In the Matter of the Arbitration:

between

Transport Workers Union of America

and

American Airlines

AWARD

Case #M-318-89

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

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

DATED: July 23, 1990
STATE OF New York )ss.:
COUNTY OF New York )

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

Anthony J. Gaudioso
Concurring
Dissenting

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

Judith A. Shire
Concurring
Dissenting
In the Matter of the Arbitration:
between
Transport Workers Union of America

and
American Airlines

CHAIRMAN'S OPINION
Case #M-318-89

The stipulated issue is:

Was there just cause for the discharge of Evelis Brandon? If not, what should be the remedy?

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

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

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

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

In determining what happened, I do not consider the testimony of Raven Chaney to be reliable. Nor do I consider the testimony of Ralston Headley to be accurate or complete. The testimony of the other witnesses, either because they did not see the incident or did not see it in its entirety, cannot be determinative. Chaney was ostensibly a fleet service clerk, but in reality, he was an undercover agent investigating drug trafficking and/or use among employees. His first written report of the altercation between the grievant and DiMarco was false, by his own admission. That report did not fix responsibility for the altercation nor support the elements of the charge. His second written report followed the grievant's dismissal, and it, together with his testimony at the hearing, support the charges against DiMarco. Chaney's explanation for his first, "false" report, namely that he didn't want to prejudice his position among the employees or presumably "blow his cover," I consider dubious. Though an accurate and full report of the incident may have damaged his relationships with the employees, I think, to accept him as a truthful and credible witness he had a duty, especially as an undercover agent, to report events truthfully and completely, regardless of the consequences. Not to do so taints his general credibility and would have tainted it in any subsequent testimony regarding drug use or trafficking. So, in my view, to maintain "his cover" is not an acceptable explanation from a professional investigator whose duty and credibility require something different. Also, I do not think it unreasonable, in his zealousness to maintain his under-
cover employment that he might enthusiastically support the Company's charges against the grievant by "seeing" what he believed the Company would have liked him to see. It should be noted, significantly, that Chaney reported that the grievant struck DiMarco on the lip with two blows at two different times. Yet DiMarco reports only one blow. So, in short, I am uneasy with Chaney's testimony, and as it is the only direct evidence linking the grievant to DiMarco's lip injury, I cannot accept it as the critical testimony which would support all the elements of the charge and hence be the basis for upholding the discharge.

Headley's testimony is equally unreliable. He broke up the altercation. I think he knows more about the blow to DiMarco's lip than he acknowledges. He denies that he saw the grievant do it, advancing instead the possibility that he (Headley) may have accidentally struck DiMarco on the lip when he separated the two men. That testimony is not convincing. His description of how he separated them (and the traditional methods of doing so) do not lend themselves to the probability of an accidental blow to the lip. Had he bruised DiMarco's lip while separating the two men, I am convinced that he and DiMarco would have known it and reacted differently.

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

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

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

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

DATED: July 23, 1990

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

between

Transport Workers Union of America

and

American Airlines, Inc.

AWARD
Case No. M-348-87-Green

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:

The discharge of Frank Green was for just cause.

The Union's argument regarding the application of Article 28(d) to the manner in which the Company issued and applied the first and second step and final advisories, has not been shown unambiguously to be within our jurisdiction and therefore has not been considered substantively. However the rights of the parties on that question and in that regard are expressely reserved and unprejudiced for future matters.

Eric J. Schmertz
Neutral Referee

DATED: January 10, 1990
STATE OF New York ss:.
COUNTY OF New York )

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

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

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

Anthony Gaudioso
Dissenting

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

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

between

Transport Workers Union of America

and

American Airlines, Inc.

Opinion of Neutral Referee
Case No. M-348-87-Green

The stipulated issue is:

Was there just cause for the discharge of
Frank Green. If not, what shall be the
remedy?

A hearing was held on November 17, 1989 at which time Mr.
Green, hereinafter referred to as the "grievant" and representa-
tives of the above-named Union and Company appeared. All con-
cerned were afforded full opportunity to offer evidence and argu-
ment and to examine and cross-examine witnesses. The System
Board of Adjustment had as its members, Mr. Anthony Gaudioso,
the Union's designee, Ms. Judith A. Shire, The Company's designee
and the Undersigned, as Neutral Referee. The Board's Oath was
waived. A stenographic record of the hearing was taken. The
Board met in executive session on December 18, 1989.

The grievant was discharged for an unsatisfactory attend-
ance record, in accordance with the Company's attendance control
policy.

There is no dispute between the parties over the unsatis-
factory nature of the grievant's attendance record. That record
has been documented in this proceeding and is unrefuted. Indeed,
one of the well settled principles of arbitral law is recognized,
and that is that chronic poor attendance need not be tolerated by
an employer regardless of the reasons and explanations for the
absenteeism, and even if it is beyond the fault and control of
the affected employee. Therefore, the grievant's transportation
problems, personal difficulties, oversleeping, medical conditions
and other offered explanations are immaterial in the face of a
conceded excessive record of chronic absenteeism over a measuring period of the last two years.

What is in dispute, and what constitutes the Union's basic argument against the terminal penalty of discharge, is the two year "statute of limitation" set forth in Article 28(d) of the contract. Said Section reads:

All letters of discipline (warning or suspension) will be removed after a period of two (2) years from date of issuance.

It is the Union's contention that because more than two years elapsed between the grievant's first step "advisory" warning him of his poor attendance and his final "advisory" that triggered his discharge, the first advisory should have been expunged from his record; the second and final advisors should not have referred to or been built on the first advisory; and the final advisory and dismissal were procedurally premature. Under the Union's assertion, once the two years had elapsed, the required removal of the first step advisory would constructively transform the second advisory into a new first advisory and that therefore an immediately subsequent "final advisory" would not sequentially follow.

The grievant received a first step advisory on August 1, 1985. He received a second step advisory on October 1, 1986 and a final advisory (and discharge) on August 13, 1987.

While recognizing that slightly more than two calendar years had passed between the first step advisory and the final advisory, the Company interprets Article 28(d) differently. It contends that once a subsequent advisory has been issued and provided at that time its reference to and inclusion of an early advisory is still timely and within the two year period, that subsequent advisory (in this case the second step advisory) stands on its own as a step in progressive discipline and the reference to a first step advisory need not be expunged when and if because of the later passage of two years, the first step advisory is removed from an employee's record. To do otherwise, argues the Company
is to negate the application of progressive discipline. Furthermore, the Company points out that the time facts in this case are not new to the parties; that many other discipline cases have been similar; that the Union in those prior cases never raised a question over the effect on the second step advisory or the final advisory when a first step advisory is removed after two years, and never objected to the Company's practice of administering the absentee control policy and the time sequence of the advisories as it did in this case.

It is unclear to the Neutral Referee whether he and this System Board has jurisdiction or authority to resolve the foregoing procedural dispute. This System Board is one of six Area Boards of Adjustment. It is contractually distinguished from a System General Board of Adjustment and a System Divisional Board of Adjustment. The Attendance control Policy is a Company "rule." Its progressive Three Step advisory procedure constitutes the implementation of that rule. Whether the Union is correct in its interpretation of the effect of Article 28(d) in the Three Step procedure, or the Company is correct in its application of its rule in the face of Article 28(d) may be either a dispute "involving the interpretation or application of (the) Agreement within the Board's jurisdiction under Article 32, or contrarywise a "dispute relating to...rules..." which Article 32 expressly bars from the jurisdiction of the System Boards. Therefore this Board's jurisdiction, if not questionable is certainly ambiguous. And that ambiguity has not been resolved or clarified by the record before us.

Additionally, the authority of the System General Board of Adjustment is to "hear and determine all disputes properly before it which are not within the jurisdiction of the Divisional or Area Boards..." It is clear that the authority of a Divisional Board is limited to "overtime and other rate of pay grievances" (Division Board I) and to "scope, work assignment and seniority grievance cases" (Division Board II) and therefore not over other contract issues. Hence, in the absence of clear authority within the
Area Boards to deal with the instant issue as a contract interpretation arising out of a discharge (and I have held that this Area Board's authority is at best ambiguous) it may fall within the authority of the System General Board.

Let me be clear. Because of the foregoing ambiguity and lack of clarity as to authority I make no determination on this procedural question. I do not decide whether it is an issue of contract interpretation or a matter of a "rule." I make no determination of whether or which System Board has jurisdiction. I expressly reserve the rights of the Union and the Company on these matters, to be raised and argued again, if appropriate, at another time and in another proceeding.

What I do decide is that that issue, as the Union's basic defense in this case, has not been shown by the Union to be unquestionably within our jurisdiction for this Board to give it consideration. Therefore, it is not and shall not be considered in this particular arbitration case, with the rights of the parties unprejudiced and expressly reserved for future matters.

Consequently, left in this case, are only the grievant's unsatisfactory attendance record over an extended period of time, and the substantive evidence of counseling, warnings and final discharge. Under that circumstance, I have no choice but to uphold the grievant's dismissal.

DATED: January 10, 1990

Eric J. Schmertz
Neutral Referee
In the Matter of the Arbitration
between
Transport Workers Union of America, Local 501
and
American 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:

Because of uneven application of discipline, the discharge of Ronald Altomare is reduced to a disciplinary suspension. He shall be reinstated, but without back pay and the period of time between his discharge and reinstatement shall be deemed the disciplinary suspension for violations of Rules 3, 4, 5, and 34.

DATED: January 18, 1990
STATE OF New York ) ss.
COUNTY OF New York )

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

DATED: January 1990
STATE OF
COUNTY OF

I, Anthony Gaudioso do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED: January 1990
STATE OF
COUNTY OF

I, Judith A. Shire do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration:
between
Transport Workers Union of America, Local 501
and
American Airlines, Inc.

The stipulated issue is:

Was Ronald Altomare discharged for just cause, and if not, what shall be the remedy?

Hearings were held on June 20 and September 19, 1989, at which time Mr. Altomare, 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 tripartite System Board of Adjustment consisted of Mr. Anthony Gaudioso, the Union's designee; Ms. Judith A. Shire, The Company's designee and the Undersigned as Neutral Referee. The Oath of the Board was waived; a stenographic record of the proceedings was taken, and each side filed a post hearing brief. The Board met in executive session on December 18, 1989.

The grievant is charged with various rule violations (Rule #3, 4, 5) relating to being away from his work place and off the Company property without permission during regular working hours. Though violations of these rules may result in discipline, the penalty of discharge was imposed on the grievant because of a specific violation of another Rule - Rule 34. That Rule reads:

Dishonesty of any kind in relations with the Company, such as theft or pilferage of Company property, the property of other employees or property of others entrusted to the Company, or misrepresentation in obtaining employee benefits or privileges will be grounds for dismissal and where the facts warrant, prosecution to the fullest extent of the law. Employees charged with a criminal offense on or off duty may be
immediately withheld from service. Any action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal.

He is accused of arranging or permitting his time card to be punched out at the end of his shift by other employees when he had not returned to and was not on the Company premises at the time. The alleged "dishonesty" is the fraud involved in that arrangement and the claim or taking of pay (based on the time card record) for time not worked.

It is undisputed that under Rule 34 both the employee whose card is so punched and the employee who punches it for him have committed Rule 34 violations and are equally subject to discharge. Apparently, however, if the employee whose card is punched by another is on the premises at the time, or if it cannot be determined that he is away, the penalty of summary discharge is not imposed.

And herein lies the defect with the Company's case in this proceeding.

The Company has proved to my satisfaction (primarily by the evidence and testimony of the surveillance of the grievant) that the grievant left the plant on several different days, ostensibly to take a late lunch; visited a video store and his home; and remained out of the plant for a period of time significantly beyond the contractually allowed meal period. That testimony and evidence are entirely credible and stand unrefuted. Also, though I think supervision was lax, acquiescent and possibly negligent in not preventing this, I am not persuaded that the grievant obtained permission or authorization to remain out of and off the premises for those extended periods of time.

By adequate circumstantial evidence (which can prove a disciplinary charge in an arbitration) I am satisfied that on those occasions the grievant did not return to the property and
was not on the premises at the end of his shift. The evidence shows that he was not seen returning to his job or to the property, and that he could not be located at work or on the property at that critical time when supervision actively looked for him. He was not seen, directly (or on film when a hidden camera was used) at or around the time clock at punch out time. Though the surveillance of him off premises was discontinued before the time of punch out, that discontinuance was late in or near the end of his shift. And though his actual whereabouts after that point has not been precisely determined, I conclude that considering the late hour and the fact that he had by then been off the property well beyond the allowed meal period, he did not return to his work station or to the property.

The convincing evidence in this regard is the undisputed fact, established again by surveillance, that other employees, who were both identified and not identified in the record, punched him out. I conclude he arranged that that be done and I reject his one explanation that he thought he forgot to punch out and after leaving at punch out time called back into the office and asked someone else to punch him out if he had not done so. I simply do not believe that explanation in the face of substantial contrary evidence.

