be inconsistent with DiSusa. However, without facts concerning the employment background of each, conclusions concerning the consistency of the sanction are difficult to assess. Moreover, a single case (i.e. DiSusa) is not enough to establish a pattern or practice, which would make the Bartee penalty disparate or discriminatory.

The few commendations Bartee received for good work on several occasions are not sufficient to outweigh the negative aspects of his record, including the current charges.

In summary, I conclude:

1. there was no prejudice to the grievant attributable to the Company's conduct of the investigation or the manner in which the Step I hearing was conducted;

2. the misconduct, if engaged in while the grievant was on lay-over, was of such a kind and nature and engaged in under such circumstances that it was practically certain it would and, in fact, did cause serious embarrassment to TWA, and was contrary to standards of conduct reasonably expected of flight attendants.

3. the Company sustained its burden of proving by clear and convincing evidence that Bartee engaged in the misconduct with which he was charged while on lay-over;

4. the discharge of the grievant was neither arbitrary, unreasonable or unduly harsh nor did it constitute discriminatory treatment of the grievant.

DATED: April 9, 1989

Eric J. Schmertz
Neutral Referee
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 Judith Fields-Leduc.

DATED: April 27, 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: April 1989
STATE OF
COUNTY OF

I, John Nelson 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: April 1989
STATE OF
COUNTY OF

I, Jane Hefflinger 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:
betweeen

The Independent Federation of Flight Attendants and

Trans World Airlines, Inc.

The stipulated issue is:

Was there just cause for the discharge of Judith Fields-Leduc? If not, what shall be the remedy?

Hearings were held on November 10 and November 11, 1988, at which time Mrs. Fields-Leduc, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the System Board of Adjustment was waived. Ms. Jane Hefflinger served as the Union's designee on the Board of Adjustment and Mr. John Nelson served as the Employer's designee on said Board. The Undersigned was selected as the neutral referee.

Each side filed a post-hearing brief, and the Board met in executive session on April 5, 1989.

The grievant was discharged for "strike violence." I find that she was willfully involved in acts constituting "strike violence" and that those acts were sufficiently serious to justify her discharge.

Let me come right to the point. The grievant's version of the critical events is so highly implausible and illogical as to lack credibility. When the contrary testimony of eye witnesses
innocently involved in the events is factored in, the grievant's version not only becomes unbelievable but the Employer's case against the grievant achieves the "clear and convincing" level required to sustain a discharge.

Certain aspects of the incident and events are not disputed. On April 8, 1986, as four non-striking flight attendants were walking in street clothes from the Lexington Hotel on 48th Street in Manhattan towards a restaurant, they were suddenly and intensely chased by a group of strikers or strike supporters. The pursuers jeered them loudly, using angry, insulting and profane language, and pelted them with raw eggs. Frightened, the four attendants fled in different directions. Some took refuge in a nearby store and an apartment lobby. The grievant was with the pursuers, was part of the chase, and was prominently engaged in directing invectives and insulting language at the non-strikers.

What is denied, and what is in dispute is whether the grievant joined in the egg throwing, more specifically whether she "cracked" an egg on the head of one of the four attendants (Barbara Williams Bellows) and whether she violently grabbed another attendant (Diane Stevens) by the shoulder from behind with apparent intent to assault her.

The Employer also charges that the grievant "stood by and watched as a male flight attendant (a striker) attempted to kick Bellows and "raised her fists against Bellows and tried to strike her."

The grievant's explanation is that she was on her way home near the Lexington Hotel; that she decided to check on any picket line there (in her capacity as a strike captain who briefed pickets) and came upon that location as the chase began or was in progress. She became emotionally caught up in the events and joined the chase. She does not deny that she jeered at the four
attendants, calling them "scabs" and accused them of "taking jobs" from the strikers. However she denies that she threw eggs, or smashed an egg on the head of one of the attendants, or committed any other acts or threats of violence. Rather, she claims that someone (unidentified) ran past her and placed an egg in her hand. But that she immediately disposed of it by throwing it directly onto the sidewalk.

I think it unlikely in the extreme for the grievant to have refrained from egg throwing and from physically grabbing one of the attendants when she had joined in all the other acts and events of the chase. Indeed, she was so emotionally caught up in the events and obviously so angry with the non-strikers, that she followed two of them into an apartment lobby where they had sought refuge, and verbally berated them there. I simply do not believe that she "stopped at the water's edge" and did not join in the egg throwing. Such restraint, considering her acknowledged anger and participation in the chase, would have been unrealistic and unnatural, and I do not accept it as fact.

This disbelief on my part becomes conclusive when the adverse testimony of some or all of the non-strikers is considered. All four testified that they saw the grievant in the group that threw eggs. Linda Ross testified that she saw the grievant strike Bellows on the back of her head. It is undisputed that Bellow's head and hair were splattered with raw egg, and I conclude that that resulted from the witnessed assault by the grievant. I find no reason to disbelieve what Ross testified she saw.

Similarly, again considering the manifest improbability of the grievant participating in some of the frightening and threatening events but not in egg throwing, I find no reason to disbelieve Diane Itier who testified that the grievant grabbed her
shoulder and believed the grievant was trying to hit her.

The balance of the events, and the allegations related thereto, such as what the grievants and others did just before the police arrived and in the presence of the police, and whether at certain points the grievant ran across the street or simply walked, do not change my foregoing findings of fact and conclusions. As such I find it unnecessary to decide the other allegations of physical violence or whether the grievant entered a guilty plea in court to the assault charges.

There are two remaining questions. First, did the grievant's acts constitute strike violence warranting discharge. And second, was her penalty too severe and disparate when compared with other cases in which lesser penalties were imposed.

It must be noted that the chase and the attack on the four non-striking attendants took place on a New York City street, away from a strike location, under circumstances when the attendants were not in uniform and not crossing a picket line, but off duty or on layover on the way to a restaurant for dinner. Under that circumstance, the chase and attack had to be planned; the non-striking attendants had to be previously identified and probably observed in their movements to and from the Lexington Hotel. The chase and the assault with eggs had to be especially frightening to the four attendants considering its suddenness, unexpectedness, vehemence and locale. It is immaterial whether the grievant participated in the planning phase. Her willing and unreserved participation made her an accessory at least. By any definition or standard, I must conclude that she and the others (unidentified in this record) who engaged in the chase and egg assault committed acts of strike violence, and that what she did was serious enough to warrant discharge.
I feel compelled to state at this point that I believe I understand the anger and frustration of strikers when they see replacements or non-strikers work in their place. Any ideological sympathy I may have personally, cannot extend as an arbitrator to excuse violence. As a matter of law, contract interpretation and the well settled principles of labor relations, strike violence is proscribed and actionable and grounds for discipline, including discharge. It is to the law, the contract and those principles that the arbitrator is bound.

Finally, I do not find that her discharge was disparate treatment or discriminatory. The Union cites the case of Uli Derekson, a purser who struck a picketing flight attendant with her car as she crossed the picket line, and was not disciplined, and the case of Peter Washington who was suspended thirty days for turning a fire extinguisher on and into the face of a picket. As reprehensible as those two actions were, they are significantly distinguishable from the case at hand. Both were unplanned, spontaneous, albeit violent, reactions. There is some indication that Washington reacted to a racial slur. The full facts of the Derekson situation could not be directly testified to with probative value. But neither had the elements of the circumstances of the present case. In the grievant's case, the acts were not spontaneous or momentary. Rather, even if not planned, they were carried on over a period of time, and took on the calculated objective of frightening, punishing, intimidating and possibly injuring the non-strikers. It did not take place, as did the two cases cited, at a picket line or at a strike location. Nor can it be considered "normal" strike activity or even a provoked response to replacements or non-strikers at a struck locale. Nor does it fit into activity designed to peacefully persuade workers
not to cross a picket line or to persuade the public not to patronize the struck establishment.