The film surveillance of the time clock showed that the grievant's time card was punched out on three occasions by employees Burns and Jakubiel. Yet, Burns and Jakubiel were not discharged because, the Company explains, it could not establish that on those occasions the grievant was not on the premises. The Company distinguishes between the days that surveillance of the grievant was maintained, asserting that on those days he did not return to the property, and the three times his card was punched out by Burns and Jakubiel, when the grievant's absence from the property could not be determined. Frankly I do not see the distinction. The
Company alleges that on the days of surveillance off the property, the grievant did not return at punch out time, though his card was punched. Implicit in that allegation is that someone else punched the grievant's card for him, when he was off the premises, though there is no direct evidence of his absence on those occasions. When the Company finally saw (from the films) that Burns and Jakubiel punched the grievant's card on three other days, it should have, in my view, reached the same conclusion, namely that by pre-arrangement other employees punched the grievant out at the end of the shift when there was no more (or less) evidence as to the grievant's whereabouts at the time. In my judgment, when the Company concluded that the grievant did not return to the property on the days he was observed off the premises and that on those days some other non-identified employee(s) punched his card for him, it should have concluded similarly when it finally saw on three other occasions, that the grievant's card was punched out by Burns and Jakubiel. In short, the same circumstantial evidence supportive of the Company's factual allegations in this case were present in both circumstances. I do not find the distinction made by the Company to be a difference justifying different penalties for the grievant on one hand and Burns and Jakubiel on the other.

Put another way, I find that both the grievant and Burns and Jakubiel committed Rule 34 violations of equal egregiousness. Under the well settled rule that discipline must be equally and evenhandedly imposed on all employees similarly situated, the grievant, Burns and Jakubiel should have been dealt with the same way.

The Company did not treat them similarly because it reached different conclusions about the grievant's whereabouts at punch out time. But I find those conclusions inconsistent and factually indistinguishable. On all occasions that the grievant's card was punched out by other employees, there is the same quantum of evidence that he was not on the premises.
Frankly, in the application of discipline, the Company cannot have it both ways. It cannot base the grievant's dismissal on a set of facts which it then does not apply to Burns and Jakubiel, when both circumstances arose out of a course or pattern of conduct and the "same transaction."

As I see it, with no more direct evidence on any occasion that the grievant had or had not returned to the premises, the Company, to satisfy the disciplinary rule, had the duty to make the same decision about Burns and Jakubiel as it did about the grievant. If it concluded that the grievant was off premises on certain days when others punched his card, it had no acceptable evidentiary reason to conclude otherwise or equivocate, on the three occasions it saw Burns and Jakubiel punch his card.

If the grievant's discharge was based on circumstantial facts subject to a test of those facts in this arbitration, to be even-handed, the Company should have discharged Burns and Jakubiel and subjected those discharges to the same arbitral test. To do otherwise is disparate treatment.

Of course, the grievant cannot be excused. But for my finding of unequal treatment, I would have sustained his discharge. Therefore, though I shall reverse his discharge and direct his reinstatement, it shall be, in accordance with the Board's remedial powers, without back pay. And the period of time from his discharge to his reinstatement shall be deemed a disciplinary suspension for the rule violations he committed.

Eric J. Schmertz
Neutral Referee

DATED: January 18, 1990
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

Boston Globe Employee Association:

and

The Boston Globe Newspaper Company:

OPINION AND AWARD

Case #1130-0576-87

The stipulated issue is:

What shall be the disposition of the grievance numbered 87-01, involving William Boles?

Hearings were held at the American Arbitration Association in Boston, Massachusetts on June 21 and September 18, 1989, at which time Mr. Boles, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record of the hearing was taken; and both sides filed post-hearing briefs.

In pertinent part, Grievance 87-01 reads:

Job Title: Assistant Librarian
Complaint: That Bill Boles through no fault of his own has lost wages and promotion.

Violation(s): Art. II, Para. 2, Pge. 3; Art. II, Para. 8G and 8H, Pge. 11, and any other applicable paragraphs or provisions.

What Settlement is Expected: That Bill Boles be made whole.

At the hearing the parties entered into the following Joint Stipulation of Facts:

1. The parties to this arbitration are the Boston Globe Newspaper Company (the "Company") and the Boston Globe Employees Association (the "Union"). The Company is a Massachusetts corporation with its principal place of business in Boston, Massachusetts, and is engaged in the publication
of a daily newspaper. The Union, which is unaffiliated, represents a bargaining unit of approximately 1200 employees in the editorial, commercial, circulation, advertising and building maintenance department.

2. The collective bargaining agreement between the Company and the Union which governs this grievance was in effect from July 1, 1989 through June 30, 1987 (the "Agreement"). Jt. Ex. 1. The current collective bargaining agreement between the Company and the Union is in effect from July 1, 1987 through December 31, 1990.

3. The grievant, William Boles, has been employed by the Company since 1970. His job and salary history is attached as Joint Exhibit 2.

4. On and after July 18, 1985, the Company posted an opening for the position of Assistant Librarian. Jt. Ex. 3.

5. Mr. Boles was selected for the position of Assistant Librarian on September 30, 1985 at a weekly salary of $717.25.

6. Prior to that, he held the position of Library Associate at a weekly salary of $613.25.

7. On October 2, 1985, the Union filed a grievance. Jt. Ex. 4.

8. The grievance was heard by Arbitrator Arthur Stark on May 30, September 9 and 10, 1986.

9. The parties' post-hearing briefs are attached as Joint exhibits 5 and 6.


11. On January 9, 1987, the Company placed Ms. Rollins in the Assistant Librarian position, with commensurate back pay. Jt. Ex. 7A.

12. On January 18, 1987, the Company returned Mr. Boles to his former Library Associate position. Mr. Boles' pay was reduced by $116.00 per week to the rate established in Article VI of the Agreement for the Library Associate.
job classification for his seniority. Jt. Ex. 8.

13. The Company gave Mr. Boles a merit increase of $58 per week. Jt. Ex. 9. The current contract rate for his position is $723.25. He is being paid $809.03. (A combination of previously held merit pay of $19, the new merit increase of $58 and the application of the contractual general percent increases to the combined merit pay).


15. The first level grievance hearing was held on January 29, 1987. The grievance was not resolved.

16. The second level grievance hearing was held on March 5, 1987, but again no resolution was reached.


18. There have been instances where a bargaining unit employee has been promoted within the bargaining unit or to an exempt position but later was moved to a lower-paying position either at the discretion of the Company or at the request of the employee, and the employee has retained the higher pay he or she received as a result of the promotion. Since 1979, there have been at least a dozen instances in which BGEA bargaining unit members were transferred at their request to lower-paying jobs and their pay was reduced accordingly. Jt. Ex. 11.

19. The instant case is the first case in which the Company has returned an employee to a former position after an arbitrator's decision. The only other arbitration case contesting filling a vacancy was the case of Doreen Dole, who grieved the selection of Nancy Curley over her to the position of Secretary/Sports in the Editorial Department. Arbitrator Robert L. Stutz ruled on December 30, 1981 that the Company had violated the
contract by failing to assign the grievant and ordered the Company to place her in the position. Jt. Ex. 13. In that case, the Company and Ms. Dole agreed to her occupying another position and Ms. Curley was not displaced from her position. Ms. Curley, a clerk in the Accounting Department and Ms. Dole, a secretary in the Advertising Department, applied for the secretarial position in the sports Department. After the Award of Arbitrator Stutz, the Company asked Ms. Dole if she would accept a secretarial position in the Marketing Department. That secretarial position in Marketing previously had not been posted as a vacancy of job opening. Upon Ms. Dole's agreement to occupy the secretarial position in Marketing, the Company posted her former secretarial position in advertising.

As the foregoing stipulation indicates, the grievant was promoted from Library Associate to Assistant Librarian on September 30, 1985. His selection by the Company for the latter position resulted in an increase in his weekly salary from $613.25 to $717.25. The Union's subsequent grievance on behalf of employee Wanda M. Joseph-Rollins, which claimed that Ms. Joseph-Rollins was entitled to the promotion instead of the grievant, was sustained by Arbitrator Arthur Stark. Stark found that the Company violated the contract by awarding the Assistant Librarian position to the grievant and ordered that Joseph-Rollins be given the job, with back pay after successful completion of the trial period. Stark held however that he was "without authority to grant the Union's request that the grievant not suffer a reduction in salary."

It is that consequence - the grievant's return to or "demotion" to Library Associate with an attendant reduction in pay, that the Union protests in the instant case, and with which Stark did not deal because he lacked authority. However the issue has been joined in the case before me.

The Union's principal positions are summarized as follows:

1. The grievant worked in the Assistant Librarian's position for a year and three months, from October 1985 until January 1987. He was originally selected by the Company as the bidder thought to be most qualified. He successfully completed the 60 day trial period, and his work, overall, was evaluated as
"superior" and "good."

As a consequence he acquired permanent status as an Assistant Librarian; and is entitled to job or pay protection in that permanent status.

2. His subsequent removal from Assistant Librarian and his reassignment to Library Associate violated Article II, Section 2, a, b, and c which reads:

Article II: General Provisions
2. No Reduction in Wages or Loss of Merit

There shall be no reduction in the pay of any employee covered by the terms of this agreement during the life hereof.

The provisions of this paragraph are subject to the following exceptions:

a. The military leave provisions as set forth in Article V, paragraph 9.

b. Employees who voluntarily apply and are accepted for a position which has a lower base pay, may have their pay reduced to the appropriate scale in the new classification.

c. Employees who become incapacitated may continue in employment at a rate of pay mutually agreeable to the Employer and the employee.

because it resulted in a "reduction in wages" for a reason not specified above.

It also violated Article II, Section 8G and H, which read:

8. Filling Vacancies

G. Change of Classification Pay

An employee moved or promoted to a higher wage classification shall be paid in his/her new classification at the experience level next higher than his/her current rate of pay and shall advance from there in the time provided by the Wage Provision (Article VI). No employee shall incur any economic loss as a result of accepting a higher paying position as
herein provided.

H. Trial Period

Employees advanced to a higher paying classification shall have a trial period not to exceed sixty (60) calendar days. Two evaluations shall be held between the department head and the employee during this trial period. A written report of each evaluation shall be provided to employee and union.

because it resulted in an "economic loss" to the grievant after he had accepted a "higher Paying position," and that he was immune from removal from the higher classification after successful completion of the trial period. Also, that his increased pay when promoted from Library Associate to Assistant Librarian should be construed as a "merit increase" and the contract bars its revocation.

3. Following the Stark decision, the Company told him that though he might lost the Assistant Librarian job, he "would not suffer a reduction in pay."

4. Arbitrator's have barred recoupment of money or a reduction in pay, when it has been discovered or held, as here, that the employer made the mistake, and where the misjudgment was not the employee's fault. But that in any even a mere correction of a clerical error in pay is in no way similar to reducing the pay of the grievant who had acquired permanent status as an Assistant Librarian.

5. As the original reorganization of the library contemplated and proposed four Assistant Librarians (i.e. an increase by three) but that only two additional positions were created and filled, there is or should be a de facto vacancy into which the Company could and should have placed the grievant.

6. What happened to the grievant is analogous to a "layoff" (i.e. a "layoff" from the job of Assistant Librarian) which is violative of the intent of Article VIII, Section 4 of the contract, which reads:

"The employer agrees that during the term of this agreement there will be no layoffs of regular full-time employees except for dismissal as enumerated below in Article IIA,
paragraph 3 (Discharge and Probationary Period).

7. Similarly, what happened to the grievant is analogous to "a pay reduction as a result of the installation of a new process," in violation of Article VIII, 4, which reads in pertinent part:

"No member of this Union will be dismissed or suffer a pay reduction as a result of installation of a new process.

If a job position or job classification is to be eliminated or altered as a result of a new process, the parties shall facilitate the appropriate redeployment of employees involved ..."

(The clause goes on to provide retraining where necessary, not at issue here.)

8. The Company should have handled the grievant as it did with employees Dole and Curley following the Award of Arbitrator Stutz. There, Stutz found that the Company erred in granting a secretarial job to Curley that should have gone to Dole. The Company retained Curley in the secretarial job, and found and placed Dole in a comparable job with comparable pay. As a result neither lost pay and Curley was not reduced in classification. The grievant was entitled to the same accommodation, particularly since he was in the Assistant Librarian's job for a year and three months and Curley in the secretarial job for only four weeks.

9. Though demoted to Library Associate, the grievant continues to perform duties "virtually identical for 70% of the time" to duties he performed as an Assistant Librarian, and that therefore, he was and is a de facto fourth Assistant Librarian.

Let me first deal with Arbitrator Stark's ruling that he lacked authority to grant the Union's request that the grievant not suffer a pay reduction. It seems to me that for the Union to make that specific request meant it recognized that without such an order from the Arbitrator the normal and traditional consequence of the Award the Union sought in that case (namely affirmation of
Joseph-Rollins grievance) would be the demotion or re-assignment of the grievant to his earlier job as Library Associate with an attendant reduction in pay to the level of that latter classification. And I believe that by denying his authority or jurisdiction with the statement "unless specifically authorized by the parties," Stark also saw that as the normal and traditional (albeit implied) consequence of his Award. Or in other words, he was saying that unless the parties jointly authorized him to consider a different effect on the grievant (e.g. barring a reduction in his pay), his Award would result in the usual consequences, the employee wrongly promoted would be removed and returned to the job from which he bid, and at a lesser pay if it was a lesser classification. In short, I think the Union and Stark recognized that the retention of the grievant's pay at the Assistant librarian level, was an extraordinary remedy requiring specific and joint submission to Stark for consideration, and did not automatically follow from the contract or customarily.

That conclusion is supported by the record before me in this proceeding. There is inadequate probative evidence to conclude either that the grievant was promised that he would not suffer a pay cut or that the Company promised or is obligated to create or implement a fourth Assistant Librarian position for him.