Unlike Washington and Derekson, the grievant had plenty of time to think through what she was doing. Even if first caught up in the emotions of the events, there came a point during the chase when she could and should have stopped and withdrawn without further participation. Her continued presence and participation cannot be interpreted as a spontaneous and momentarily irrational act, but became part of a planned and possibly premeditated action when she voluntarily continued to be part of it. In short, she became a willing and knowing participant when she had a chance to and should have stopped that participation. Even if it started as an instantaneous and unthinking reaction to non-strikers who had taken her job, she knowingly permitted it to go too far and too long to the point of wrongfulness and illegality. For that she can be held responsible.

DATED: April 27, 1989

Eric J. Schmertz
Neutral Referee
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:

1. There was not just cause for the discharge of Kenneth Hooper.

2. He shall be reinstated.

3. His reinstatement shall be without back pay, and the period of time from his discharge to his reinstatement shall be deemed a disciplinary suspension for rule violations relating to failure to properly perform his duties and responsibilities as a Flight Service Manager.

DATED: December 4, 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.

DATED: December 1989
STATE OF
COUNTY OF

I, Susan Lantz 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, Diane M. Scott do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The issue is:

Whether there was just cause for the discharge of Kenneth Hooper and if not, what shall be the remedy?

Hearings were held on September 27 and September 28, 1989 in New York City, at which time Mr. Hooper, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. Additionally, the grievant was represented by private counsel of his choosing. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The System Board of Adjustment consisted of Ms. Susan Lantz, Union designee; Ms. Diane M. Scott, Company designee, and the Undersigned Neutral Referee. The Oath of the Board was waived. The Board met in executive session on October 19, 1989.

The basis for the grievant's discharge and the charge against him is stated in the letter dated December 28, 1988 from Mr. Donald Fleming, Regional Manager In-Flight Services, to the grievant. In pertinent part it reads:

"...as a result of an in-flight revenue and procedure audit performed on Flight 701/12 October 1988 you are charged with submitting untruthful information for (or on) Company documents, failure to safeguard Company property, theft of Company funds and
failure to follow accounting and revenue control procedures."

In short, and based on the Company's evidence and testimony adduced at the hearing, the grievant is charged primarily with both theft of Company revenue and merchandise and with submitting willfully untrue reports, in connection with transactions involving the sale of liquor, duty-free products and the rental of headsets. And he is charged incidentally with violations of certain general Rules of Conduct.

The Company freely states that prior to the events giving rise to this case, it suspected the grievant of committing prior thefts. Though it did not previously charged him with theft or the submission of fraudulent reports, it twice disciplined him (by counseling and then with a fifteen day suspension) "for related revenue account discrepancies and loss of funds."

The Company also admits that because of its suspicions it made the grievant a "target" of an investigative procedure and surveillance of his work as the Flight Service Manager on Flight 701 from London to New York on October 12, 1988.

The investigation took the form first of "sterilization" of the plane just before it left London. Sterilization involved the taking of an inventory of the headsets aboard, the quantity and types of alcoholic beverages, and the quantity and type of merchandise for duty-free sale. Then, upon arrival in New York, and under what the Company says were controlled and secure procedures, an inventory of those items were taken, revenue produced from the sales checked against the headsets used and not used, the liquor and duty-free items that remained, and against the sales and revenue reports submitted by the grievant.

It is undisputed that under Company rules, the Flight Service Manager is responsible for the accurate completion of all In-Flight Revenue papers and the safeguarding of all Company revenue produced from in-flight sales.
It is the Company's position that the inventories and audits showed the following discrepancies:

**Head Sets**

a) Hooper reported seventy-six (76) head-sets sold when actually ninety (90) were sold or reissued.

Total Dollar Variance:  
- 90 x $4.00 = $360.00  
- 76 x $4.00 = $304.00  
Revenue Short = $ 56.00

b) Hooper reported that $262.50 was deposited. Only $255.50 was deposited.

Revenue Short = $ 6.50

**TOTAL REVENUE SHORT** = $ 62.50

**Duty Free**

a) Hooper failed to account for the following:

- 1 bottle of Chivas Regal = $ 16.00  
- 1 Anais Anais = $ 24.00  
- 1 Helena Rubenstein Make-up kit = $ 29.00  
- 1 Noisome Creme = $ 28.00

$ 132.00

**TOTAL REVENUE SHORT** = $ 132.00

**Liquor**

a) Hooper failed to accurately account for inflight beverage coupons for a loss of revenue equalling $ 1.00

b) Ten (10) marked Ambassador miniatures were found in coach carts. Each miniature costs $2.50.

Total revenue lost $ 25.00

c) Hooper stated deposit was $321.00, while in fact only $320.00 was deposited.

Revenue lost $ 1.00

d) Failure to accurately report final inventory of coach liquor carts. The audit revealed a shortage of:
Again, repeating the Company's primary accusation against the grievant, I quote from the testimony of Mark Moscicki the Company's Supervisor of In-Flight Operations, and the one who made the decision to discharge the grievant.

The Neutral Referee asked him if the Company was claiming that the grievant "stole" the $134 that represented the discrepancy in duty-free sales. He responded "yes." He also testified that the grievant's dismissal was based "on the charge of theft and other charges..." and that "theft is a terminable offense not requiring progressive discipline." Making it clear that although the grievant was also charged with certain rule violations, the ultimate penalty of discharge was imposed because the Company concluded he "stole" revenue, and that that act was "the straw that broke the back."

I agree with the Company that theft is a summary dischargeable offense. From the record it is clear to me that if the Company did not believe that he stole revenue, the case would not have been "pushed over" to the point of discharge. Therefore as to whether the discharge is to be upheld or reversed turns on whether theft has been proved by the requisite standard of proof.

As the grievant is not officially charged with a crime (as that cannot be done in an arbitration), nonetheless the charge of theft parallels the criminal charge of theft. And though the grievant's liberty is not in jeopardy in this proceeding, his reputation and future employability certainly are. Therefore, though the criminal standard of proof of beyond a reasonable doubt is not applicable here, it has been my consistent view and holding that under these circumstances the applicable standard of
"clear and convincing evidence" of the offense charged must be rigidly and uncompromisingly met for the charge of theft to be upheld. And, as the parties well know, the burden of satisfying that standard is on the Company.

The Company has raised some very serious suspicions about the grievant's conduct, especially when viewed against the backdrop of a prior record of revenue "losses" and other irregularities. Considering that prior record, I understand why the Company became suspicious; why it apparently doubted that the prior "losses" and irregularities were simply errors or poor duty performance; why it decided to make the grievant a "target" and to try to catch him committing theft and fraud; and why it audited and inventoried the flight. Indeed, I have no quarrel with what the Company did because it has the right to protect the merchandise it distributes and sells aboard a flight and the revenue therefrom, and to uncover the dishonesty of an employee.

I have studied this record very carefully, including excellent written summations of the facts and argument submitted to me at my request by my colleagues on the System Board, and I have concluded that the circumstantial evidence adduced and relied on by the Company falls short of the requisite "clear and convincing" standard.

There is no direct evidence that the grievant stole money or goods. No one saw him do any such thing or even physically act in a manner on which any such reasonable conclusion could be based. He made no "admissions against interest," no "spontaneous declarations" or even suspicious or compromising remarks which could point in that direction. Upon arrival in New York, he was immediately confronted by Company investigators and was subject to questioning. Yet he made no statements that could be deemed incriminating. Importantly, the Company searched his flight bag and found nothing. His person was casually searched, and it was possible for the Company to have searched him extensively then. Nothing was found. His wallet was "looked into," but no demand
was made on him to account for the money he had in the wallet, and there is no evidence that any of it was stolen.

It is well settled that in the absence of direct evidence a discharge offense, including one that parallels a crime, may be proved by circumstantial evidence.

But if a case is sustained on circumstantial evidence, the quantum of proof is met only if that evidence is of such quality, quantity, and coincidence that only one logical and reasonable explanation or conclusion can be drawn - and that is that there are no acceptable possibilities other than that the offense was committed. If there are other reasonable, realistically possible and hence believable explanations, even if not equally persuasive, to account for the events, the conclusion of culpability should not be made, because the evidence of guilt, in that case, would fall short of "clear and convincing."

The Company's circumstantial case against the grievant is first grounded on the accuracy of the "sterilization" of the flight before it left London. If there were errors at that time in the count of headsets or liquor, for example, that would throw off and make inaccurate the audit conducted in New York. And if so, that could reasonably account for discrepancies between the headsets and liquor which the Company asserts was sold (or missing and presumably sold) and the shortfall in revenues reported and/or turned in.

I am not prepared to find conclusively, on the basis of clear and convincing evidence, that the "sterilization" was absolutely accurate. For example, there is testimony that headsets are stored in quantity in bags, and that the bags are supposed to contain a specific number of sets. There is evidence that in the original count the Company assumed the accuracy of the quantity supposed to be in each bag, but may not have checked that quantity individually. And that at times a lesser or greater number of sets are stored in one bag than officially called for.

Frankly, while it is improbable that the sterilization was
inaccurate, I am not prepared to conclude, based on this record before me, that that was not a reasonable possibility. For at least relatively minor errors in the original count of headsets, liquor, and even duty-free sale items could explain the discrepancies in numbers and moneys when these items were audited in New York.

Also, the grievant was not the only employee who made headset, liquor and duty-free sales on the flight. Cabin Attendants did so too. I think it a reasonable possibility (because I have personally experienced it) that Attendants may have given out some headsets free that should have been sold (in the Coach section); may have given liquor miniatures and/or bottles free that should have been sold, (again in the Coach section) or co-mingled them between the First and Ambassador classes where they are free, and the Coach section, where they are to be sold; may have erred in the sale of duty-free merchandise or negligently misplaced items or failed to collect for items sold; and may have made errors in their sales and use report to the grievant and in the amounts of money they collected and turned over to him.

That circumstances causing any of these possibilities or their actual occurrences are to be noted on the official reports (referred to by the Company as the "safety net") and were not so noted means only that the grievant failed to carry out his supervisory duties properly and was negligent, careless or indifferent. But it does not mean convincingly, that he stole money or merchandise or willfully adjusted the report to hide or obfuscate any such misconduct.

The duty-free merchandise that was allegedly missing and presumably sold, but for which there is a significant monetary short fall, presents special circumstances. These items when available for sale, like liquor or headsets, are within the custody, control or proximity of others beside the grievant. I think it reasonably possible that someone else, another employee
or a passenger may have taken them without making payment. The
grievant testified that he was away from the duty-free cart once
or twice during the flight, including one time because of a pass-
enger fist fight. This was not refuted by others aboard. No one
else was searched or apprehended and therefore could have left
the plane with the merchandise, undetected.

Also, as previously noted, is it not possible or reasonably
possible, that some duty-free items were "sold" for later payment
before the plane arrived, and that with other matters pressing,
the purchaser forgot to pay and was not followed up? Or, pay-
ment was improperly converted by someone else, and the grievant
negligently made out inaccurate reports. I find nothing in the
contract or the Company Rules that makes the grievant an absolute
guarantor of the accuracy of what was reported to him by the Cabin
Attendants or absolutely responsible for monetary errors made by
others under his supervision, where as here, the charge is not just
negligence, carelessness or incompetence, but rather fraud and
theft.

An examination of some of his reports shows errors that I
think he would not have recorded had he wanted to cover up or not
call attention to his actions. For example, he reported the de-
posit of $262.50 for headsets sold, but only $255.50 was in fact
deposited. To avoid calling attention to that money discrepancy
why would he not have reported $255.50 so that the report corre-
lated with the money on hand?

He reported a deposit of $321 on a liquor accounting, when
only $320 was turned in. Why would he have not tried to hide this
discrepancy if he pocketed the difference?

I recognize that minor discrepancies of the foregoing type
could have been made purposefully, to cover-up or divert attention
from larger, but not recorded monetary discrepancies from, for ex-
ample, duty-free sales. But as both conclusions are, I believe,
reasonable possibilities, I cannot find convincingly that his
reports were willfully false.

But I wish to be blunt. I do not conclude that the grievant did not steal and did not make out fraudulent reports. Like the Company, I am suspicious, not only from the facts in this case but also by viewing them against the backdrop of a prior record of revenue losses, passing bad checks, and cocaine use. These things could well be reasons for a need for money and could induce theft. As an employee for some 15½ years and as an experienced Flight Service Manager he cannot persuasively assert that he did not know how to properly fill out revenue and sales reports or the importance of their accuracy, especially for Customs. Speculatively, therefore, theft may be an answer to his administrative errors. Also, there are questions in my mind about his forthrightness as a witness. But I am unable to elevate my suspicions, speculations and questions to the requisite probative or evidentiary level that would transform the Company's otherwise equivocal circumstantial case to one that is clear and convincing. Suspicions, unanswered questions, uneasy demeanor, and speculative conclusions, are simply not enough, where, as here, a heavy burden of proof is on the Company. Yet I do conclude that he made inaccurate and incomplete reports, contrary to his responsibilities and he has no acceptable excuse for those omissions.

Though I shall order the grievant's reinstatement, it shall be without back pay, and the period between his discharge and reinstatement shall be a disciplinary suspension for negligence, carelessness and inattention to his responsibilities "to make accurate reports." He has been disciplined previously for these failings. But as the main charge of theft has not been proved, a further suspension for poor work performance and for violations of administrative and operating rules, is the appropriate penalty at this point.

In short, I am giving the grievant the benefit of the doubt. But if revenue losses and other such irregularities continue to occur on flights on which he works, I would deem that to create a rebuttable presumption that he was engaged in misconduct of the
type charged in this proceeding. In that event, and also because it would be an inexcusable continuation of poor work performance and rule violations, the Company would not be confronted with the same rigid standard of proof. Instead, the burden would be on the grievant to rebut the presumption.

DATED: December 4, 1989

Eric J. Schmertz
Neutral Referee
In the Matter of the Arbitration:

between

Independent Federation of Flight Attendants

and

Trans World Airlines, Inc.

A W A R D

Cases 88-30 and 88-213

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

The disciplinary letter, the fifteen (15) day suspension and the discharge given to and imposed on Gaines Salvant were not for just cause. He shall be reinstated with full back pay and benefits.