He may have been told by Librarian Jobe that he "wouldn't lose any money," but that is not all he was told. A few days later she equivocated and said that "things were up in the air." The grievant knew or should have known that Joseph-Rollins was grieving. Indeed the Joseph-Rollins grievance was filed by the Union shortly after the grievant's selection, and he was told by the Company's Assistant Managing Editor that if he Union prevailed in that grievance, his tenure as an Assistant Librarian could end. These latter statements vitiated or placed in serious doubt any assurances that he would not be cut in pay if he lost the Assistant Librarian post. Again, a promise to insulate him from a pay reduction would be so unusual under the circumstances, the Dole-Curley case not withstanding, as to require more certainty and
unambiguousness to be enforceable.

That Jobe originally proposed, and may even still wish to have four Assistant Librarians, does not now mean that management's decision to have three (i.e. two new ones rather than three new ones) leaves one (the fourth) inchoate or otherwise established, but vacant, as a spot for the grievant instead of his reduction to Library Associate. I am not persuaded that the Company did not make a legitimate managerial decision to trim Jobe's request from three to two new Assistant Librarians. And I am not persuaded that a de facto third still exists or is needed, merely because it was originally requested. Additionally, for reasons set forth in this Opinion, I find no contractual basis that requires the Company to create a third new Assistant Librarianship just because Arbitrator Stark found that Joseph-Rollins instead of the grievant should have been selected. This is not to say that the Company could not have done so as an accommodation to the grievant, particularly since it was pleased with his work, and had originally selected him. Indeed it may have been the gracious and equitable thing for the Company to do. Rather it is to say that the Company was not obligated to do so, and it is to obligations that the Arbitrator is bound.

In this regard the Stutz decision and the accommodation reached by the Company and the Union over Curley and Dole are not precedentially binding on the instant set of facts. First, a single such incident is not enough to constitute a "past practice." Second, there was an open and available job into which Dole, with his express agreement, could be placed, in satisfaction to him and to the Union of the Stutz Award. That was a mutually agreed to commendable arrangement, but I cannot find that it was contractually mandated. I am not persuaded that in the instant case there was an open or available job into which the grievant (or Joseph-Rollins) could be put by mutual agreement without the grievant suffering a reduction in classification and a reduction in pay.

I do not find Article II Section 2 applicable. In my view, the pay that is not to be reduced attaches to the particular job the employee occupies so long as he is in that job. His pay for that job shall not be reduced or lost. But that does not apply if
his job changes. Here, the grievant's job was changed, by operation of an Arbitrator's decision. He was no longer an Assistant Librarian. So, the guarantee of the salary of that classification no longer obtained. What does obtain is the contract obligation to pay a wage or salary commensurate with the job classification occupied. The grievant was so paid as a Library Associate. Also, I am not persuaded that his increase in salary when he went from Library Associate to Assistant Librarian, was a "merit increase." Rather it was the normal contractual differential in pay between the two classifications. So, when the grievant returned to the Library Associate job the reduction in pay was not a loss of a "merit increase."

Article II Section 8 is not applicable. The grievant did not incur an "economic loss as a result of accepting a higher paying position." While an Assistant Librarian he received, as he should have, the higher pay of that classification. His "economic loss" was not because he accepted the higher paying job, but because Arbitrator Stark held that Joseph-Rollins had a contractual preference to that job. His "loss," if it can be so characterized, resulted from his loss of the higher rated job, and not because he accepted that job. As previously stated, he accepted the higher job and received the higher pay with constructive if not actual knowledge that there was a risk that he would lose it because of the Joseph-Rollins grievance. That is not an "economic loss as a result of accepting a higher paying position" within the meaning of Section 8.

As the acquisition of "permanent" status following the successful completion of the trial period did not immunize him from the Stark finding that another employee was entitled to the job from the outset, it follows that permanent status did not immunize him or any "permanent" employee, from being replaced or removed from a "permanent job" by operation of the legal process of arbitration. A "permanent employee" status does not, of course, mean permanence in all circumstances. If the appointment was wrong ab initio, and is annulled by an Arbitrator's decision (as Stark did), the permanent status is also annulled or rolled back to the
original status quo, and removal or replacement to correct the original error follows. Indeed if the Union is correct in its interpretation, that interpretation would have been a bar to its earlier action on behalf of Joseph-Rollins.

I do not view the grievant's removal from the Assistant Librarian position and his re-assignment as a Library Associate, to be a "layoff" within the meaning of Article IIA, Section 1 of the contract. Layoffs are reductions in the workforce because of reductions in or loss of available work. That was not what happened here. Stark held that the grievant's appointment was an error, and that the job should have gone to Joseph-Rollins. The latter replaced the former as a consequence. That was not due to a loss of or a reduction in the available work. The same quantity of work for an Assistant Librarian continued to obtain, and there was not a reduction in the workforce, only a replacement and a demotion. Similarly, what happened was not "a result of a new process," which in my view means and applies to new equipment, methods and physical arrangements. The grievant was not "displaced" for that or those reasons, but again, because his appointment was a mistake in the first place.

More serious is the Union's claim that since and despite his return to Library Associate, the grievant continues to perform duties that substantially fall within the Assistant Librarian classification, specifically that his present duties "are virtually identical for fully 70% of his time."

There is no doubt that the grievant is a talented and valuable employee. There is no dispute over the fact that he has the skill and ability to do all the tasks and duties of an Assistant Librarian, as he did for a year and three months. He was not removed from the Assistant Librarian job because of poor or even marginal work. He was evaluated as "good" and "superior," and initially was the Company's first choice for the promotion. If he still handles the duties of an Assistant Librarian he should be entitled to the pay of that classification and to an official
upgrading to that classification. This would be consistent with the general arbitral rule and the contract that employees shall be paid the salary or wages of the job they perform, and that includes classification and pay corrections if and where an employee is "working out of classification" by performing the duties of a higher rated job.

But I find that that question is not before me and I make no determination on it, including assessing the substantive nature of the 70% that the Union says is virtually identical and the 30% that is not. The instant grievance is limited to the grievant’s removal from the Assistant Librarian classification, his reassignment to the job of Library Associate and his resultant reduction in pay and was filed when that event took place. It does not encompass a claim that now, as a Library Associate, he still performs all or enough of the duties of an Assistant Librarian to be entitled to the pay for that classification and/or for an official upgrading to it. That may be another grievance involving subsequent facts, and the rights of the parties in that connection and in that event, are expressly reserved.

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

Grievance No. 87-01 involving William Boles, is denied.

Eric J. Schmertz
Arbitrator

DATED: February 3, 1990
STATE OF New York )ss.: 
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
To: Eric
Date: 4/23/97 Time: 1:56

WHILE YOU WERE OUT

Richard Bock

of: FAX 718-330-7579

Phone: 718-330-7487

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Message: Re: Investigation on unfair labor charge you are doing for him.

Operator

AMPAD EFFICIENCY®
23-021 - 200 SETS
23-421 - 400 SETS CARBONLESS
In the Matter of the Arbitration:
between
Brookhaven Beach HRF
and
Local 144 S.E.I.U.

This is the third and Final Award with reference to all issues submitted to me for arbitration in accordance with a jointly signed letter dated November 30, 1984, and in accordance with the collective bargaining agreement entered into between Brookhaven Beach HRF and Local 144 dated November 30, 1984.

As previously indicated in my prior Interim Award, the arbitral issues are as follows:

All issues relating to the liability of Brookhaven Beach HRF for contributions to the Local 144 funds; and all issues relating to wages for the period April 1, 1984, through March 31, 1987.

The proceedings before me have been extensive and protracted and have involved the submission of extensive testimony and documentary evidence involving a multiplicity of issues, including but not limited to the financial condition of Brookhaven Beach HRF; the applicable Medicaid Regulations that are concerned with all the issues raised; the appropriate accounting procedures to be applied thereto; and contract interpretation. Both sides have been accorded full opportunity to present full cases on the issues.

A W A R D

A. Brookhaven Beach HRF shall make the following payments to all collective bargaining employees as follows:

Wages

1. I do hereby confirm and ratify my prior Interim Awards with respect to wages to be paid to all Bargaining Unit employees for the 1984 and 1985 contract years.
2. With respect to the 1986 contract year, I do hereby direct that Brookhaven Beach HRF shall pay a lump sum payment to all Bargaining Unit employees equivalent to a 5% wage increase for the period July 1, 1986, until March 31, 1987.

Fund Contributions

I do hereby confirm and ratify my prior Interim Awards with respect to the fund contributions that shall be paid by Brookhaven Beach HRF for the 1984 and 1985 contract years. In addition to the foregoing, I do hereby determine that the same terms and conditions of said Award shall apply to the 1986 contract year.

The above Award with respect to fund contributions, shall be limited by my jurisdiction in this matter in accordance with the November 30, 1984, agreement, to wit that my Award herein "shall not result in any adjustment to fund contributions less favorable on a pro-rata basis to Brookhaven Beach HRF than those agreed to between Local 144 and any other Southern New York facility for the contract period April 1, 1984, to March 31, 1987."

Payment of all monies due to be paid in accordance with this Final Award shall be paid within 30 days from the date hereof.

Eric J. Schmertz
Arbitrator

DATED: March 12, 1990
STATE OF New York ) ss.:  
COUNTY OF New York )

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

between

Local 144, S.E.I.U.

and

Clearview Nursing Home

FINAL AWARD

This Award represents a final determination with regard to all issues that have been submitted to me concerning "Reimbursement" and/or "Affordability" with regard to the contract years 1984, 1985 and 1986 commencing April 1, 1984, through March 31, 1987. As such, this Award supersedes any and all prior Interim Awards heretofore determined herein.

Both of the parties have submitted extensive evidence to me including documents, records, testimony and financial analyses concerning the many issues that are involved in making arbitral determinations of "Reimbursement" and "Affordability" for the periods heretofore described.

I have reviewed in detail, the terms and conditions of the contracts entered into between the parties, and more particularly the "Reimbursement clause" and other provisions of the contracts, as amended by the parties, that relate to all of the foregoing.

I have also examined the positions advanced by both parties as to the methodology or methodologies that are relevant and many sophisticated legal and accounting theories proposed by each of the parties with respect to the facts.

After review of all of the above, I do Award as follows:

A. Fund Contributions

I decline to grant any relief to Clearview Nursing Home for each and all of the years of the contract including April 1, 1984, through March 31, 1987. As such, Clearview shall be required to make all contributions required to be made under the contract executed between the parties in November, 1984, as amended in April 1989, for the period April 1, 1984, through March 31, 1987.
B. Wages

With respect to all wages and lump sums due under the November 1984 contract as amended in the April 1989 contract, for the period April 1, 1984 through March 31, 1987, I do hereby determine as follows:

1. Clearview shall pay a lump sum of 6½% to all covered employees for periods actually worked by such covered employees for the period July 15, 1984, through December 31, 1984.

2. Clearview shall pay a lump sum of 5% to all covered employees for all periods actually worked by all covered employees for the period of January 1, 1985, through December 31, 1985.

3. Clearview shall pay a lump sum of 4% to all covered employees for all periods actually worked by all covered employees for the period April 15, 1986, until the expiration of the contract.

4. Payment of the above sums shall be made to all covered employees within 60 days of the date hereof.

5. Any and all monies paid to any employee or employees during the pendency of this proceeding, either pursuant to any prior Interim Award or otherwise, shall be credited against the amounts due under this Award.

DATED: March 12, 1990
STATE OF New York )
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
DATED: March 1, 1990
STATE OF New York ) ss.: 
COUNTY OF New York )

I, Frank 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.

Frank McKinney
Concurring
Dissenting

DATED: March 2, 1990
STATE OF New York ) ss.: 
COUNTY OF New York )

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

Herbert Rothman
Concurring
Dissenting
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration:
between
Utility Workers of America,
AFL-CIO

and

Consolidated Edison Company

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

Under the job protection conditions expressed in the Chairman's Opinion, the Company does not violate the Collective Bargaining Agreement when it unilaterally assigns Senior Nuclear Production Technicians to the Fire Brigade.

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

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

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

I, Ross A. Riminici 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 1990
STATE OF New York )
COUNTY OF New York )

I, Jack Murphy 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

Utility Workers of America, AFL-CIO

and

Consolidated Edison Company


On June 27, 1989 I rendered a Ruling on the Scope of the Issue and Arbitrability in which I held inter alia that the Company could require the members of the fire brigade to take a stress test. I also found arbitrable the grievance of Senior Nuclear Production Technicians, challenging their involuntary assignment to the fire brigade. The instant phase of this arbitration now concerns the latter question.

The stipulated issue is:

Does the Company violate the collective bargaining agreement when it unilaterally assigns Senior Nuclear Production Technicians to the Fire Brigade, and if so, what shall be the remedy?

Hearings were held on September 16 and November 27, 1989 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Tripartite Board of Arbitration consisted of Mr. Jack Murphy, Union designee, Mr. Ross A. Rimirici, Company designee, and the Under-signed as Chairman. The Oath of the Board was waived. A steno-graphic record was taken and the parties filed post-hearing briefs. Thereafter the Board met in executive session.

I understand and appreciate the reasons for the grievance. Before the grievance, Senior Nuclear Production Technicians (SNPT) when assigned to the fire brigade, were required to take and pass a Radiation Health Physical examination every two years, as re-
quired by the Nuclear Regulatory Commission, but not a traditional "stress test."

Under that circumstance no real issue arose over whether membership in the fire brigade was a required part of their job. But with the introduction of a stress test and my Ruling upholding the right of the Company to administer it, the grievants became understandably worried that this new requirement could jeopardize their jobs if membership in the fire brigade was a required duty. Specifically, if passing a stress test was required, and if they declined to take it or could not pass it, they believed they would be found unqualified for their job classification and would or could be terminated. To the grievants, most of whom are in their forties and who were not previously required to take and pass a stress test, it represented a physical hazard and a new condition of employment not previously required, and for which, after many years of employment and considering their age, they might not be capable of passing. Additionally, it is understandable and logical for them to believe that fire fighting was not related to the duties, skills and responsibilities of a Senior Nuclear Production Technician, and hence, though many had served on the fire brigade over the years, they did so voluntarily and/or as a normal cooperative response to the emergency of a fire.

However, by contract, by express assignment and by practice, I must find that assignment to the fire brigade of SNPT is generally a mandatory duty and hence part of their job functions.

First, the Managerial Rights clause of the contract gives the Company the right to make such assignments and not rely upon the voluntary or cooperative participation of the SNPT's. Article XI Section 43 of the contract reads:

43. Management and Operation of the Business; Rights of Employees and the Union: (1) The right and power to select and hire all employees, to suspend, discipline, demote or discharge them for reasonable cause, to promote them to supervisory positions, to assign, supervise and direct all working forces, to maintain discipline and efficiency among them and to exercise the other customary functions of the Management for the carrying on of the
business and operation, are recognised as vested exclusively in the Company. Such right and power shall not be exercised arbitrarily or unfairly as to any employee and shall not be exercised so as to violate any provision of this Contract. No rule, procedure or practice of the Management shall be contrary to any provision of this Contract.

In implementation of the management right to "assign the working force," the Company, as early as June 7, 1975 issued a Fire Emergency Plan in which General Watch Foreman, Watch Foreman and Chemical Technicians (then the titles for the grievants) were "assigned to a permanent Fire Fighting Brigade to form a nucleus around which an efficient firefighting force can be organized for a fire contingency." With that right to make job assignments, the fact that there may be no substantive relationship between the occupational work of the SNPT and emergency firefighting, is immaterial.

As the facts relate to the particular grievants in this case, it is also evident that the Company, by allowing SNPT's who were not fire brigade qualified work the watch, by not specifically listing being fire brigade qualified as part of the job requirements or specifically listing the fire brigade training in the training curriculum, is somewhat responsible for the SNPT's believing that being fire brigade qualified was part of their job requirements. However, for the reasons previously stated, such acts on the part of the Company do not cause the Company to waive its right to assign, supervise, and direct all working forces. There was and has been a sufficiently consistent practice of SNPT participating in the fire brigade and taking updated firefighting training, to constitute a binding implementation of the 1975 Plan. And that practice is persuasive evidence that the Company intended that one duty of the SNPT was to be part of the fire brigade and the Company carried out that intention with regular assignments to the Brigade over the years. Consequently, based on the Company's right to "assign," the exercise of that right in the Fire Emergency Plan
of 1975 and the continued practice thereafter, I find that membership in the Fire Brigade is part of the job and duties of the SNPT.

The consequences of not taking or not passing the stress test are not as grave as the grievants perceive. I do not see that it will result in job loss. First, any if not all of the SNPT will probably pass the stress test (which I understand is legally adequate, but less strenuous than traditionally perceived). If so, there is no problem.

The few, if any, who do not pass it, can and should be handled under the jointly negotiated Permanent Limited Duty Policy, agreed to on August 3, 1989. Though the parties are familiar, of course with that Agreement its Purpose and Policy bear repeating here, to wit:

A. The Company will assign employees who cannot perform their regular duties due to the imposition of Permanent Medical Restrictions to some work function which the employee is capable of performing provided that such work is available, the employee is qualified and his/her record has in all respects been satisfactory.

B. All actions under this procedure will be in accordance with the Company's Affirmative action Program - Employment of the Handicapped and Disabled Veterans - Corporate Policy Statement (CPS) 500-12.

Clearly, utilization of this Policy is appropriate and equitable. After all, if SNPT in or approaching middle age, are for the first time required to pass a stress test to qualify for one of their job duties, it would be grossly unfair and harsh, if after years of good and dedicated service, a medical limitation of this type, under these circumstances, caused them to be terminated. The few, if any, SNPT's who would fall into the Limited Duty group will be accommodated by assignment to other functions they are capable of performing in accordance with and under the provisions of the aforesaid Policy.
So, within the frame and conditions as set forth afore-mentioned, and specifically with the job security protections and probabilities expressed and incorporated into this Opinion, I find no contract violation by the Company's assignment of SNPT to the Fire Brigade.

Eric J. Schmertz
Chairman

August 6, 1990
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration:

between:

Utility Workers of America,
AFL-CIO

and:

Consolidated Edison Company:

AWARD
Case #1330 1243 88

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

Under the job protection conditions expressed in the Chairman's Opinion, the Company does not violate the Collective Bargaining Agreement when it unilaterally assigns Senior Nuclear Production Technicians to the Fire Brigade.

Eric J. Schmertz
Chairman

DATED: July 22, 1990
STATE OF New York )ss.:
COUNTY OF New York)

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

Ross A. Rimicci
Concurring
Dissenting

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

I, Ross A. Rimicci 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, Jack Murphy do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
On June 27, 1989 I rendered a Ruling on the Scope of the Issue and Arbitrability in which I held inter alia that the Company could require the members of the fire brigade to take a stress test. I also found arbitrable the grievance of Senior Nuclear Production Technicians, challenging their involuntary assignment to the fire brigade. The instant phase of this arbitration now concerns the latter question.

The stipulated issue is:

Does the Company violate the collective bargaining agreement when it unilaterally assigns Senior Nuclear Production Technicians to the Fire Brigade, and if so, what shall be the remedy?

Hearings were held on September 16 and November 27, 1989 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Tripartite Board of Arbitration consisted of Mr. Jack Murphy, Union designee, Mr. Ross A. Rimicci, Company designee, and the Under-signed as Chairman. The Oath of the Board was waived. A stenographic record was taken and the parties filed post-hearing briefs. Thereafter the Board met in executive session.

I understand and appreciate the reasons for the grievance. Before the grievance, Senior Nuclear Production Technicians (SNPT) when assigned to the fire brigade, were required to take and pass a Radiation Health Physical examination every two years, (as required by the Nuclear Regulatory Commission, but not a traditional "stress test."
Under that circumstance no real issue arose over whether membership in the fire brigade was a required part of their job. But with the introduction of a stress test and my Ruling upholding the right of the Company to administer it, the grievants became understandably worried that this new requirement could jeopardize their jobs if membership in the fire brigade was a required duty. Specifically, if passing a stress test was required, and if they declined to take it or could not pass it, they believed they would be found unqualified for their job classification and would or could be terminated. To the grievants, most of whom are in their forties and who were not previously required to take and pass a stress test, it represented a physical hazard and a new condition of employment not previously required, and for which, after many years of employment and considering their age, they might not be capable of passing. Additionally, it is understandable and logical for them to believe that fire fighting was not related to the duties, skills and responsibilities of a nuclear operator, and hence, though many had served on the fire brigade over the years, they did so voluntarily and/or as a normal cooperative response to the emergency of a fire.

However, by contract, by express assignment and by practice, I must find that assignment to the fire brigade of SNPT was and is a mandatory duty and hence part of their job functions.

First, the Managerial Rights clause of the contract gives the Company the right to make such assignments and not rely upon the voluntary or cooperative participation of the SNPT's. Article XI Section 43 of the contract reads:

43. Management and Operation of the Business; Rights of Employees and the Union: (1) The right and power to select and hire all employees, to suspend, discipline, demote or discharge them for reasonable cause, to promote them to supervisory positions, to assign, supervise, and direct all working forces, to maintain discipline and efficiency among them and to exercise the other customary functions of the Management for the carrying on of the
business and operations, are recognized as vested exclusively in the Company. Such right and power shall not be exercised arbitrarily or unfairly as to any employee and shall not be exercised so as to violate any provision of this Contract. No rule, procedure or practice of the Management shall be contrary to any provision of this Contract. (emphasis added).

In implementation of the management right to "assign the working force," the Company, as early as June 7, 1975 issued a Fire Emergency Plan in which General Watch Foreman, Watch Foreman and Chemical Technicians (then the titles for the grievants) were "assigned to a permanent Fire fighting Brigade to form a nucleus around which an efficient firefighting force can be organized for a fire contingency." With that right to make job assignments, the fact that there may be no substantive relationship between the occupational work of the SNPT and emergency firefighting, is immaterial.

Thereafter, though I have no doubt that the grievants thought their firefighting training and participation in the Brigade was at best a collateral function and voluntary, there was and has been a sufficiently consistent practice of SNPT participating in the fire brigade and taking updated firefighting training, to constitute a binding implementation of the 1975 Plan. And that practice is persuasive evidence that the Company intended that one duty of the SNPT was to be part of the fire brigade and the Company carried out that intention with regular assignments to the Brigade over the years. Consequently, based on the Company's right to "assign," the exercise of that right in the Fire emergency Plan of 1975 and the continued practice thereafter, I find that membership in the Fire Brigade is part of the job and duties of the SNPT.

However, I conclude that the grievants have overreacted to the consequences of not taking or not passing the stress test. I do not see that it will result in job loss. First, many if not all of the SNPT will probably pass the stress test (which I understand is legally adequate, but less strenuous than traditionally perceived). If so, there is no problem.
The few, if any, who do not pass it, can and should be handled under the jointly negotiated Permanent Limited Duty Policy, agreed to on August 3, 1989. Though the parties are familiar, of course, with that Agreement its Purpose and Policy bear repeating here, to wit:

A. The Company will assign employees who cannot perform their regular duties due to the imposition of Permanent Medical Restrictions to some work function which the employee is capable of performing provided that such work is available, the employee is qualified and his/her record has in all respects been satisfactory.

B. All actions under this procedure will be in accordance with the Company's Affirmative Action Program - Employment of the Handicapped and Disabled Veterans - Corporate Policy Statement (CPS) 500-12.

Clearly, utilization of this Policy is appropriate and equitable. After all, if SNPT in or approaching middle age, are for the first time required to pass a stress test to qualify for one of their job duties, it would be grossly unfair and harsh, if after years of good and dedicated service, a medical limitation of this type, under these circumstances, caused them to be terminated. I am sure that the few, if any, SNPT who would fall into the Limited Duty group could and will be accommodated by assignment to other functions they are capable of performing. And, to ease one additional fear of the grievants, I conclude that under the foregoing Policy, priority for such placement would be by and at Indian Point, with placement elsewhere if eligible positions are not available at Indian Point.

So, within the frame and conditions as set forth aforementioned, and specifically with the job security, protections and probabilities expressed and incorporated into this Opinion, I find no contract violation by the Company's assignment of SNPT to the Fire Brigade.

July 22, 1990

Eric J. Schmertz
Chairman
The stipulated issue is:

Whether the grievance was timely at Step I.
If timely, did the District violate the Agreement by:
1. Failing to provide details of parental complaints.
2. Failing to timely notify the grievant of such parental complaints.
3. Failing to make every effort to resolve the parental complaints before administrative action was taken.

If so, what shall be the remedy?

A hearing was held on February 5, 1990 at which time the teacher involved, Alice M. Thompson, hereinafter referred to as the "grievant" and representatives of the above-named Association and District appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

Step I (i.e. Level One) of the grievance procedure reads in pertinent part:

a. The aggrieved will first present the grievance in writing no later than ten school days after the grievance occurs, or knowledge should reasonably be had thereof, to the principal or immediate superior with whom it will be discussed.
directly or, at the aggrieved person's request, in conjunction with the Association's representative, with the objective of resolving the matter. The principal or immediate superior shall render his decision within five school days after the grievance was discussed.

It is immaterial whether the grievant presented her grievance within the ten school days prescribed, because the Association met that time limit. Under Article VI A Definitions, paragraph 2, the "aggrieved" is expressly defined as "the teacher, teachers, or Association making the claim" (emphasis added). Based on the record, I am satisfied that the Association did not know of the parental complaints about the grievant or the district's evaluation of her that followed, until July 12, 1989 when the grievant informed the Association. At that point, school was in summer recess, and "school days" within the meaning of Level One, were not running. They began to again run when the school year began in September, 1989. The Association filed a formal written grievance on August 2, which was received by the District on August 7. (Earlier, on July 18, 1989 the Association verbally discussed the grievance with the District). So, constructively by July 18, and in compliance with the requirement for a written grievance on August 2, the Association grieved before the expiration of ten school days after it learned of the grievance. Thus the grievance as pursued by the Association on behalf of the grievant is arbitrable, even if the grievant herself did not formally file a written grievance within the time limit after she knew of the complaints and the District's evaluation.

I need not decide each of the Association's allegations of procedural "failures" of the District as referred to in the stipulated issue. That is because the Superintendent, Dr. Charles Murphy, asserted that the parental complaints about the grievant were not the basis for his evaluation of her, but only "jogged" his memory that she was due for and he had promised her an evaluation. The complaining parents did not follow his instructed and
prescribed procedure to discuss their complaints directly with the grievant, and he did not disclose the names of the complainants to the grievant. In the course of the hearing, Dr. Murphy and the District agreed that under those circumstances, there should be nothing in the grievant's file relating to the complaint. With that concession, I shall order that all references to the parental complaints should and shall be removed from any and all files on the grievant, and no reliance on or reference to those complaints in any way may be used or revealed in the future.