DATED: October 16, 1989
STATE OF New York )ss.: Eric J. Schmertz
COUNTY OF New York ) Neutral Referee

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

DATED: October 1989
STATE OF Norma Adams
COUNTY OF Concurring

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

DATED: October 1989
STATE OF Dirk J. Siedlecki
COUNTY OF Dissenting

I, Dirk J. Siedlecki, 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
Independent Federation of Flight:
Attendants
and
Trans World Airlines, Inc.

The issues are:

[1] Whether there was just cause for the 15 day suspension of Gaines Salvant, and the disciplinary letter placed in his file, and if not what shall be the remedy?

[2] Whether there was just cause for the discharge of Gaines Salvant, and if not what shall be the remedy?

A hearing was held on May 24, 1989 at which time Mr. Salvant, 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. Norma Adams and Mr. Dirk J. Siedlicki served respectively as the Union and Company arbitrators on the System Board, and the Undersigned was selected and served as the Neutral Referee. The Oath of the Board was waived.

The grievant was first suspended and later discharged because he reached those sequential points in the Company's progressive discipline policy for "No Shows" for flight assignments.

Significant in this case is the fact that the grievant was not suspended and discharged under the generally accepted principles and disciplinary grounds for unsatisfactory attendance or absenteeism, but rather, as acknowledged by the Company, for violations of a specific policy relating to and designed to control and discipline for failure to protect flight assignment (i.e. "No Shows").
Therefore the propriety of the discipline imposed on the grievant in this case turns on whether in fact, he violated the specific "No Show" policy and whether that policy was enforceable and binding on him.

If the latter part of that question is answered in the negative an answer to the first part is immaterial.

If there is any well settled rule in industrial relations, which is uniformly and consistently recognized and applied by arbitrators, it is the rule on the effectiveness and enforceability of policies resulting in employee discipline. This is compellingly so when the policy contains a specific step by step progression of increasingly severe discipline, resulting, at specific points, in the more severe penalties of suspension and discharge. The conditions for liability and enforceability are universally recognized. They are:

That the policy and procedures reasonably relate to the jobs affected and to the performance of those jobs;

That the measures of discipline be reasonable for the offenses;

That the policy or work rule be made known to the covered work force by adequate notices, postings, distribution or other dissemination;

That the policy or rule be evenhandedly and consistently applied to all employees similarly situated.

All of these standards must be present and complied with for the policy to be enforceable for discipline.

In this matter, the policy is clearly reasonable. To ensure the reliability of the Company's flight schedule, flight attendants are expected, properly, to meet their flight assignments, and a record of "No Shows" need not be tolerated.

A review of the policy, with its points of warnings, letters
of discipline and suspension and finally discharge, shows a relation of reasonableness between the offenses and their cumulative nature, and the levels of discipline imposed.

In this matter there is, however, some evidence of disparate treatment, at least procedurally, in the application of the steps and sequence of the "No Show" policy, between the grievant and one or two other employees, similarly situated, to the grievant's disadvantage. And on the question of whether he committed all the violations alleged, there are grounds to consider whether one of the grievant's "No Shows" (the flight assignment on which he was "balanced") should have been charged against him because he may not have been properly notified and did not "okay" that assignment.

But I need not decide those last two factors because I have concluded that a different essential requirement for the enforceability of the Company's policy has not been met.

The Company acknowledges that it did not notify its employees of the policy nor of its specific formula for discipline. It also did not officially notify the Union of the policy or its implementation.

Indeed, the Union learned of it accidentally. The Company admits that the details of the policy were for the internal information of management and as a guide to management for the imposition of discipline in "No-Show" cases.

This is not to say that the grievant was not told, through counseling and warnings, that he was subject to further discipline and that his job was in jeopardy. Rather, it is to say that he was not put on notice of the precise sequence of steps and the number and frequency of "No Shows" that would mechanically result not just in the application of discipline, but, critically, the point at which he would be suspended and discharged.

The Company's "No Show" policy is exact, as follows:
No Show Offense Disciplinary Action Range

1st Letter of Warning

2nd 5-10 days removal from payroll

3rd 10-15 days removal from payroll

4th Termination (In some instances, a 30 day removal might be appropriate.)

Where, as here, the policy is so exact and progressively inexorable, the employee is entitled to know, with similar precision and exactness, where he stands and what will next happen.

The reasons that he is entitled to that notice are also well known. Disciplinary programs and policies are not limited to the imposition of penalties. Also, they are designed and intended to rehabilitate and save the employee from further discipline by changing his record and raising his performance to a satisfactory level. By warning of specific consequences, step by step, of failure and continuing failure to work to a satisfactory level, the employee is given a fair chance to remedy his wrongs. This latter rehabilitative purpose is frustrated, or at least impeded, if the policy is not well publicized to the work force.

Absent that notification, it remains solely punitive and that is not enough to justify it, even if the penalties are reasonable and evenhanded.

Also, in my view, the notice requirement extends also to the employee's bargaining agent. That the Company did not inform the Union was a failure of the purposes of notice. Obviously, discipline of its members is an important matter to the Union, not just so that the Union can represent and defend its member, but so that the Union can provide advice and counsel and assist the member towards rehabilitation. If the Union is not a "partner" with the Company in gaining employee compliance with rules and policies, it certainly has a legitimate part to play in helping its member improve conduct and performance, thereby making discipline or further discipline unnecessary. And both the Company and the
Union should want that result. Not to notify the Union, and give it a chance to participate is to make that result which is one of the reasons for a discipline policy - all the more difficult.

For the reasons stated, this flaw is enough to procedurally negate the discipline imposed on the grievant. I make no determinations on the grievant's "No Show" record or how or where it would have fit in the Company's "No Show" policy, had that policy been enforceable.

DATED: October 16, 1989

Eric J. Schmertz
Neutral Referee
In the Matter of the Arbitration:
between
Air Line Pilots Association
and
Trans World Airlines

AWARD
Case #NY-130-87
#NY-147-87

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

The Company violated Section 5J of the contract by using bid crews rather than reserve pilots to protect ferry flights 5051 and 5065 respectively on October 18 and November 4, 1987.

The Company shall cease and desist from using bid crews under such circumstances in the future and shall instead use reserve pilots available under the provisions of Section 12(D)(2) of the contract.

DATED: August 8, 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: August 1989
STATE OF
COUNTY OF

I, Fred White 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: August 1989
STATE OF
COUNTY OF

I, John R. Dell Isola 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 R. Dell Isola
Concurring

DATED: August 1989
STATE OF
COUNTY OF

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

W. J. Hillebrand
Dissenting

DATED: August 15 1989
STATE OF MISSOURI
COUNTY OF ST. LOUIS

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

Michael M. Fliniau
Dissenting
In the Matter of the Arbitration:
between

Air Line Pilots Association

and

Trans World Airlines

The stipulated issues are:

1] Whether or not the Company's action in October of 1987 of utilizing a bid crew while on a flight assignment to protect ferry flight 5051 on the 18th of said month instead of a reserve crew violates Section 5J and related sections of the Agreement.

2] Whether or not the Company violated Section 5J and related sections of the Agreement when on November 4, 1987 it used a bid crew rather than a reserve crew to protect flight 5065 from Newark to LaGuardia.

It was stipulated that if contract violation(s) are found, the Board of Arbitration has remedial powers.

A hearing was held on August 24, 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. Captains W. J. Hillebrand and Michael Fliniau served as the Company members of the Board of Arbitration. Captain Fred White and John R. Dell Isola served as the Union members on said Board. The Undersigned was selected as the Chairman. The Oath of the Arbitrators was waived. A stenographic record of the aforesaid hearing was taken; the parties filed post-hearing briefs, and subsequently, the Board of Arbitration met in executive session.

Thereafter, to obtain additional testimony, evidence and argument on points that he considered possibly relevant, the Chairman reopened the hearings. As a result, a subsequent hearing
was held on April 26, 1989. A stenographic record of that hearing was taken; and the parties filed post-hearing briefs on the matters dealt with at that hearing. A subsequent meeting of the Board of Arbitration was expressly waived.

Section 5J of the contract reads:

When a pilot is called to the airport for the purpose of acting as pilot on a flight or flights, and the flying on such flight or flights amounts to a total flying time of less than two (2) hours and after the completion of such flying, the pilot is released from duty to return home or to a hotel, the pilot shall receive flight pay and credit of not less than two (2) hours flight and longevity pay (½ day, ½ night) at regular rates for the equipment so flown or protected. Pilots will not be required to take flights of a special nature at their home domicile or trip turn-around point immediately prior to or upon completion of a regular scheduled flight except when reserve pilots are not available for such flight. This paragraph shall not apply when completing interrupted flights, check flights, training flights, or practice flights. (Underscoring supplied).

These disputes center on the underscored part of Section 5J.

It is undisputed that the ferry flights involved in both issues were "flights of a special nature" and that the crews or personnel utilized were either "at their home domicile or trip turn-around point immediately prior to or upon completion of a regularly scheduled flight." What is in dispute is whether reserve pilots were or were not "available for such flight(s)" within the meaning of said contract Section.

The Company asserts that the use of the crews and personnel it selected in both instances was contractually proper because reserve pilots were not available. It is the Company's position that "available" means available to protect the flight and the on-time departure schedule of the flight in question. In other words,
unless the reserve pilot can be called and can get to the airport in time to ferry the plane to its departure location so that it can take off with passengers on or about at its original scheduled departure time the reserve pilot is "not available."

As I see it, the Company has implied into the language of Section 5J the phrase "to protect the flight and its on-time departure schedule" as the proper and understood meaning of the actual language "available for such flight."

I am not persuaded that that implication or interpretation is correct. Certainly had the parties intended that meaning and application, it would not have been difficult to include that specific condition in Section 5J. Indeed, Section 5J does not even include the phrase "to protect the flight," whereas other contract sections do so specifically.

Absent that specific conditional language on a reserve pilot's "availability," we must look elsewhere in the contract to see if there is a more explicit definition of "reserve pilot" and, more pointedly, a definition of his "availability."

In my view, both definitions are found in Section 12 of the contract. Certain parts of Section 12 make clear, in my judgment, that reserve pilots are to be used, as in this case, "to protect a flight" and that that contractual requirement is not limited to the reserve pilot being able to report in time to insure the flight's original on-time departure schedule.

Section 12(D)(7) reads in pertinent part:

In order to minimize the necessity of requiring a crew member to protect a flight on an emergency or call-out basis, the Company shall use the Number 1 reserve." (emphasis added)

I am satisfied that that was the condition that existed in both situations involved in this case. The flights were "to be protected" and as Section 12(D)(7) states, a Number 1 reserve was to be used, not a crew member. Further evidence that "to protect a flight" a reserve pilot in at least the Number 1 reserve status is to be used, is the language of Section 12(D)(4) which reads in
"In the event that a Number 1 reserve is used to protect a flight, the Number 2 reserve may be called to finish the remainder of the set up period as Number 1 reserve..." (Emphasis added).

I do not find that the use of a Number 1 reserve (or for that matter a reserve not on Number 1 duty, under the remaining language of Section 12(D)(7)) is limited to circumstances where the reserve can be called and can respond in time to protect the regular and original flight schedule. Section 12(D)(2) reads:

A pilot assigned as the Number 1 reserve must be able to report to the airport within two (2) hours of the first attempt by Crew Schedule to contact such pilot. A pilot assigned as the Number 2 reserve must be able to report to the airport within six (6) hours of the first attempt by Crew Schedule to contact such pilot.

The foregoing contract sections provide the definitions of "reserve pilot" and "availability" within the meaning and intent of Section 5J. A "reserve pilot" is a pilot who is "on call" in either Number 1 or Number 2 status, and as Section 12(A)(1) provides is "available to fly a reserve schedule, for each status, for each type of equipment and within each domicile..." (Emphasis added).

He is "available," if, as a Number 1 or Number 2 reserve, he is able to report, respectively within two hours and six hours.

Consequently, I cannot agree with the Company that under 5J it need use a reserve pilot only if he can get to the airport in time to not only "protect the flight" but to protect its regular and original flight schedule. If, by using a reserve, there is a delay in that schedule, that is what the parties agreed to and bargained for in their contract, and though possibly disruptive of the Company's flight schedule and inconvenient for passengers, it reflects the contract bargain to which the Arbitrator is bound and which he is required to enforce. Therefore I need not decide whether in the instant cases a reserve pilot could have responded
in time to position the plane for an on-time departure.

Accordingly, under the facts of the two instances in the two stipulated issues, the Company should have used at least a Number 1 reserve pilot(s) to ferry the aircraft involved, even if that delayed the regularly scheduled departure of that aircraft from its departure location. A pilot on Number 1 reserve met the definitions of a "reserve pilot" who was "available" under and within the meaning of Section 5J of the contract. The Company is directed to prospectively follow and comply with this ruling and cease and desist from using crew pilots under the circumstances they were used in the situations giving rise to the two instant grievances.

Had it been the intent of the Company when it negotiated Section 12 later in the bargaining history than when Section 5J was negotiated, that it would have no effect on the definitions of "reserve pilot" and "availability" under Section 5J, it should have changed Section 5J or immunized it from explicit definitions and conditions of Section 12. That it did not means that Sections 5J and 12, which both employ the same critical terms and language, must be reconciled and treated consistently, not differently.

The testimony at the reopened hearing on the bargaining history of Section 12 persuades me that both sides obtained benefits. The Company got increased flexibility in the use of reserves, and guarantees of their stand-by readiness with attendant cost reductions, and the Union got contractual assurances that reserves who had previously "positioned themselves at domiciles" (at their own expense), but often not used, would be more frequently utilized if they met the two hour and six hour conditions. That bilateral arrangement (which included other cost savings as well for the Company) cannot now be held inapplicable to Section 5J.

Finally, this decision though a directive for the future, must be applied under a "rule of reason." The Union has recognized, and has stated in this record, that there are unique or
unusual circumstances where operations may require or justify the use of regular crews, rather than reserves. That concession, together with the provisions of Section 9(H) are material in that regard.

DATED: August 8, 1989

Eric J. Schmertz
Chairman
In the Matter of the Arbitration:  
between  
The Independent Federation of Flight Attendants  
and  
Trans World Airlines, Inc.  

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

The severance of Deanne Haywood from the Company's employ at the expiration of her medical leave of absence is reversed. The disagreement over her medical condition should have been resolved under Article 23 of the contract. She is restored to medical leave of absence status and this matter is remanded to the Company and the Union for processing and for final determination and disposition under Article 23 of the contract.

DATED: September 19, 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: September 1989  
STATE OF  
COUNTY OF  

I, Jane Hefflinger 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: September 1989  
STATE OF  

I, Jill J. Swaya do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.
COUNTY OF

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

   The Independent Federation of Flight Attendants
   and

   Trans World Airlines, Inc.

The issue involves the severance from the Company's employ, of Deanne Haywood at the expiration of her medical leave of absence, and the Company's denial of her request for restoration to active status prior to or at that time.