That expungement order, makes moot any findings of "failure" by the district to notify, provide details on, and to make efforts to resolve said complaints.

It is not illogical or unreasonable for the Association to argue, as it does, that the subsequent evaluation of the grievant, and her changes in teaching assignments resulting therefrom were based on the parental complaints, and should, like those complaints also be nullified and expunged from the grievant's record. However, I do not reach that conclusion. I accept the District's explanation that the grievant was due for an evaluation, and I am persuaded that an evaluation would have been made at about the time it was made or soon thereafter, whether or not there were parental complaints. And though I am sure the parental complaints were in Dr. Murphy's mind when he made the evaluation I am not prepared to conclude that the substantive findings of the evaluation were cast by or critically (and therefore fatally) influenced by the invalidated parental complaints. Frankly, that is too cynical and malevolent a view in the absence of more evidence connecting the parental complaints with the Superintendent's findings in the evaluation that followed. Accordingly, I am not prepared to nullify the evaluation or the grievant's reassignment that followed. What I do not conclude, however, is that the evaluation was substantively accurate. The issues of the accuracy and correctness of the evaluation were not litigated in this proceeding. All that I have done is to rule that the evaluation
was not procedurally defective merely because it followed the now nullified parental complaints.

Therefore, if the Association has contractual rights or rights in any other forum to challenge the substantive findings of the evaluation of the grievant on the merits, those rights are not prejudiced by this proceeding and hence are expressly reserved.

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

1. The grievance of Alice M. Thompson, as pursued on her behalf by the Association, is arbitrable.

2. All references to the instant parental complaints about Ms. Thompson should have been and shall be removed from all her files and records, and may not be referred to or used in the future.

3. Dr. Murphy's evaluation of Ms. Thompson was not procedurally improper and the Association's request that it be redacted from the records, is denied.

4. Whatever rights the Association may have to challenge the substantive findings of that evaluation on the merits, are expressly reserved.

DATED: May 17, 1990
STATE OF New York )ss.: COUNTY OF New York )

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

Did the District violate Article IVA and Schedule B, C of the 1988-1991 Agreement when it assigned certain teachers to a school day that was outside the normal starting and ending times for teachers? If so what shall be the remedy?

It is stipulated that the "normal starting and ending times" are as set forth below at the schools listed:

Alden Terrace  8:10 - 2:55
Gotham Avenue  8:10 - 2:55
Dutch Broadway  8:30 - 3:15
Clara Carlson  8:45 - 3:30
Covert Avenue  8:55 - 3:40
Stewart Manor  8:55 - 3:40

Hearings were held on December 4, 1989 and January 3, 1990 at the District's offices in Elmont, New York, at which time representatives of the above-named Association and District appeared and were afforded full opportunity to offer argument and evidence and to examine and cross-examine witnesses. The Arbitrator's Oath was waived, and the parties filed post-hearing briefs.

It is undisputed that the District scheduled some teachers to come to work earlier than or later than the above listed normal starting times and to end their respective work days earlier or later than the above listed ending times. The District did so to "better service" the educational needs of small groups of students.
These "flexible hours" were designed for example, to give students music or vocal instruction, remedial reading instruction, band and orchestra activities, art instruction, and to allow for those activities before or after the normal work day so that they would not interfere with or take those students away from regular classes and the regular pedagogical program.

In each instance of a "flexible" work day, the affected teacher did not work more than the contractual 6 hours and 45 minutes. They were paid straight time wages, and for those involved in this grievance, did not receive an extra stipend for "after school activities" as referred to in Schedule B, Paragraph C of the contract.

The District is correct in pointing out that the contract does not specify a starting or ending time of the work day, but only limits the work day to six hours and forty-five minutes. If that was the only contractual consideration, and unless I found that the District "manipulated" the work day schedule of some teachers to avoid paying extra for "after school activities," I would uphold the District's action.

But the contractual considerations are not so limited.

Article IV A reads:

Hours: The teaching day shall not be in excess of six hours forty-five minutes inclusive of a duty-free lunch period of not less than fifty minutes including supervision as may be required under subparagraph "C" hereof, and five hours and thirty minutes of pupil contact time. Nothing herein shall be construed to prevent the Administration from calling, after the teaching day, a maximum of four staff meetings per month; it being further understood that teachers shall remain at their stations until children board buses safely.

Significantly, I conclude, it includes only two activities that require or may require a teacher to remain "after the teaching day." And they are for "staff meetings" and "until children
board buses safely." These two activities are evidentiary of a precise or fixed hour for the end of a teaching day. For, to require a teacher to remain beyond the end of a teaching day, either for a staff meeting or to insure the safe loading of the buses, must mean, obviously and logically, a period or point of time measured from and after a precise end to the teaching day. Teachers on flexible schedules, especially those who begin later and end later, would still be teaching during a period in which a staff meeting could be scheduled or when buses are loading. And they would be engaged in an activity, (i.e. teaching) beyond the end of the "normal" work day. That is not among the two activities specified in Article IV A.

So, on its face, I am not certain that the six hour and forty-five minute work day is as unrestricted in terms of starting and ending times, as the District asserts. Indeed, it can be argued that if the District wanted some teachers to have working hours different from what was "normal," it should have included that as another circumstance which could keep teachers "at their stations" after the normal end of the teaching day.

However, even with the foregoing interpretation, I would construe the intent and meaning of the two exceptions, as they would apply to or determine a precise set of starting and ending times, as ambiguous at best, and not clear enough to confine all teachers to a work day with starting and ending hours as stipulated in the issue.

But there is more, which I conclude is determinative. In the negotiations for the current contract, the parties agreed to an increase in the "instructional day" by twenty minutes, to five and one-half hours, although the teacher's work day remained at six hours and forty-five minutes. That agreement was formally memorialized in a memorandum dated January 6, 1986 from Dr. Caliendo to the teaching staff. The memorandum not only confirmed the extension of the "instructional day," but also set forth a schedule for the teachers workday at each of the schools. Those schedules,
as set forth in the memorandum read:

<table>
<thead>
<tr>
<th>Teacher's Day Begins</th>
<th>Children's Day Begins</th>
<th>Children's Day Ends</th>
<th>Teacher's Day Ends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alden Terrace 8:10</td>
<td>8:20</td>
<td>2:40</td>
<td>2:55</td>
</tr>
<tr>
<td>Gotham Avenue 8:10</td>
<td>8:20</td>
<td>2:40</td>
<td>2:55</td>
</tr>
<tr>
<td>Dutch Broadway 8:30</td>
<td>8:40</td>
<td>3:00</td>
<td>3:15</td>
</tr>
<tr>
<td>Clara Carlson 8:45</td>
<td>8:55</td>
<td>3:15</td>
<td>3:30</td>
</tr>
<tr>
<td>Covert Avenue 8:55</td>
<td>9:05</td>
<td>3:25</td>
<td>3:40</td>
</tr>
<tr>
<td>Stewart Manor 8:55</td>
<td>9:05</td>
<td>3:25</td>
<td>3:40</td>
</tr>
</tbody>
</table>

Though the District now argues that it was not intended to fix starting and ending hours of the six hour and forty-five minute work day, it certainly appears to do so, and nowhere in that memorandum, either expressly in its body or by footnote or by statement to the Association, did the District indicate or reserve any right to schedule some teachers on a different or flexible schedule.

Indeed, the memorandum also states:

A collaborative effort was followed in developing this schedule. Full consultation with EETA took place. The single most important factor in determining the times for each school was the availability of transportation. Many options were considered before a decision was made on the schedule presented above.

In view of the "collaborative effort" and the "full consultation with EETA," I think it reasonable, indeed compelling, that the Association interpreted the memorandum and the understandings, which included and apparently accorded the District its desired extension of the instructional day, to fix or confirm the starting and ending hours of the work day at each of the schools, as expressly listed. In other words, considering the extensive and full negotiations involved, and the explicit listing of the beginning hours and ending hours of the Teachers Day along with the explicit beginning and ending hours of the Children's Day, I find that the District constructively estopped itself from reserving any right to unilaterally change those starting and ending hours for any teachers, the pedagogical merits of any such change
notwithstanding.

Let me hasten to observe that I do not doubt the legitimate educational purposes for which flexible scheduling was done. Based on this record which leaves unclear whether the activities of the teachers so scheduled were activities that fell within Schedule B, I cannot conclude that the District manipulated the work schedules to avoid paying extra for those activities. But my authority is limited to whether the unilateral changes are allowed under the contract, not whether they are educationally sound. If barred by the contract, the educational merit is of no arbitral consequence.

But there is more that contractually restricts the District. A policy statement by the District, adopted "prior to 9/67)" and "amended 7/7/70 and 5/3/74" and, so far as this record is concerned, never revoked or modified, further and conclusively establishes a fixed work day with explicit starting and ending hours.

That Policy reads:

The teaching day shall not be in excess of six hours forty-five minutes inclusive of a duty-free lunch period of not less than fifty minutes including supervision as may be required under Policy #4114.2. The teacher's day shall commence one-half hour prior to the instructional day and shall terminate fifteen minutes after the students' dismissal. Nothing herein shall be construed to prevent the Administration from calling, after the teaching day a maximum of four staff meetings per month; it being further understood that teachers shall remain at their stations until children board busses safely.

Clearly, it is both a recitation of the contract language of Article IV, but also a policy clarification. It not only sets the teaching day as six hours forty-five minutes, but goes on to explain "The teacher's day shall commence one-half hour prior to the instructional day and shall terminate fifteen minutes after the students' dismissal." (emphasis added)
Read in conjunction with Dr. Caliendo's memorandum of January 6, 1986, it means to me that a regular work day had been promulgated by the District as early as 1967, and that that work day was delimited by a regular starting time of one-half hour before and a regular end, fifteen minutes after the instructional day. And as the instructional day had fixed beginning and ending hours, so too, per force, did the teachers' day. 

Significantly and conclusively, the reiteration of the beginning and ending hours of the teachers' day in Dr. Caliendo's memorandum of January 6, 1986 must be viewed as confirmation (perhaps unintentionally by Dr. Caliendo) of what was in place since as early as 1967 and negotiated then or later as part of Article IV A, or the way Article IV A should be applied. And what that was and is, is a teachers regular work day not just of six hours and forty-five minutes but with beginning and ending hours at the schools, as listed. That there may have been a past practice of "flexible scheduling" is immaterial where, as here, it is barred by the contract.

Therefore, for the District to unilaterally change the beginning and ending hours of the teachers work day of any of the teachers covered by this collective bargaining agreement, is violative of Article IV A of said collective bargaining agreement. As the Association has not shown that the work assignments were within those for which extra pay is accorded under Schedule B, the request for extra pay for that work is denied, and the Award shall be limited to a cease and desist order.

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

The District violated Article IV A of the 1988-1991 Agreement when it assigned certain teachers to a school day that was outside the normal starting and ending time for teachers. The District is
directed to cease and desist from making any such assignments.

Eric J. Schmertz
Arbitrator

DATED: March 15, 1990
STATE OF New York )ss.:
COUNTY OF New York )

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

In the Matter of the Arbitration: between

Grocery, Bakery, Construction Drivers and Helpers, Local 559 : OPINION AND AWARD
and
First National Supermarkets, Inc.

The stipulated issue is:

What shall be the disposition of the Union's grievance dated January 17, 1988 on behalf of Bruce R. Foss?

A hearing was held at the offices of the American Arbitration Association in Hartford, Connecticut on December 15, 1989 at which time Mr. Foss, 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. Following the hearing, and pursuant to arrangements agreed to, a certain employment record was submitted, and both sides were afforded an opportunity to file a brief regarding that employment record. The Company filed such a brief. The Union summarized its case verbally at the end of the hearing.

The Union's grievance dated January 17, 1988 reads:

On September 13, 1987 I was hired full-time and received a wage reduction. I believe this was wrong as I have been employed part-time since 5-9-1980.

Bruce R. Foss

The facts of the grievant's employment are not in dispute. He became a part-time driver in 1980 and continued in that capacity
until September 13, 1987 at which time he sought and accepted a job as a full-time driver. His last pay rate as a part-timer was $12.45 an hour. Upon becoming full-time he pay was fixed at $10.89 an hour.

The Company asserts that the reduction in hourly pay is consistent with and mandated by Addendum "A" Wage Section 3 of the contract. That Section reads in pertinent part:

   New Hire Progressions - Drivers 1st Year of Employment - $2.00 per hour less than hourly scale rate.

There is no dispute that the rate of $10.89 paid the grievant was $2.00 less than the then hourly scale rate.

What is in dispute is whether the foregoing Section was applicable to the grievant.

The Union's claim that the asterisk sentence immediately preceeding Section three, which reads:

*No one in these categories will suffer a reduction in wages should they become full-time.

precludes a reduction in the grievant's pay when he became full-time is not contractually supported. That sentence, particularly because the asterisk obviously refers to certain job classifications (identified by asterisk) in Section 2 of the Addendum is applicable and limited to those classifications in the warehouse, and, neither by its location in the Addendum (i.e. before Section 3) nor by specific asterisk can it be logically applied to drivers.

The Union's contention that it was intended to be applied to drivers as well by a mutual agreement at contract negotiations, has not been shown by adequate probative evidence. Indeed, I am persuaded that if there was such a mutual agreement, the foregoing sentence would have been made part of Section 3 and the driver
classification would have carried an asterisk as well. The contract language and structure on this point is clear and unambiguous and a verbal agreement to the contrary has not been shown.

More in point is the Union's argument that the grievant was not a "New Hire" when he became full-time because he had previously worked a number of years for the Company as a part-timer. Essentially, it is the Union's assertion that Section 3 applies to employees hired as drivers "from the street" who have had no previous employment as drivers with the Company. And that by virtue of the grievant's prior employment as a part-timer the pay rate of $2.00 less than scale for new hires in the first year of employment was not applicable to him and he should have been accorded the full-time rate when he became a full-time driver.

The Company responds that the grievant was a "new hire" within the meaning of Section 3 because it had no contractual duty to offer a full-time opening to a part-timer, and because the grievant voluntarily sought the full-time job and was not, in any contractual sense promoted or transferred to it. Also, the Company points out that though his pay scale was reduced he acquired many fringe benefits as a full-time employee that he did not enjoy and was not entitled to as a part-timer.

On this latter point, I find the contract language ambiguous. Two logical but different interpretations are equally possible and plausible. As the Union contends the phrases "New Hires" and "1st Year of Employment" can refer, logically and reasonably, to employees who have not worked for the Company before in any capacity as a driver, and upon being hired as full-time drivers are, in all respects in their "1st Year of Employment with the Company." Equally logical and reasonable is the Company's interpretation that "New Hire" and the "New Hire Progression" applies to anyone who begins full-time employment, inasmuch as the "hourly scale rate" and the "Progression" is applicable only to full-time status. And as the sentence barring a reduction in wages upon becoming full-time is controlling only as to two classifications in the warehouse,
the Section 3 language, per force, makes full-time drivers "new hires" upon becoming full-time, regardless of any prior employment with the Company as part-time drivers.

As the parties well know, contract ambiguities are resolved by arbitrators by resort to practice under the disputed contract language. Where there has been a consistent or meaningful practice, that practice then represents the way the parties intended or understand the contract to mean. Absent a probative practice, the issue must then be resolved on the traditional basis of "burden of proof", with the burden on the Union as the grieving party.

Here, there has been a practice that I deem probative and controlling, and it is a practice supportive of the Company's position in this proceeding.

The undisputed record indicates that eight part-time drivers became full-time during the term of the 1986-88 contract. Seven were treated as "new hires" and had their hourly wage rates reduced under Section 3 of the Addendum when they became full-time. Only one of the eight did not have a downward adjustment in his rate of pay to the level $2.00 below scale. None of the seven who were paid under Section 3 grieved, nor were grievances filed by the Union in those cases alleging contract breaches. It is well settled that a single variation from an otherwise consistent practice, does not vitiate the practice. I am satisfied that seven instances without protest from the employees or the Union is of sufficient quantity to constitute a consistent practice, and the single exception therefrom is not fatal, in interpreting the intended meaning and application of Section 3 of Addendum "A" Wages of the contract. Alternatively, the Union has not shown a practice supportive of its interpretation, and hence would not have met its burden of proof if that point had been reached.

Accordingly, I find that the Company accorded the grievant the proper wage rate when he became a full-time driver.
The Undersigned duly designated as the Arbitrator, and having been duly sworn and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Union's grievance dated January 17, 1988 on behalf of Bruce R. Foss is denied.

DATED: January 23, 1990
STATE OF New York ss.
COUNTY OF New York

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

between

Metal Trades Council

and

General Dynamics, Electric Boat Division

The stipulated issue is:

What disposition shall be made of grievance No. MTC 234-89 dated August 15, 1989?

A hearing was held in Groton, Connecticut on November 20, 1989 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record of the hearing was taken; the Union made oral summation at the end of the hearing, and subsequently, the Company submitted a post-hearing brief.

The grievance reads:

The Metal Trades Council of New London County AFL-CIO charges the Electric Boat Division of General Dynamics with violating Article XXX and any other related provisions of the current labor agreement.

The Union contends that the Employer has made a farce of the subcontracting meetings by failing to meet its contractual obligation. Prior to letting such contracts the Union must be comprehensively informed of what work the Company intends to contract.

The Union demands that the Employer cease and desist.

Signed: Joseph W. Messier, President

Based on the record before me I have concluded that I am unable to decide and that there is not a justiciable issue on
whether the Company has or has not complied with Article XXX and other related contract provisions or with prior arbitration decisions regarding what information it has given or must give to the Union prior to and when it plans to subcontract work, until the Union cites a specific instance(s) when the Company did not do what the Union asserts is required.

In the instant case, the Union cites no specific subcontracting situations. Rather it claims generally, that in many but unspecified circumstances, the Company did not or refused to provide the Union with the "comprehensive" information about the proposed subcontracting as required by the contract and prior arbitration decisions. The Company denies the general accusation, and also argues that it need only provide information that is relevant to that particular subcontracting situation. However, until a specific case is cited, so that the facts thereof can be adjudicated and considered by the Arbitrator, I do not see how I can decide first, whether the Company did, or did not, provide all the information the Union sought, and second, whether if it did not, it was required to do so. The Union's general assertion, without specific examples that the Company failed to use or complete a Union generated questionnaire which the Union asked the Company to use and complete in providing the information requested or required, does not, standing alone, without a particular case(s) as the focal point, mean that the Company has failed to comply with its contractual obligations. In short, if the Union cannot tell me specifically where the questionnaire was ignored or where incomplete information was provided, I fail to see how I can rule meaningfully that the Company did not do so.

I see no reason why I would not agree with the prior arbitration decisions which the Union cited. Indeed, I have no trouble affirming the rulings of those decisions, and I do so herein. The problem is that absent specific claimed cited violations of those decisions, I am not in a position to affirm their applicability to a subsequent set of facts or situations, or to hold one way or
the other that they were or were not adhered to by the Company.

A reading of the transcript in this case discloses the lack of specificity in the Union's case. The testimony on pages 23 through 27 show the inconclusiveness of the Union's complaint as it applies to actual subcontracting situations. Consider the following questions on cross-examination by Company counsel, and the answers of the Union's chief witness:

Q. To your knowledge is that question being responded to or answered by the Company?

A. I believe it is.

Q. Okay. With respect to manpower, it says "Do the affected titles of people on layoff", is that question being answered by the Company, do you know?

A. I'm not really sure because although I've skimmed through some sheets, I haven't, I don't have clear in mind exactly which ones were at this point.

Q. Okay. Do you know if justification is normally given by the Company for the decision to subcontract?

A. Scheduling, and sometimes scheduling and manpower.

Q. Is that the majority of cases are justified on that basis?

A. I believe that's true, although, like I said, I haven't scrutinized all of them.

Q. Okay. Now, look at the second one where it says "If yes, has the Company recalled any employees?" Do you know if the Company is responding to that question?

A. I really can't say.

Q. You don't know?

A. How about the next one, "If none are being recalled, why not?" Do you know if the Company is responding to those questions?
A. I could, I think, produce an example of a recent meeting to show the answers to that, but off the top of my head I couldn't.

Q. Off the top of my head --

A. I can't get into any specifics, I'd be guessing.

Q. Okay. Well, let me put it to you this way. Of these questions that you've made up for this sheet that have been propounded to the Company Committee, do you know which ones haven't been answered?

A. I think under cost, we've had trouble getting answers on that.

Q. On either of one of --

A. Particularly the second one.

Q. Okay. So "what is the total for the intended subcontract?" do you know whether you get that information or not?

A. Sometimes we will get an estimated figure.

Q. So you get something on the first one?

A. I have seen figures in that one, I remember seeing that.

Q. Okay. So the second one says, "What is the total for labor only?" Do you get that one?

A. No.

Q. Is that the one that's causing the problem primarily?

A. That's one of them.

Q. Okay. How about equipment, do you have any problem in the equipment section?

A. I believe so. I don't know that equipment is always a factor but --

Q. I mean, to the extent that the Company says "We don't have an X, Y, Z piece of equipment and therefore we have to subcontract-out the job." Are they refusing, to your knowledge
to give you information to clarify the justification for that kind of decision?

A. I'd rather not try to guess at the answer, I don't know.

Q. You don't know?

A. No.

Q. These questions on scheduling, do you know whether the start times are given, the start work dates?

A. I think I have seen in some instances that it's just estimates.

Q. Okay. But there's not a refusal to respond to the question?

A. There may be in some instances. I think we could provide you with an example to answer these questions.

Q. Would the same thing be true for the second one?

A. I believe we do get dates on the second one.

Q. Okay.

A. Or estimated dates.

Q. Any other other ones in this category that cause you a problem?

A. I don't believe we get the breakdown how many man hours are involved and the job per title; how many man hours are in the backlog for each affected title, if the Company is taking action to reduce the backlog aside from sub-contracting.

Q. So it's those last three?

A. That's part of the problem.

Q. And the cost problem that you indicated earlier?
A. Um-hum.

Q. And then maybe some problems with the rental equipment?

A. Um-hum.

Q. And you haven't attended one of these meetings since when?

A. A long time; not in the last ten years.

The testimony of the other Union witness added no probative specificity to the Union's grievance.

What I am saying in short, is that I cannot do arbitral justice to the positions of either side without the facts of a specific subcontracting incident(s) before me as the focal point. Without that I cannot say conclusively that the Company did not give the Union all the information the Union sought and claimed it was entitled to, let alone decide whether the Company's obligation is limited to what the Company claims is relevant to any particular subcontracting decision.

The Union has cited and introduced into evidence several arbitration decisions which it says supports its position. Though as I have stated, I see no basis upon which I would consider overturning those decisions, and as I also stated, I affirm them herein, what remains "up in the air" is their applicability to the undefined complains of the Union in the instant proceeding. I note significantly, that each of those cases dealt with specific subcontracting situations. Arbitrator Seitz' case involved "subcontracting the drilling of holes in the floor of Building 401 and the resurfacing of the floor of that building." Arbitrator Healy's decision dealt with "Industrial Radiography or Non-Destructive Testing." Arbitrator Reel's cases involved "contracting out certain dismantling work in a storage facility," and the subcontracting of "the re-badging process." Arbitrator Schmidt's matter concerned subcontracting "the pollution control excavation and paving work undertaken in the vicinity of the "Big Dish building."
And Arbitrator Hoban considered the use of a subcontractor "to blast and spray 263 pontoons."

In the instant case before me I do not know yet on or to what subcontracted work the Union's complaint(s) are founded or directed.

Accordingly, I have decided to return this matter to the parties for further discussions, and with a direction to the Union to specify to the Company those subcontracting situations about which the Union claims inadequate information was provided it, and to identify what or which information it claims it was denied or not given. This direction is without prejudice to the respective positions of the parties on their rights and obligations in subcontracting situations.

If agreeable to both sides, I shall retain jurisdiction in this matter for a reasonable time, for a re-opening and for further proceedings if and when the Union has given the Company and is prepared to present to me complaints of specific subcontracting incidents that violated the contract and/or the prior arbitration decisions cited. Absent mutual agreement on my retention of jurisdiction, such specific complaints by the Union would be subject to the regular grievance and arbitration provisions of the contract.

DATED: February 3, 1990
STATE OF New York ) ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The Undersigned, duly designated as the Arbitrator in the above matter, and having duly heard the proofs and allegations of the parties therein, makes the following AWARD:

The 10-day suspension of Ignatius Gentile was not taken for just and sufficient cause in accordance with Article 31-H(1) of the negotiated agreement.

The 10-day suspension of Ignatius Gentile is reversed and set aside.

Employer is ordered to make Mr. Gentile whole with respect to any and all monetary losses and the impairment of any other rights, including but not limited to sick leave, vacation time, pension rights, time in grade and seniority, which resulted from the 10-day suspension.

Eric J. Schmertz
Arbitrator

DATED: March 30, 1990
STATE of New York )
COUNTY of New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The undersigned was appointed to arbitrate the captioned matter pursuant to the December 15, 1987 Collective Bargaining Agreement between the Immigration and Naturalization Service, the Employer, and the American Federation of Government Employees (National Immigration and Naturalization Service Council), the Union. The stipulated issue is:

Was the 10-day suspension of Ignatius Gentile taken for just and sufficient cause in accordance with Article 31-H(1) of the negotiated agreement, and if not, what shall the remedy be?

Hearings were held on March 31, 1989, and January 17, 1990, at which time Mr. Ignatius Gentile, the grievant, and the Union and the Employer were given full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken. Neither party elected to submit post-hearing briefs.

I. Procedural background.

On November 27, 1987, Mr. Robert Murray served as Supervisory Deportation Officer in the New York District Office, Deportation and Detention Branch, Immigration and Naturalization
Service. On the same day, Mr. Ignatius Gentile, a Deportation Officer employed by the Employer since 1971 and the grievant in this proceeding, was assigned as Bond Officer in the New York District Office. Mr. Murray requested that the Employer take disciplinary action based on Mr. Gentile's alleged misconduct on November 27, 1987. In a letter dated March 1, 1988, the Acting Deputy District Director advised Mr. Gentile that he had concluded that a proposal of adverse action against him was warranted and proposed that such action consist of 30 days suspension without pay or some lesser action. The March 1 letter contained four reasons and six specifications for the proposed action: Reason I, dereliction of duty (two specifications); Reason II, misstatement of fact to a supervisor and co-worker (two specifications); Reason III, refusal to answer a supervisor's question (one specification); and Reason IV, use of insulting, abusive and obscene language to a supervisor (one specification). Mr. Gentile responded to the allegations and the proposal of adverse action.