Hearings were held on February 2, 3, and March 29, 1989, at which time Ms. Haywood, 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. Jane Hefflinger and Ms. Jill J. Swaya served respectively as the Union and Company members of the Board of Arbitration. The Undersigned served as Neutral Referee. The Arbitrators' Oath was waived; the parties filed post-hearing briefs, following which the Board of Arbitration met in executive session.

I am satisfied that this dispute should have been handled and resolved under Article 23 of the collective bargaining agreement. Pertinent to this matter is Section 23(B)(3) and (C) which read:

(B) Any employee hereindier who fails to pass a Company physical examination may, at his or her option, have a review of the case in the following manner:

(3) In the event that the findings of the medical examiner chosen by the employee shall disagree with the findings of the medical examiner employed by the Company, the Company will, at the written request of the employee, ask that the two medical examiners agree upon and appoint a
third qualified and disinterested medical examiner, preferably a specialist for the purpose of making a further medical examination of the employee.

(C) The said disinterested medical examiner shall then make a further examination of the employee in question, and the case shall be settled on the basis of his findings.

I am persuaded that the "findings" of the grievant's medical examiner, Dinko Podrug, M.D. and the "findings" of the Company medical examiner(s) Gerald Laufer M.D. and Dr. Howard Irwin Glazer (a clinical psychologist) before the grievant's termination are in "disagreement" within the meaning of the foregoing contract provision.

Dr. Podrug's last diagnosis of the grievant was "that she was suffering from borderline personality," but no longer the "dysthymic disorder" from which she had suffered earlier.

Following his examination of the grievant, Dr. Laufer diagnosed her as "major depression - in remission. Borderline Personality Disorder."

Dr. Glazer's diagnosis, based on psychological tests was that she "is suffering from ..." "Major depressive episode, recurrent, in remission" and "borderline personality disorder."

Dr. Glazer reported that the grievant's "major depression could recur actively" and that she "could easily decompensate under stress."

The medical testimony and evidence indicate that "dysthymic disorder" is a mood disorder, the symptoms of which are less severe than those of a "major depressive episode." Clearly, the medical examiners in their final reports were in disagreement over whether the grievant still suffered from the more severe "major depression" or was free of that illness. And assuming that she still suffered from "dysthymic disorder," despite Dr. Podrug's testimony that she no longer did, that "disorder," even if only a less severe
manifestation of her earlier acknowledged "severe depression" would still raise a disagreement between or among the medical examiners over the grievant's diagnosis and condition at the time she sought reinstatement to active employment as a flight attendant.

Moreover, Article 23 speaks not just of the medical examiners' diagnoses but rather "findings." I conclude that "findings" is a broader term than "diagnosis" and includes "prognosis" for the future including the ability or inability to return to work. Here, the medical examiners are in sharp disagreement. Dr. Podrug found that the grievant's "condition has improved sufficiently for her to resume her normal lifestyle and responsibilities, including full-time work..."

On the other hand Dr. Laufer said "she would be unable to function in an in-flight capacity at this time. The prognosis is poor." Dr. Glazer found that "while she is psychologically compensated adequately at this time in order to resume a more normal lifestyle it is my clinical opinion that Ms. Haywood could easily decompensate under stress and is permanently disabled from work as an international flight attendant."

So, based on the foregoing, I conclude that the grievant's and Company's medical examiners "disagree" with each others findings within the meaning and intent of the controlling contract provision.

I also find that within the meaning and intent of Article 23 a "request" for implementation of Article 23 was adequately made. The grievant is legally represented by the Union. The Union's business agent, on her behalf, and during the grievance procedure asked for the appointment of a disinterested medical examiner, as contemplated by Article 23. In my judgment, his request, as her representative constituted her request, in constructive if not actual satisfaction of the requirements of Article 23 (B)(3). As that notice is unquestioned, I find it immaterial that it may not have been made in writing. Also the request was denied not because it was not made timely but because it is the Company's position
that the medical examiners were in agreement, not in disagreement.

That request was not made until the grievance procedure and after the grievant had been severed from the employment rolls because of the expiration of her medical leave is also immaterial. Article 23 does not put a time limit on the request. Also, I think it reasonable to conclude that the grievant did not know of the difference in the findings of the doctors, or she thought, understandably, that it was unimportant or indeterminative until her final request for return to work was denied and her medical leave expired.

In short, a request for the application of Article 23 is appropriate when the disagreement between the medical examiners results, as in this case, with the denial of the request to return to work, and the expiration of the medical leave. That is when the dispute or disagreement becomes justiciable, and though it could have been processed earlier, the request in this case, under these circumstances, was certainly not stale.

Finally, as I have held that Article 23 is applicable, it would be manifestly unfair and unreasonable to foreclose the grievant and the Union on her behalf from asserting her Article 23 rights in opposition to her termination, merely because they were not asserted while she was still an employee. Put another way, to contest the propriety of her termination, she and the Union are entitled to make use of a contract right which they believe has been violated or improperly ignored, which if applied would or might have preserved her employment status.

Accordingly, the grievant's severance from the Company's employ at the expiration of her medical leave of absence is reversed. She is restored to medical leave of absence status and this matter is remanded to the Company and the Union for processing and for final determination under Article 23 of the contract.

DATED: September 19, 1989

Eric J. Schmertz
Chairman
American Arbitration Association, Administrator

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:  

between  

Bridge and Tunnel Officers Benevolent Association  

and  

Triborough Bridge and Tunnel Authority

OPINION AND AWARD

Case #1330 1301 88

The issue is:

What shall be the disposition of the Union's grievance #88-18 dated September 14, 1988?

A hearing was held on February 1, 1989 at which time representatives of the above-named Union and Authority appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The dispute and the grievance centers on the Union's claim that Jewish Bridge and Tunnel officers (hereinafter referred to as "BTO's") who requested and were granted time off for Rosh Hashanah and Yom Kippur, September 12, 13 and 21, 1988, should not have been charged for those days off against their accrued vacation (or other) time.

It is undisputed that historically and by practice BTO's did not receive time off for observance of religious holidays (whether Jewish or Christian) without that time being charged to accrued vacation or other accrued time benefits.

It is also undisputed that historically and by practice, clerical and maintenance employees and supervisory personnel did and do get religious days off without the time being so charged.

The disagreement giving rise to the instant grievance arose because of a difference in the Authority's notice regarding the
aforesaid Jewish holidays in 1988. In prior years, the notices made clear that maintenance and clerical employees could request the days off (i.e. Good Friday, Rosh Hashanah and Yom Kippur) without the time being charged to accrued benefits. And in prior years, the notices affecting BTO’s reiterated the policy of permitting requests for such time off, but with the explicit provision that such time would be charged. However, for the Jewish holidays of 1988, the Authority’s notice, by memo to Raymond Hickman, the Vice President of Operations, did not differentiate between maintenance and clerical employees and BTO’s. Rather, it appeared to apply to all employees, including BTO’s with the provision that absences granted "will not be charged to vacation."

That memo, in its entirety reads:

"DATE: August 30, 1988  
TO: Raymond Hickman  
FROM: Elaine St. Bernard  
RE: Religious Holidays  

Monday, September 12, and Tuesday, September 13, 1988 are Rosh Hashanah, the Jewish New Year, and Wednesday, September 21, 1988 is Yom Kippur, the Day of Atonement.

Employees who wish to absent themselves for the purpose of observing religious duties on Monday, September 12, Tuesday, September 13, and Wednesday, September 21, 1988, may submit requests to their respective supervisors not later than September 7, 1988. Such absences will not be chargeable to vacation.

The question of granting all or any such absences is left to the judgment of the respective supervisors for recommendations and will depend entirely on whether the work of the division can be carried on properly. (emphasis added)

As the memo was addressed to Mr. Hickman, who had jurisdiction over BTO’s as well as maintenance and clerical employees, it was not unreasonable for the BTO’s and the Union to assume that the policy had changed and that for 1988 BTO’s could request
the time off, and if granted pursuant to the last paragraph of aforesaid, the absence would not be charged to vacation or other accrued time.

The Authority contends that that part of the memo was a typographical error, and that there was no change in the long standing policy or practice. I accept the Authority's explanation of a typographical or drafting error.

The question however is whether the Authority corrected the error within the time it had to do so, and whether, if it attempted to make the correction, it did so effectively when it had the chance and time to do so.

I conclude it did not adequately and effectively correct the error, though it had the time and the means to do so.

The Authority acknowledges that it recognized the error on the day the memo was issued and posted, August 30th. Though it had up to twelve days to correct it prior to the first day of Rosh Hashanah, it did not make the correction adequately or effectively. It did not post a corrected or superseding notice. It did not officially notify the Union or the employees. What it did do was to notify the various departmental supervisors and left it to them to notify the BTO's presumably if and when Jewish BTO's applied for the days off. There is no evidence in the record that the various supervisors or department heads notified the employees under their jurisdiction, or if they did, when and how.

Indeed, based on the record, it appears to me that nothing was done until one or more BTO's applied for the time off. Then, for the first time they were told, verbally, that the August 30th memo was in error. Also, the Authority did not officially notify
the Union of the error. What it did was to mention it to a member of the Union's executive committee, again verbally, and in my view, casually. The Authority witness could not even identify which Union executive board committee member was so told.

Under the foregoing circumstances, I do not find it unreasonable for the grievants and the Union to rely on the inclusive wording of the August 30th memo and notice, and not to treat or accept the late and casual attempts at correction by the Authority, as an effective change in or cancellation of what the August 30th memo said.

In short, the Authority had plenty of time to officially and institutionally correct what I believe was a typographical error in its August 30th notice and memo, but failed to do so in a timely, adequate and effective manner. Therefore those BTO's who requested and were granted the Jewish holidays of Rosh Hashanah and Yom Kippur, September 12, 13 and 21, 1988 should not be charged for those absences against accrued vacation or other accrued benefits. If they were so charged, they shall be made whole.

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:

For the Jewish holidays of September 12, 13 and 21, 1988 the Union's grievance #88-18 dated September 14, 1988, is granted.

DATED: February 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

Oil, Chemical and Atomic Workers:
International Union, Local 8-891:

and

Union Carbide Corporation:

AWARD

Grievance No. 021-11-87

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

1] The Company did not act with proper cause in discharging Milton Sadofski.

2] He shall be reinstated.

3] His reinstatement shall be without back pay.

DATED: June 1989

STATE OF New York) ss.:

Eric J. Schmertz
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

COUNTY OF

Michael Pappa
Concurring with #1 and #2
Dissenting from #3 above

I, Michael Pappa 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

T. M. Galusha
Dissenting from #1 and #2
Concurring with #3 above
In the Matter of the Arbitration:
between

Oil, Chemical and Atomic Workers:
International Union, Local 8-891:
and

Union Carbide Corporation

The stipulated issue is:

Did the Company act with proper cause in discharging Milton Sadofski? If not, what shall be the remedy?

Hearings were held in Bound Brook, New Jersey on November 1, 1988 and December 28, 1988 at which time Mr. Sadofski, 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 Board of Arbitration consisted of Mr. T. M. Galusha, Company designee, Mr. Michael Pappa, Union designee, and the Undersigned as Chairman. The Oath of the Arbitrators was waived; the parties filed post-hearing briefs; and subsequently, the board met in executive session.

The grievant is charged with industrial sabotage. Specifically the Company claims that he willfully and maliciously cut the belt on a heat sealer machine. It asserts that the grievant had a motive for doing so; was in the area of the machine at the time the Company says the belt was cut; and that based on scientific evidence, the cut was made by a knife issued to the grievant as a work tool and found in his locker.

The Company's case against the grievant is entirely circumstantial. Though it is well settled that circumstantial evidence can add up to the clear and convincing proof required in discharge
cases, it does not do so in this matter. There is no direct evidence of the grievant's culpability. He was not seen tampering with the machine or working on it or with it in any suspicious manner. He made no admissions against interest or any other implicating statements or engaged in any incriminating conduct.

The Company has not persuaded me by clear and convincing evidence that the belt was cut on April 23, 1988 sometime between 8:30 AM and 9:30 AM. The cut was discovered at 9:30 AM when the machine was put into production. But the evidence fails to establish when the cut was in fact made, or even the probable time.

The machine had been in the shop for repairs. Sometime around 4 PM on April 22nd it was returned to the production floor. I consider it entirely possible and reasonable that the cut could have been made anytime after 4 PM on the 22nd of April, or indeed even while the machine was in the shop. The cut was not discovered until Maintenance Mechanic Collins worked on it preliminary to commencing its operation between 9 and 9:30 AM on the 23rd of April. The Company fixes the time of the cut, not on any direct evidence, but on an inferential conclusion founded on the grievant's proximity to the area and on his motive. To do so is to "bootstrap" a critical conclusion on circumstances which do not probatively establish the time of the act of sabotage, especially when those circumstances are themselves disputed, and even if true, do not establish the required nexus between the act and the time it was committed.

The machine was the center of attention while in the shop. Apparently, it was in and out of the shop frequently for repairs, and because those repairs often resulted in extra work for the mechanics, including apparently overtime for Collins, it was
dubbed "Collins' Cow." At times the employees "dressed" the machine to look like a cow, using a glove to represent its udder. I do not consider it impossible or unreasonable therefore for the belt to have been cut at a different time and under different circumstances than claimed by the Company, and for other reasons, including reasons relating to its special attention. In the absence of evidence fixing the time of the cut independent of the grievant's work locations and alleged motivation, I cannot conclude that the cut was made within one hour prior to the start up of the machine. That being so, I consider it immaterial where the grievant was working or his proximity to the machine on the morning of April 23rd.

The Company has not, to my satisfaction, adequately connected the grievant's "motive" to the act of sabotage. It is the Company's claim that the grievant cut the belt in angry retaliation to word at about 8:30 AM on April 23rd that he was to be disciplined for an earlier offense "of sleeping on the job." The testimony is sharply conflicting and unclear on whether in fact the grievant knew of that discipline before the time that the Company claims the belt was cut. So, a retaliatory nexus between notice of discipline and the act of sabotage has not been convincingly shown. But even if the grievant did know he was to be disciplined for an earlier offense, and even if the cut was made at the time fixed by the Company, there is still insufficient evidence to clearly and convincingly show and conclude that a connection between notice of discipline and retaliatory sabotage should be made. Indeed, based on the Company's theory, anyone in the plant who had been previously disciplined could have a motive to retaliate. I understand the Company's reasoning and even its
suspicions, but suspicions fall short of the probative connections that the clear and convincing standard requires.