After investigation, including consideration of Mr. Gentile's responses to the charges, the Employer acting through the District Director concluded:

1. there had been a failure to sustain Specifications 1 and 2 for Reason I¹ and Specification 2 for Reason II²;

¹ Specification 1 of Reason I (dereliction of duty) charged that "Mr. Gentile was derelict in his duty by failing to properly arrange for the release on bond of an alien in Service custody, resulting in the alien's unnecessary and prolonged detention."
2. Specification 1 for Reason II and each specification for Reasons III and IV had been sustained;
3. disciplinary action was warranted; and
4. Mr. Gentile should be suspended for ten days without pay.

Mr. Gentile elected to appeal the Employer's decision by invoking the arbitration procedures under the Collective Bargaining Agreement. This is the arbitration proceeding pursuant to Article 31(J) of the Collective Bargaining Agreement.

II. The administratively sustained Reasons and Specifications.

The following are the Specifications and Reasons sustained

The Chief, General Investigations, in his report to the District Director reported that there was "insufficient evidence to prove that Mr. Gentile was deliberate in his failure to contact Chula Vista", where the alien was detained.

Specification 2 for Reason I charged that "Mr. Gentile failed to complete the date of birth information on bond worksheets relating to four detained aliens." The report of the Chief, General Investigations, was that there was insufficient evidence to prove that the failure to obtain the date of birth information was deliberate.

Specification 2 for Reason II (misstatement of fact to a supervisor or co-worker), in substance, charged that Mr. Gentile had misstated to Mr. Murray the reason for his failure to obtain date of birth information with respect to four bond worksheets by allegedly falsely claiming the information came from "detention cards" in El Paso when the information actually came from I-213 forms in El Paso. Mr. Gentile in his response denied he had ever said anything about detention cards and that he had accurately reported that he had been advised by El Paso that the information he sought had been lost at the time he called El Paso. The Chief, General Investigations, report concluded there was "insufficient evidence on which to support the charge" and the fact that Mr. Murray obtained the information later that day did not establish it was available when Mr. Gentile made the inquiry of El Paso.
by the Employer for which the 10 days suspension without pay was imposed:

Reason II  Misstatement of Fact to a Supervisor and Co-Worker

Specification 1

It is charged that Mr. Gentile instructed Deportation and Parole Clerk Roselle Wright to complete a bond substituting her own date of birth for the missing information.³

Reason III  Refusal to Answer a Supervisor's Question

Specification 1

It is charged that Mr. Gentile, when asked by Mr. Murray why he had failed to call-in the surety bond to Chula Vista as previously instructed, responded that, "I have a reason, but

³ The report of the Chief, General Investigations, to the District Director contains a synopsis of the grievant's response (according to the investigator) and the investigator's conclusion. The responses and the conclusions with respect to each administratively sustained specification and reason appear in this and the following two footnotes.

Response (Specification 1, Reason II)

Mr. Gentile stated that his instruction to Ms. Wright was, in fact, a suggestion to overcome the fact that the aliens' dates of birth were unavailable; and that the suggestion came after Ms. Wright refused to heed Mr. Gentile's previous suggestion which was that she substitute "00/00/00" for the missing information.

Conclusion

I conclude that Mr. Gentile Misstated a Fact to a Co-Worker. A bond is an official government document; to knowingly cause it to be completed containing false information is improper. Nothing in Mr. Gentile's response satisfactorily explains his behavior.
I'm not telling you."^4

Reason IV  Use of Insulting, Abusive and Obscene Language to a Supervisor

Specification 1

It is charged that Mr. Gentile stated to Mr. Murray, "Go ahead and write me up. I'll beat you and you know I'll beat you, because this Agency is run by assholes."^5

III. The evidence at the hearing.

A. General.

At the arbitration hearing, the Employer called one witness, Mr. Robert Murray. The Union called Mr. Gentile and Deportation

4 Response

Mr. Gentile denies that he refused to answer Mr. Murray's question, and further states that he made several attempts to arrange for the release of Mr. Wu on bond.

Conclusion

There is an absence of corroboration on the part of either party with respect to this event. I must conclude that Mr. Murray factually reported that which was said to him by Mr. Gentile. It is obvious that the maintenance of order, discipline and efficiency of the affairs of this organization must depend in part upon recognition of the authority of its supervisors. Mr. Gentile's refusal to answer a proper question placed to him by a supervisor must be interpreted as a refusal to acknowledge and cooperate with those factors on which the organization must function.

5 Response

Mr. Gentile denies that he made such a statement.

Conclusion

In the absence of corroboration on the part of either party in this instance, I must conclude that Mr. Murray factually reported that which was said to him by Mr. Gentile. Such language cannot be tolerated.
Officers Dwyer, McGuiness and Bieber. The Union also called Mr. Joseph Occhipinti, Supervising Special Agent and Chief of the Anti-Smuggling Unit in the New York District office, a member of management. Mr. Charles J. Murphy also was called by the Union. He is a Special Agent for the Immigration and Naturalization Service and the President of the National Immigration and Naturalization Service Council. The Council, part of the Union, consists of 37 local unions which represent the Employer's employees around the country.

The entire administrative record concerning the charges was received as a Joint Exhibit. This included: Mr. Murray's request for disciplinary action; the Deputy Director's proposal for adverse action; the grievant's response to the charges; affidavits and other supporting documents; the report of the Chief, General Investigations, to the District Director, including his conclusions and recommendations; and the decision of the District Director which constitutes the decision of the Employer.

B. On November 27, 1987, Mr. Murray was on duty as supervisor in the Employer's New York District Office, and Mr. Gentile, a deportation officer, was on duty during a shift that ended at 4:00 P.M. At Mr. Gentile's request, Mr. Murray assigned Mr. Gentile to serve as Bond Officer in lieu of having him go out in the field, because Mr. Gentile had just returned from sick leave.
The function of the Bond Officer is to process the paper work for a bond that an obligor will post to accomplish the release of a detained alien who is entitled to be released pursuant to court order. In the ordinary course, the potential bond obligor supplies information on a worksheet which the Bond Officer has the duty to verify and, when appropriate, to make additions and corrections. Often, information is obtained from the place where the alien is detained (e.g., Chula Vista, California, or El Paso, Texas).

Sometime between 9:00 A.M. and 10:00 A.M. on November 27, Mr. Murray assigned Mr. Gentile the task of completing the paper work on a bond for a Mr. Wu, an alien then being held in Chula Vista detention center in Southern California. Mr. Murray had had possession of the bond for about 40 hours (since November 25), but he told nothing about this to Mr. Gentile. It appears that Mr. Gentile made several calls during the day in order to obtain information concerning Mr. Wu, but apparently the telephones were not being answered in Chula Vista. Another deportation officer testified that Mr. Gentile had been trying to make contact throughout the day and that it was not uncommon for it to be difficult to make telephone contact with Chula Vista. In order to complete the worksheet and the bond, Mr. Gentile wanted to obtain Wu's date of birth but was unable to do so.

Mr. Murray testified that towards the end of the day on November 27, 1987, he overheard a conversation between Mr.
Gentile and Ms. Roselle Wright concerning the preparation of the bond she was typing which was to be posted for the release of Mr. Wu. Mr. Murray stated that Mr. Gentile told Ms. Wright, who was completing the forms, to put her birthdate on the form being prepared for the Wu bond because he did not have Mr. Wu's date of birth.

Mr. Murray testified that the date of birth was a material fact in the issuance of a bond and in any event it violated the law and Employer policy to enter false statements about a date of birth in the record. He also expressed concern that the obligor on the bond might be able to avoid liability if the date of birth was incorrect. Mr. Murray denied any knowledge of a policy or practice which would permit knowingly recording an incorrect date of birth.

Mr. Gentile did not deny that he made a statement to Ms. Wright substantially similar to the one Mr. Murray reported. Indeed, he believed the statements were made not only in connection with the Wu bond, but probably with respect to other bonds as well, particularly those involving several aliens whose information has to be obtained from El Paso where there was some trouble at the time which prevented him from obtaining some information.

However, Mr. Gentile (and the Union) claimed that the statement was reported by Mr. Murray out of context and that the suggestion to Ms. Wright was consistent with accepted practice.
Mr. Gentile admitted that he made the request of Ms. Wright after he had advised her that he did not have the alien's birthdate and after having initially told her to enter 000 000 as the alien's birthdate which Ms. Wright said she unwilling to do.

Mr. Gentile claimed that his sole purpose was to obtain the release of the aliens expeditiously and that he had found it impossible to obtain the aliens' birthdates from the Chula Vista, California detention center and from El Paso. However, he did have all of the information necessary to identify the aliens as the ones entitled to release on the bonds, i.e., he had the "A" number and the alien's name. The "A" number was a certain method of identification, according to Gentile and other witnesses, because each alien was assigned a different "A" number, and with the number and the name or date of birth or perhaps even the nationality, the identity of the alien as the one entitled to release on bond could be confidently established. Gentile and others testified that it was common practice when a date of birth could not be obtained and the identity of the alien had been established by reference to the "A" number and the alien's name, to enter a fictitious birthdate in order to complete the record and permit access to the computer. The Union presented testimony of other agents and introduced several Employer computer-generated documents which showed that the use of a fictitious birthdate (e.g., 0101010) was commonplace.

Moreover, when finally completed (after Mr. Gentile had left
for the day but during Mr. Murray's tour) the documents for the alien involved with the request to Ms. Wright showed different birthdates on the bond and on the worksheet. One of the dates of birth was that of a secretary (not Ms. Wright) who had typed the bond. The alien was released based upon those documents.

Ms. Wright was not called as a witness by either side. Two written statements by her (which were part of the prior administrative investigation), were offered and received in evidence without objection. One statement, obtained by the Employer, affirms that the specific request was made by Mr. Gentile. The other statement, obtained by the Union, states Ms. Wright's conclusion that Mr. Gentile's acted only with the purpose to comply with the goal of obtaining the expeditious release of the alien involved and he had not asked her to do anything improper. Neither statement goes much beyond the bare statements reported in this paragraph.

In addition to the conversation with Ms. Wright, Mr. Murray testified that at about 4:00 P.M. he asked Mr. Gentile why he had not made contact with Chula Vista. According to Mr. Murray, Mr. Gentile replied, "I have a reason, but I'm not telling you." Mr. Gentile followed up this remark, according to Mr. Murray, by telling Mr. Murray "that I [Murray] could write him [Gentile] up and that if I wrote him up that--his word was, I will beat you, you know I'll beat you, this agency's run be assholes." Mr. Gentile categorically denied that he made any of the statements
and characterized Mr. Murray's version as "pure lies". In this connection, Mr. McGuiness, a deportation officer, was present with the other two gentlemen in and around Mr. McGuiness' office at about 4:00 P.M. and he heard and saw nothing which indicated that there had been any unpleasantness between Mr. Murray and Mr. Gentile.

There also was Union evidence concerning an alleged conspiracy on the part of some members of management to intimidate, retaliate against and destroy the Union by oppressing its officers and members. This evidence consisted of the opinions of employees based on their observations and the claim that an unusual number of union officers and shop stewards had been subjected to disciplinary actions. In addition, the Union sought to cast doubt on Mr. Murray's credibility and motivation by extensive inquiry into the manner in which the charges against Mr. Gentile were brought, claiming that the charges were brought with so little if any investigation that several were administratively dismissed. In this connection there was strong corroborative evidence in support of Mr. Gentile's version of the events concerning those dismissed charges which are described in notes 1 and 2 of this opinion.

IV. Discussion.

The Employer has the burden of establishing by clear and convincing evidence that there was just and sufficient cause for disciplining Mr. Gentile. With respect to Reason II, Specification 1 (Misstatement of Fact to a Supervisor and Co-
worker), it is conceded that Mr. Gentile told Ms. Wright to enter her own date of birth on the form or forms in question which, literally, would have been a misstatement of fact. In support of the Employer's position that this conduct provides just and sufficient cause for disciplinary action, the Employer relies on the fact of falsity alone as well as Mr. Murray's testimony that he was unaware of any practice which would render such conduct acceptable and, in effect, his denial that there was such a practice. Moreover, Mr. Murray stated his belief that it was wrongful conduct because it constituted a violation of the law and because it might impair the government's claim on the bond.

Further support for the Employer's position might be found in Ms. Wright's refusal to comply with any of Mr. Gentile's requests. Her refusals possibly could cast doubt on how wellaccepted or well-known was the practice of entering fictitious dates of birth. However, these doubts without resolution by testimony from Ms. Wright remain as speculations, because Ms. Wright was not a witness.

The Union's evidence on Specification 1, Reason II, consisted of Mr. Gentile's testimony concerning the circumstances surrounding the request to Ms. Wright, his and the testimony of others supported by Employer computer-generated documents concerning an apparently common practice of using fictitious dates of birth where identity had been established by other information in order to expedite the release of an alien. In
substance, there was significant evidence of record that Mr. Gentile, after having identified the aliens who were entitled to be released, acted in accordance with common office practice to accomplish their release expeditiously. Moreover, there was no evidence that the literal "misstatement" was to be made for the purpose or with the contemplated effect of misleading anyone. Indeed, the Employer's own computer records demonstrate that such "misstatements" are not treated by the Employer as a representation of fact. The request or advice to Ms. Wright simply was a method utilised to avoid unnecessary delay, a method which the evidence indicates apparently was known to the Employer whether or not Mr. Murray's claimed ignorance of the practice is credited. On this record, I find that the Employer has failed to establish by clear and convincing evidence that the conduct charged provides just and sufficient cause for disciplining Mr. Gentile.

The specifications for Reasons III and IV involve simply diametrically opposite versions by Mr. Murray and Mr. Gentile. I agree with the Employer's Chief of General Investigations concerning the absence of corroboration of either side's version (see notes 4 and 5, above). However, I am constrained also to find that the Employer has not sustained its burden of establishing by clear and convincing evidence that the words were spoken and that there was just and sufficient cause for disciplining Mr. Gentile on the basis of these last two
charges.6

V. Conclusion.

Based on the foregoing, I conclude that the Employer failed to establish by clear and convincing evidence that there was just and sufficient cause for the 10-day suspension of Ignatius Gentile or for taking any disciplinary action against him on the grounds charged in Specification 1, Reason II or in Specification 1, Reason III, or in Specification 1, Reason IV. Consequently, the Employer's determination that Mr. Gentile be suspended for ten days without pay is reversed and set aside and it is further determined that Mr. Gentile should be made whole with respect to any loss of money or other rights and privileges which he has lost be virtue of the suspension.

DATED: March 30, 1990

ERIC J. SCHMERTZ
Arbitrator

6 In view of the conclusions reached in this opinion, the issue of conspiracy to destroy the union and Mr. Murray's credibility insofar as it is related to the alleged conspiracy need not be resolved in this proceeding.
The Undersigned, duly designated as the Arbitrator in the above matter, and having duly heard the proofs and allegations of the parties therein, makes the following AWARD:

The 10-day suspension of Ignatius Gentile was not taken for just and sufficient cause in accordance with Article 31-H(1) of the negotiated agreement.

The 10-day suspension of Ignatius Gentile is reversed and set aside.

Employer is ordered to make Mr. Gentile whole with respect to any and all monetary losses and the impairment of any other rights, including but not limited to sick leave, vacation time, pension rights, time in grade and seniority, which resulted from the 10-day suspension.

Eric J. Schmertz
Arbitrator

DATED: March 30, 1990
STATE of New York )
) ss.
COUNTY of New York )

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

In the Matter of the Arbitration between

The New York Professional Nurses Union

and

Lenox Hill Hospital

OPINION AND AWARD
Case #13 300 00590 91

The issue is what shall be the disposition of the Union's grievance of March 22, 1991, Numbered 91-4?

A hearing was held at the offices of the American Arbitration Association on September 16, 1991 at which time representatives of the above-named Union and Hospital appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Union's grievance reads:

The Hospital has violated the collective bargaining agreement, including but not limited to Article XIV Section 8 by denying orientation differential.

The remedy requested is:

Ms. Gotkin shall be made whole in every way including but not limited to payment of orientation differential.

Article XIV Section 8 of the current and applicable collective bargaining agreement reads:

Employees who orient RN's and LPN's shall receive a differential of one (1) hour of her/his regular pay for each seven and one-half (7½) hour shift (pro-rated for shifts in excess of seven and one-half (7½ hours) for which he/she works in such capacity or one and one-half (1½) hours
of his/her regular pay if there is more than one orientee.

From September 1987 to February 1991 the grievant, Clary Gotkin was Head Nurse in cardiac surgery (open-heart surgery) in the Hospital's operating room. In February, 1991 she transferred to Staff Nurse, still in cardiac surgery. She, and the Union on her behalf, claim that over several days in February, March, August and September, 1991 she "oriented" nurses who rotated into cardiac surgery from other surgical departments of the operating room and that this "orientation" was within the meaning and intent of Article XIV Section 8 of the contract. The nurses she claims she "oriented" were experienced nurses from other surgical departments who had not previously served in cardiac surgery. The Union asserts that those nurses need instructions and familiarization with the cardiac surgery nursing methods and procedures and equipment, and the grievant "taught" those things to them. The program the grievant claims she taught those nurses is set forth in a three page document entitled "Operating Room Nursing Cardiovascular Rotation" (Union Exhibit #4). The introductory paragraph of Exhibit #4 reads:

You are expected to demonstrate your understanding of cardiothoracic surgery and the special needs of the patients undergoing this surgery. This means that the areas of invasive monitoring, hemodynamics, blood gases, cardiac and pulmonary functions and cardiac drugs are no longer just words to you. You are not expected to thoroughly comprehend these aspects, but your demonstrated interest should be observed.

The second paragraph introduces "areas of basic competency with which nurses entering cardiac surgery are to become familiar during [the] rotation" and upon which they "will be evaluated."
The "goal sought" is "for the staff member to be able to function independently in both scrub and circulating roles in routine and emergency situations." The headings of "Area(s) of Competency" are:

1. Use of Area Resources
2. Knowledge and Demonstration of Use of Area Supplies
3. Demonstration of Proper Care, Handling, and Packaging
4. Preparation of the operating room for Cardiac/Pacemaker surgery
5. Demonstration of Use of Details Specific to the Reception of and Preparation for the cardiac patient
6. Demonstration of Awareness of Nursing Responsibility During Cardiac/Pacemaker surgery
7. Demonstration of Working Knowledge of Cardiac Anatomy and Circulation
8. Demonstration of Knowledge of Open Heart Procedures...
9. Anticipation of Surgeon's Needs During Routine and Common Emergency Procedures...
10. Evidence of a collegial Supportive Attitude toward Team Members...
11. Verbalization of Understanding Basic Instruction given...

The grievant testified that it was the foregoing instructional program which she followed for nurses who rotated into cardiac surgery from other surgical departments of the operating room on the dates for which the differential is claimed.

The Hospital does not dispute the grievant's basic claim that she provided instruction and familiarization to these nurses. Rather it asserts that Article XIV Section 8 of the contract does not apply to that work; does not apply to experienced nurses who rotate among the various surgical departments of the operating room; but is limited to "new nurses" upon their entering into the Hospital and during their probationary period of employment. The
"orientation" referred to in Article XIV Section 8 argues the Hospital, is institutionalized in a "Preceptor Program." (Hospital Exhib B3). In written form it is a 56 page document with subject matter divided into two parts, as follows:

Part I
1. Purpose of the program and
2. Role of the Clinical Preceptor
3. Guidelines for selection of Clinical Preceptors
4. Guidelines for the implementation of the Clinical Preceptor's responsibilities
5. The Role of the Supervisor
6. The Role of the Inservice Instructor

Part II
1. Evaluation form of new staff member
2. Evaluation form of Clinical Preceptor and Program
3. Evaluation form of Clinical Preceptor
4. Knowledge and Skill Reference Record

The Hospital contends that to "orient RN's and PLN's within the meaning and intent of Article XIV Section 8, is to put these nurses through that Preceptor Program. And that nurses who give that orientation are the only ones entitled to the contractual differential set forth in that contract clause.

It is stipulated that "new" or "probationary" nurses are not assigned to cardiac surgery. Nurses so assigned are experienced from service in other surgery departments of the operating room; are beyond their probationary period; are not "new" to the Hospital; but have not previously served in cardiac surgery.

The Hospital draws a sharp distinction between the Preceptor Program and the Operating Room Nursing Cardiovascular Rotation. It claims that because nurses rotating into cardiac surgery are experienced in general surgery they know about much of the equipment
and techniques used from their experience in other surgery disciplines, and that they need only rudimentary familiarization with the procedures of cardiac surgery. That familiarization argues the Hospital, is not to "orient" within the meaning and negotiated intent of Article XIV Section 8.

The Union and the Hospital contend that the language of Article XIV Section 8; the "legislative history" of that clause, and past practice support their respective, but difference positions.

As the parties well know, past practice contrary to clear contract language does not change or alter the contract. Rather the contract language prevails. Similarly, and for the same reasons, arbitrators resort to evidence of past practice only if the contract language is unclear, ambiguous or not reasonably susceptible to a determinative and conclusive interpretation. Here I find that the contract language is not so unclear or ambiguous as to foreclose a reasonable and determinative interpretation.

It is well settled that when the parties use an ordinary word in their contract, without any special definition of that word, it should be interpreted consistent with its ordinary and common usage and meaning. Webster's Dictionary provides the following relevant definition for the word "orient":

"to acquaint with an existing situation or environment"

The dictionary definition of "orient" appears to be what even the Hospital concedes the grievant did with the rotated nurses in cardiac surgery. As "orient" is synonymous with "acquaint" it is less educationally demanding than "to teach." It presupposes a
basic or fundamental knowledge of the discipline (like surgery nursing) and that only some guidance and direction are needed to bring those known skills and experience to bear on the special work at hand. Based on the record, that at least is what the grievant did. She may not have taught basic skills, and she may not have had to deal with new and inexperienced nurses and teach them fundamentals of surgery nursing, but she had to "familiarize" them or "acquaint" them with the cardiac surgery service. In that regard therefore what she did pursuant to Union Exhibit #4, and the ordinary, critical language of Article XIV Section 8, are consistent. Indeed, the contract language makes no distinction among RNs and LPNs who may be "oriented." Had a distinction been intended between new and experienced nurses, it would have been easy for that distinction to have been made, in simple contract language, as part of Article XIV Section 8.

A look at the negotiation history of Article XIV Section 8 gives further interpretative clarification and negates any conclusion that it is unclear or ambiguous.

The Hospital points out that the Union tried to get the orientation differential extended to students and clerks, but failed. It argues that the Union did not seek to "extend" it to experienced nurses at that time and that because any such extension was not sought or even contemplated, the Union should not now be allowed to achieve by arbitration what it failed to obtain in negotiations.

But the Hospital apparently overlooks what changes the Union did achieve in earlier negotiations, leading to the current contract clause. Significant to my mind is the change from the
1985-1987 contract between these parties. That earlier clause read in pertinent part:

Orientation of Registered Nurses is part of the Staff RN's job. Employees who are assigned by the Employer to "new RN orientation" shall receive a differential.... (emphasis added).

In the 1988-89 contract, the Union obtained an extension of coverage from RNs to "RNs and LPNs" and elimination of the statement that "orientation is part of a staff RN's job." Though it did not get further extensions to cover students and clerks, it did gain deletion of the phrase "assigned by the Employer to new RN orientations." The clause read in pertinent part:

Employees who are assigned by the Employer to orient RNs and LPNs shall receive a differential....

The deletion of the earlier reference to "new RN orientation" is clearly significant. To my mind it means that until 1988, orientation was confined to new, probationary nurses. But once deleted and absent any other explanation, the meaning of the clause changed. A bare reading, juxtaposed with its history, leaves only one logical conclusion. And that is that though the Union did not gain an extension of coverage to "students and clerks," it gained coverage of orientation to experienced nurses as well as new nurses. The Hospital's argument that failure to cover "students or clerks" means that no enlargement of coverage was obtained, does not logically follow. The Union sought but did not get coverage for two classifications of employees who were not nurses. But an explicit expansion of the nurse category to include
experienced nurses was not necessary, because it was obtained with the deletion of the "limitation to new RNs."

The current contract language is further supportive of the above conclusion. The essential language of the current Section 8 of Article XIV not only tracks the 1988-1989 language covering orientation of RNs and LPNs, but makes it applicable to circumstances when "employees...orient RNs and LPNs." It no longer conditions that orientation on its "assignment by the Employer." The elimination of the "assignment" condition is further evidence of a relaxation of Employer control and earlier limitations on who orients and who is being oriented. In short, the contract changes over the years read together, compel the conclusion that the ordinary, current language of Section 8 covers as "orientation" the "acquainting" or "familiarization" of experienced RNs and LPNs who enter the cardiac surgery service on rotation from other departments. At the very least, I am persuaded that the grievant did that work as evidenced by Union Exhibit #4, and is entitled to the differential.

That the past practice may have been different, is immaterial. Even that is not clear in the record. The Union points to five instances where it says the orientation differential was paid to a staff nurse who "oriented" experienced, non-probationary nurses. The Hospital replies that three of those were "mistakes" and two were paid for "other procedures," but mislabeled as an "orientation differential." However these explanations were just that - bare statements by a Hospital witness. No hard evidence
was introduced to show conclusively that three "mistakes" were made and that twice, payments were mis-identified. Nor do I have adequate evidence of the magnitude, frequency and examples of the rest of the practice on which the Hospital relies.

Because the record is unclear on which days the grievant in fact performed services that constituted "orientation" within the meaning of Article XIV Section 8 and this arbitration decision, I shall make no ruling on what the Hospital owes the grievant for the orientation differential. I shall leave it to the parties to examine the circumstances of the dates for which she claims the differential, and to attempt to agree on the accuracy of the claim and/or which qualify for the differential. If the parties disagree, they may by mutual agreement refer it back to me for determination, or that dispute may be processed for arbitration under the contract.

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

The Union's grievance dated March 22, 1991 and numbered 91-4 on behalf of Clary Gotkin, is granted to the extent that her "orientation" of non-probationary nurses coming into the cardiac surgery department of the operating room on rotation from other departments entitles her to an orientation differential under Article XIV Section 8 of the contract.

Remanded to the parties is the determination
of on which days and for which nurses Ms. Gotkin performed orientation services. For those on which there is agreement, the Hospital shall pay the contractual differential to Ms. Gotkin.

Disagreements may be referred back to me for determination upon mutual agreement by the parties. Otherwise, disagreements may be processed for arbitration before another arbitrator.

Eric J. Schmertz
Arbitrator

DATED October 15, 1991
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.