The evidence regarding the grievant's knife is more serious, but in the final analysis, inconclusive. Frankly, I was not impressed with the "scientific" or test procedures employed by the forensic expert who testified. His testimony was conclusory, but, in my view, inadequately documented by controlled and comparable test results leading to those conclusions. He testified that:

"Based on the examinations and comparisons which were conducted, it was concluded that the ... belt had been severed by the K5 knife or another knife exhibiting microscopic cutting edge characteristics similar to the K5 knife. The latter possibility is considered remote." (emphasis added)

Among the frailties in Mr. DeRonja's study is that he made no cut comparisons between the grievant's K5 knife (i.e. the knife issued to the grievant and found and retrieved by the Company from his locker) and any of the many other K5 knives issued to and used by other employees. His comparisons were with K2, K3 and K4 knives, which were entirely different, with obviously different cutting edges and capabilities. I fail to see how these comparisons conclusively identify the grievant's knife as the one responsible for the cut.

And again, with the time of the cut not adequately established, the examination of the knives of just those other employees in the area at particular hours that morning, is too narrow a comparison.

Moreover, with that narrow comparison, Mr. DeRonja's testimony that the belt had been severed by the grievant's K5 knife or another knife ... exhibiting "similar characteristics" leaves the latter as a reasonable possibility, despite his conclusory view that that possibility "is considered remote." This is a dis-
charge case, where the affected employee is charged with a very serious offense which, if sustained, will not only cost him his job, but impair his future employability elsewhere. It seems to me therefore that the possibility that a different K5 knife cut the belt should be, if not eliminated by scientific evidence, at least reduced to the "remoteness" claimed, not by an examination of the grievants K5 knife alone, but by comparisons with other K5 knives. Otherwise, I am not prepared to accept the testimony that only, or even probably, it was the grievant's K5 knife. Indeed, DeRonja conceded that the test cut he made with the grievant's K5 knife did not precisely duplicate the original cut. His test cut duplicated some characteristics of the original cut, not all of them. His explanation that there is never a "100% match" is unacceptable to me in the absence of controlled and comparison tests of other K5 knives showing the same variations. Based on the record before me, the variations that he concedes leaves his conclusion that it was the grievant's knife that cut the belt, unproved by the clear and convincing standard required. Also, he was unable to show, and apparently did not record, as he made his test cuts, the series, sequence, and points of similar or dissimilar characteristics. Not to do so leaves his analysis scientifically inadequate and inconclusive.

Finally, the knife was not found on the grievant's person, in use or in his possession at the time that the cut was discovered. It was found in his locker, (which the Company opened). I am not prepared to rule out the possibility that it may have been used by someone else, at whatever the critical time was when the belt was cut, the inconclusiveness of the expert forensic testimony notwithstanding.
I am persuaded however, that the grievant failed to diligently seek other employment during the period of his discharge and therefore failed to meet his duty to mitigate damages. I believe that there were other jobs available that were "commensurate" with his skills and that he had the duty, at least, to seek them out. He did not do so, and by his own testimony did not look for other employment (except to file one application) from the time his unemployment benefits ran out to the date of the arbitration, a period of 566 days. That being so, I shall order his reinstatement, but without back pay.

Dated: June 6, 1989

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

Local Union 455, International:
Brotherhood of Electrical Workers:

AWARD

and

Western Massachusetts:
Electric Company

In my Award of June 12, 1987 I stated:

"The Arbitrator retains jurisdiction for
resolution of disputes over the interpre-
tation and application of the fore-
going AWARD."

Following the rendition of the Award, disputes between the
parties did arise, and were submitted to me for resolution.

Hearings were duly held and briefs submitted. The parties
were afforded full opportunity to submit their respective cases
on those disputes over the application and interpretation of the
June 12, 1987 Award.

In resolution of those disputes, I make the following AWARD:

1. For the year 1986, the seven reinstated
   employees shall receive either vacation pay
   in lieu of time off or vacation time off with
   pay, at the option of the Company, in a pro-
   rata amount consistent with the amount of
time they actively worked in 1986 and the a-
   mount of time they would have worked had they
   only been suspended for the period(s) sustained
   by my Award, and not discharged.

   Therefore Michael Breton, Kevin Dowd, Kevin
   O'Keefe, William Smith and Theodore Williams
   shall be credited for 1986 vacation only until
   shall be credited for that period, plus the
   period from May 7, 1986 to the end of the year.

2. The seven reinstated employees were and
   are entitled to medical insurance during the
time they were out of work. Those who in-
curred medical expenses that they paid them-
selves, which otherwise would have been covered
by the Company's medical insurance plan shall be
reimbursed by the Company in an amount equal to
what that coverage would have been. The Company
may deduct therefrom the amount of the premiums, if any, that said employees would have contributed under the provisions of the medical plan. Accordingly, the expenses incurred by Kevin Dowd, Michael Breton, Theodore Williams and Gary Monte shall be reimbursed pursuant to the foregoing. Said expenses are listed on page 9 of the Union's brief.

3. The rates of pay of Brian Kenney and Earl Watson upon reinstatement shall include the merit raises which would have come into effect during the period I held they were wrongfully out of work. Therefore their rates of pay on reinstatement should have included merit increases that would have been due from May 7, 1986 to the date of reinstatement. The same is true for any other wage increase during that period. In other words, the Union's claim that merit raises be included in their wage histories, is granted to the extent that it applies to merit increases that came into effect after May 7, 1986.

On the foregoing basis, Kevin O'Keefe whose full period out was deemed a disciplinary suspension is not entitled to have the merit raises that came into effect during that suspension included in his rate at reinstatement or his wage history.

4. In accordance with the understanding between the parties, reached at the hearing, "All seven reinstated employees retain their original date-of-hire seniority dates and their pensions are not affected, i.e. will not be lessened, due to their various periods of suspension."

5. The remedy sought by the Union for Kevin O'Keefe as a result of the withdrawal of his "unescorted access" status and his resultant disqualification from his Mechanic job, is denied on procedural grounds. It is now immaterial whether the "background investigation" should have taken place or may not have taken place had he not been discharged. The allegations have been made and the circumstances as alleged by the Company have been revealed. As a matter of policy, I cannot undo that now or treat it as if it never happened. However, I make no determinations on the merits of the investigation or its alleged findings. That is beyond my reserved jurisdiction.
O'Keefe and the Union are entitled to challenge the propriety and the findings of the investigation on the merits in any other proceeding or forum available to them. In that proceeding the remedy the Union seeks herein may be sought and is not prejudiced or pre-judged by this Award. In any such proceeding the rights of the parties are fully and expressly reserved.

6. My back pay Award, is as I stated, limited by the provision of Section XVII of the contract. The "twenty working days after the close of the hearing" referred to therein, means twenty working days after all evidence and argument, including the stenographic record and briefs were received by me. This is consistent not only with the application of the rules of the American Arbitration Association but also with the generally well settled interpretation of that phrase by arbitrators. In that regard, namely the point at which the twenty working days begins to run, the Union's argument is correct.

The formula to be applied in calculating back pay under the original Award for Kenney and Watson is as follows:

From May 7, 1986 to twenty working days after the close of the hearings in this arbitration, as stated and defined in #6 above, they shall be paid at the applicable contract rates, for time they would have been scheduled to work during that period. This applies to straight time work, shift work, premium time work and overtime work, provided they would have been so scheduled. The Company may deduct from that back pay respectively $1092 earned elsewhere by Kenney and $21,320.81 earned elsewhere by Watson. If those earnings elsewhere were for a period in excess of the period for which back pay is awarded, the deductions shall then be prorated.

DATED: October 25, 1989
STATE OF New York ss.: Arbitrator
COUNTY OF New York

1. As acknowledged by the Union in its brief.
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.